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Comment, “Foreign Antitrust Violations and the Act of State Doctrine”

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ANTITRUST LAW—INTERNATIONAL LAW—ACT OF STATE DOCTRINE—FOREIGN ANTITRUST VIOLATIONS—International Association of Machinists & Aerospace Workers v. Organization of Petroleum Exporting Countries (OPEC) — In an era of far-reaching and ever-widening global economic and political interdependence, the time worn question of extraterritorial application of national laws has reemerged with increased vigor. Perhaps nowhere is this problem more pronounced than with respect to the international reach of the United States antitrust laws. In a reaffirmation and further clarification of the contemporary approach to the transnational application of United States antitrust law, the United States Court of Appeals for the Ninth Circuit, in International Association of Machinists & Aerospace Workers v. OPEC, refused to extend the scope of the Sherman Act to cover the activities of a foreign sovereign operating wholly abroad.

Troubled by the high prices its members were forced to pay for oil


4. 649 F.2d 1354 (9th Cir. 1981), cert. denied, 102 S. Ct. 1036 (1982).

5. 15 U.S.C. § 1 (1976). The Sherman Act represents the major legislative attempt to control the forces of monopoly power. It prohibits contracts, combinations, and conspiracies in restraint of trade, as well as acts of monopolization and attempts to monopolize. For the text of section 1 of the Act, see note 8 infra.
and petroleum derived products, the International Association of Machinists and Aerospace Workers (IAM), in 1978, brought suit against the Organization of Petroleum Exporting Countries (OPEC) and its individual member nations in the United States District Court for the Central District of California, alleging a conspiracy on the part of OPEC to fix the price of crude oil in violation of section 1 of the Sherman Act. IAM sought both money damages and injunctive relief under sections 15 and 16 of the Clayton Act.

Initially, the district court dismissed the action as to OPEC, the organization, as it had not been properly served. Retained as defendants, however, were the thirteen individual OPEC member nations. Also at an early stage in the proceedings, the court concluded that it

7. 477 F. Supp. at 559.
8. Id. The Sherman Act, 15 U.S.C. § 1 (1976), provides:

   Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every 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, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Id.

   Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Id. § 15.

   Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue.

Id. § 26.
12. Id.
would focus solely on the question of injunctive relief since an award of money damages was foreclosed by the indirect-purchaser rule. 13

After trial, the court granted judgment for defendants, premised on three independent findings. The court found first, that it lacked jurisdiction over the defendant nations under the Foreign Sovereign Immunities Act (FSIA). 14 Furthermore, the court noted that even if juris-

13. Id. The indirect-purchaser rule was first formally articulated in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), and represented an extension of an earlier Supreme Court case, Hanover Shoe v. United Shoe Mach., 392 U.S. 481 (1968).

Hanover Shoe established a doctrine which rejected as a defense of an antitrust violator the claim that the plaintiff had not been harmed, as the plaintiff would only pass on any increased costs. The Court held that a direct purchaser was injured by the full amount of any overcharge paid by it and an antitrust defendant would not be permitted to introduce evidence that it was the indirect purchasers who were in fact injured. The Court reasoned that unless direct purchasers were allowed to sue, violators "would retain the fruits of their illegality," since indirect purchasers "would have only a tiny stake in the lawsuit," and hence, little incentive to sue. Id. at 494.

The question presented to the the Illinois Brick Court was whether the pass-on theory, rejected by Hanover Shoe when employed defensively, might be employed offensively by a plaintiff indirect purchaser. In reversing the court of appeals, the Supreme Court held that any rule adopted would necessarily apply to both plaintiff and defendant. To the extent that Hanover Shoe precluded its use by a defendant, the Court was compelled to foreclose its use by a plaintiff as well. 431 U.S. at 736.


(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

Id. Section 1602 provides in relevant part:

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities.

Id. § 1602. Section 1605 denotes the general exceptions to the granting of jurisdictional immunity. It provides in relevant part:

(a) a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(2) 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; or upon an act outside the territory of 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.
diction were found to exist, the action would fail both because foreign sovereigns were not persons within the meaning of the Sherman Act,¹⁵ and because there was no proximate causal connection between defendants' activities and domestic oil price increases.¹⁶ Finally, the court determined that a default judgment would not lie against any nonappearing defendants.¹⁷

The court of appeals affirmed the dismissal of the action by the district court.¹⁸ However, it chose to focus its decision on the act of state doctrine¹⁹ rather than on the somewhat related theory of sovereign immunity,²⁰ noting that “[t]he act of State doctrine is apposite

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¹⁵. 477 F. Supp. at 570. The district court determined:
   It is apparent from the statutory language that plaintiff is entitled to relief in the instant action only if the defendants are “persons” as that term is used in section 1. . . .

   Section 8 of the Sherman Act, and section 1 of the Clayton Act, define “person” or “persons,” to “include corporations, associations existing under or authorized by the laws of the Territories, the laws of any State, or the laws of a foreign country. . . .” The case law accords with this interpretation. . . .

   In Parker v. Brown, 317 U.S. 341 (1943), the Supreme Court held that a domestic State is not a person who may be sued under the antitrust laws. . . .

   These same considerations apply with equal force to foreign nations. Id. See also Hunt v. Mobil Oil Corp., 550 F.2d 68, 78 n.14 (2d Cir.), cert. denied, 434 U.S. 984 (1978); Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1298 (D. Del. 1976). But see Pfizer, Inc. v. India, 434 U.S. 308 (1978) where the Supreme Court held that a foreign nation may be a “person” under our antitrust laws as a plaintiff for the purpose of bringing suit.

   16. 477 F. Supp. at 572. The court was not persuaded by plaintiff’s evidence that the dramatic rise in gasoline prices was primarily caused by the setting of crude oil prices by OPEC. The court noted the failure of IAM to prove by a preponderance of the evidence that the alleged illegal conduct by OPEC was a substantial factor in bringing about any injury or damage to plaintiff. In fact, the court alluded to a host of other factors which may have played a role in pushing gasoline prices upward. Id. at 573.

   17. Id. at 574. Relying on 28 U.S.C. § 1608(e) (1976), concerning default judgments against foreign states, the court refused to enter a default judgment since it remained unconvinced that plaintiff had established its “claim or right to relief by evidence satisfactory to the Court.” 477 F. Supp. at 575.

   18. 649 F.2d at 1362.

   19. Id. at 1358. The court stated:
   The act of state doctrine declares that a United States court will not adjudicate a politically sensitive dispute which would require the court to judge the legality of the sovereign act of a foreign state. This doctrine was expressed by the Supreme Court 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.” Id. (quoting Underhill v. Hernandez, 168 U.S. 250, 252 (1897)). For a discussion of Underhill, see text accompanying notes 55 & 56 infra.

   20. 649 F.2d at 1388-89. The court noted:
   The doctrine of sovereign immunity is similar to the act of state doctrine in
whenever the federal courts must question the legality of the sovereign acts of foreign states. The court determined that the act of state doctrine was in fact applicable in this case and, therefore, chose not to enter the “delicate area” of foreign policy. It thus declined to reach the issues of sovereign immunity, the indirect-purchaser rule, the extraterritorial application of the Sherman Act, and the definition of “person” under that act.

The attempt to apply domestic law to violations committed abroad is by no means a recent phenomenon. The long and checkered history of international law is replete with efforts to resolve such controversies, in particular, within the area of United States antitrust policy.
Early antitrust decisions struggled with the problem without reference to the act of state doctrine. Instead, the courts chose to treat each case within the framework of traditional notions of territorial jurisdiction.\textsuperscript{80} The first of these conventional approaches was that of the Supreme Court in \textit{American Banana Co. v. United Fruit Co.}\textsuperscript{31} There, the plaintiff's complaint charged that defendant had sought to monopolize the banana trade in Panama.\textsuperscript{32} The Supreme Court dismissed the action because the alleged antitrust violations took place wholly outside the United States.\textsuperscript{33} Justice Holmes would not extend the jurisdiction of the Court that far. Indeed, he noted that "[a]ll legislation is \textit{prima facie} territorial."\textsuperscript{34} This doctrine of strict territoriality proved to be short-lived, however, as the courts soon began to whittle away at such
a restrictive view of the Sherman Act. In *Thomsen v. Cayser,* a restrictive view of the Sherman Act. In *Thomsen v. Cayser,* the Supreme Court held a combination formed abroad by foreign owners of steamship lines, with the intent to restrict competition through a monopoly pricing scheme, to be in violation of the Sherman Act. Of importance to the Court in distinguishing *Thomsen* from *American Banana,* was the fact that "the combination affected the foreign commerce of this country and was put into operation here." 

With *United States v. Aluminum Co. of America,* a case involving the alleged monopolization of interstate and foreign commerce in the manufacture and sale of virgin aluminum ingot, all former notions of strict territoriality were cast aside. As one commentator noted, "[w]ith one stroke, [Judge Hand] read out of past Supreme Court decisions any requirement that the unlawful agreement be formed or to some degree carried out within the United States." 

The test for antitrust jurisdiction formulated by Judge Hand was essentially two-fold, requiring a finding of both an intent to affect and an actual effect on American commerce. Later cases refined the sec-

35. 243 U.S. 66 (1917).
36. Id. at 88. The Court relied on *United States v. Pacific & Arctic Ry. & Navigation Co.,* 228 U.S. 87 (1913), which rejected the notion that United States antitrust laws did not apply to acts outside the country where the acts of foreigners operating within the United States were at issue. See generally Simson, *The Return of American Banana: A Contemporary Perspective on American Antitrust Abroad,* 9 J. INT'L L. & Econ. 233, 236-37 (1974) [hereinafter cited as Simson].
37. 148 F.2d 416 (2d Cir. 1945).
38. Simson, supra note 36, at 237. Judge Hand's reasoning was that even if an alleged violator never set foot in the United States, the effect of his activities abroad would imply an inanimate means or presence, which would be, for all intents and purposes, the equivalent of actually setting foot here for the purposes of granting jurisdiction. 148 F.2d at 444.
39. 148 F.2d at 443-44. The breadth of this standard should be readily apparent. Given the seemingly boundless flow of effects generated by virtually any trade agreement or foreign investment in the world wealth process... the unhappy fate of a defendant left to disprove presumed effects should be patent...
Thus, whatever vitality the Holmes dicta in *Banana* may have been thought to retain... *Alcoa*... relegated... to mere historical curiosity.
Simson, supra note 36, at 238. Judge Hand felt well guided in his extension of Sherman Act jurisdiction:
We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States. On the other hand, it is settled law... that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.
148 F.2d at 443 (citations omitted). For support, Judge Hand relied upon several earlier Supreme Court cases: *Ford v. United States,* 273 U.S. 593 (1927); *Lamar v. United States,* 240 U.S. 60 (1916); *Strassheim v. Daily,* 221 U.S. 280 (1911). In *Strassheim,* the Court held that "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if
ond prong of the *Alcoa* doctrine and required that the effects be substantial. In any event, the pendulum seemed to be swinging further away from the holding of *American Banana*.\(^{40}\) With increasing determination, the courts were holding more and more foreign activity subject to the wrath of the Sherman Act. In *Continental Ore Co. v. Union Carbide & Carbon Corp.*,\(^{42}\) for example, the Court held that defendant’s reliance on *American Banana* as providing insulation from liability was misplaced. The Court wrote that “[a] conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries.”\(^{43}\) Similarly, in *Westinghouse Electric Corp. v. Rio Algom Ltd.*,\(^{44}\) an action against twenty-nine foreign and domestic uranium producers for attempts to restrain the uranium trade, the Seventh Circuit pointed to the gradual erosion of *American Banana*, and concluded that the Sherman Act did indeed extend to conduct outside the United States, as long as some of the alleged violations transpired within the United States, and the

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he had been present at the effect, if the State should succeed in getting him within its power.” Id. at 285 (citations omitted). Critics of Judge Hand’s expansive interpretation, however, have questioned the correctness of his conception of “settled law,” as purporting to be a statement of international law. See Whitney, *Sources of Conflict Between International Law and the Antitrust Laws*, 63 YALE L.J. 655 n.1 (1954).

40. See, e.g., United States v. Watchmakers of Switz. Information Center, Inc., 1963 Trade Cas. (CCH) ¶ 70,600 at 77,457 (S.D.N.Y. 1962), order modified, 1965 Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y. 1965) (appeal dismissed per stipulation). The United States alleged a conspiracy on the part of the defendant to impose unreasonable restraints on foreign and domestic commerce by fixing the price of watches sold in the United States. The court noted:

> Defendants’ combination and conspiracy has operated as a direct and substantial restraint on interstate and foreign commerce of the United States and is illegal under Section 1 of the Sherman Act and Section 73 of the Wilson Tariff Act notwithstanding that some of the conspirators are foreign nationals, that some of the agreements were entered into in a foreign country or that the acts of defendants were lawful in such foreign country.

Id. at 77,456 (citations omitted).

In dicta, the court pointed out that “[i]f, of course, the defendants’ activities had been required by Swiss law, this court could indeed do nothing. An American court would have under such circumstances no right to condemn the governmental activity of another sovereign nation.” Id. Compare with note 87 and accompanying text infra. See also Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 705 (1962) (for a discussion of *Continental*, see text accompanying notes 42 & 43 infra); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1299 (3d Cir. 1979) (for a discussion of *Mannington*, see notes 97-99 and accompanying text infra).

For a discussion of *American Banana*, see text accompanying notes 29-33 supra.


42. Id. at 704 (citation omitted).

43. Id. at 1253.
parties were American. Relying on Alcoa, and viewing the concerted conduct both abroad and within the United States as manifesting an intent to affect the uranium market in this country, the court concluded that defendants did indeed "fall within the jurisdictional ambit of the Sherman Act. . . . "

There soon emerged, however, yet another approach to questions involving extraterritoriality. While prior cases had almost exclusively involved the activities of private citizens or corporations abroad, a new line of cases developed in response to the increasing frequency with which acts of foreign nations themselves were being called into question. The fundamental analysis employed by this new collection of cases manifested an explicit reliance on the act of state doctrine and the evolving conception of sovereign immunity.

The origin of sovereign immunity as it developed in the United States can be found in The Schooner Exchange v. M'Fadden, which involved a United States citizen's asserted right to a ship allegedly seized under orders of Napoleon. Chief Justice Marshall's refusal to hear the claim was explained in an opinion which is recognized as establishing the doctrine of sovereign immunity in the United States. The Chief Justice noted that each sovereign, as an independent state, has exclusive power within its borders, which includes the absolute right of the courts to exercise jurisdiction within its territories. However, because of common interests impelling these nations to mutual intercourse "every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction" in certain situations. One such situation arises when there is a claim against a foreign sovereign. Barring this exception, the resulting immunity of a sovereign power to suit in another state's court renders the forum state's court incapable, on jurisdictional grounds, of entertaining a suit against another state.

46. Id. For a discussion of Alcoa, see notes 37-39 and accompanying text supra.

47. 617 F.2d at 1254.

48. See note 19 supra.

49. 11 U.S. 116 (7 Cranch 74) (1812).

50. Id. at 146 (7 Cranch at 92).


52. 11 U.S. at 136 (7 Cranch at 85).

53. 649 F.2d at 1357. See Graziano, Foreign Governmental Compulsion as a Defense in United States Antitrust Law, 7 VA. J. INT'L L. 100, 118 (1967). The degree of immunity seems to vary between nations according to their own peculiar conceptions. "Absolute" immunity, today being applied by a declining number of states, applies a ratione personae, that is, a view completely independent of the nature of the acts involved.
The act of state doctrine finds its genesis in *Underhill v. Hernandez*. There, the court refused to inquire into the acts of Hernandez, a revolutionary Venezuelan military commander whose government was ultimately recognized by the United States, despite claims by Underhill, a United States citizen, that he had been unlawfully assaulted, coerced and detained in Venezuela by Hernandez. Chief Justice Fuller wrote for a unanimous Court:

> 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.

Thus the act of state doctrine can be described as a recognition of the institutional limitations of the courts. It is a doctrine which avoids judicial action in sensitive areas, by leaving the executive branch to properly decide the matter.

In *Banco Nacional de Cuba v. Sabbatino*, the Supreme Court, in a five-to-four decision, reaffirmed the use of the act of state doctrine in even more intricate settings. *Sabbatino* involved the expropriation by the Cuban government of the property of a Cuban corporation largely owned by United States residents. In reversing the holding of the lower court, Justice Harlan held that the act of state doctrine, as enunciated in *Underhill*, was applicable even when the foreign act in question was in violation of international law. Fundamentally, Justice

Gaining in popularity is the "restrictive" view, which grants immunity to states only for public or sovereign acts (*jure imperii*), and not for private or commercial acts. *Id.* at 118 nn.109-11. The current United States outlook is of the restrictive variety. See The Tate Letter, 26 Dep't State Bull. 984 (1952). For a discussion of The Tate Letter, see note 112 infra. The position expressed in The Tate Letter was ultimately adopted by the Second Circuit in *Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). The contours of sovereign immunity in the United States are defined in 28 U.S.C. § 1330 (1976).

54. 169 U.S. 250 (1897).
55. *Id.* at 251.
56. *Id.* at 252.
57. 649 F.2d at 1358.
59. *Id.* at 416-17. Justice Harlan, writing for the Court, specifically noted: "None of this Court's subsequent cases in which the act of state doctrine was directly or peripherally involved manifest any retreat from *Underhill*. . . . On the contrary, in two of these cases . . . the doctrine as announced in *Underhill* was reaffirmed in unequivocal terms." *Id.*
60. *Id.* at 406. Justice Harlan, writing for the majority, pointed out that "[i]f international law does not prescribe use of the doctrine, neither does it forbid application of the
Harlan was concerned with the role of the Court in foreign diplomatic political questions. The appropriate solution, he suggested, was for an individual to employ the usual method of seeking relief: "[T]o exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal." Implicit in the Sabbatino decision was a balancing test to determine when invocation of the act of state doctrine would be proper. The Court reasoned that the greater the degree of consensus concerning a particular area of international law, the more appropriate it would be for the Court to render decisions regarding it. In such instances the Court could "focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice."

Justice White, in a vigorous dissent, found that the judicial power, as defined by the Constitution, included the competence to render decisions on questions of international law. He noted:

[N]o other civilized country has found such a rigid rule necessary for the survival of the executive branch of its government; the executive of no other government seems to require such insulation from international law adjudications in its courts; and

rule even if it is claimed that the act of state in question violated international law." Id. at 422.

61. Justice Harlan wrote that the act of state doctrine arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relationships. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.

Id. at 423.

62. Id. at 422-23 (citations omitted).

63. Id. at 428.

64. Id. at 439 (White, J., dissenting).

65. Id. at 450-51 (White, J., dissenting). Justice White wrote: Article III, § 2, of the Constitution states that "[t]he judicial Power shall extend to all Cases . . . affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction—to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." And § 1332 of the Judicial Code gives the courts jurisdiction over all civil actions between citizens of a State and foreign states or citizens or subjects thereof.

Id. at 451 (White, J., dissenting).
Indeed, Justice White viewed the law of nations as being part of the law of the land. In support of this proposition, he cited *The Paquete Habana*, in which the Court determined that "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."

So controversial was the decision in *Sabbatino*, that Congress soon sought to partially overrule its implications by passing the "Sabbatino Amendment." Essentially, the Act bars a court from declining to hear a case under the act of state doctrine where the act of state in question concerns the possible violation of international law, or involves a dis-
pute as to a claim of title or right to property.\textsuperscript{71}

\textit{Sabbatino} has played an influential role as a basis for decision in subsequent cases seeking to invoke extraterritorial jurisdiction. For example, \textit{Hunt v. Mobil Oil Corp.},\textsuperscript{72} an action alleging a Sherman Act violation,\textsuperscript{73} was dismissed by the District Court for the Southern District of New York on the basis of the act of state doctrine.\textsuperscript{74} The plaintiff in \textit{Hunt} was an independent oil producer operating under a concession from the Libyan government.\textsuperscript{75} In 1971, Libya decided to increase its share of the profits from both the plaintiff and the "Seven Sister" (Seven) oil companies, also operating in Libya.\textsuperscript{76} The Seven proposed meetings to form a "united front" against the perceived potential of a new hard-line Libyan policy with respect to foreign oil producers.\textsuperscript{77} Obtaining a letter of clearance in 1971 from the Department of Justice indicating that no antitrust action against the Seven would be brought if independent producers were included in the meetings,\textsuperscript{78} the Seven met secretly in New York. Plaintiff, however, refused to participate.\textsuperscript{79} Later that year, Libya nationalized the oil industry in response to the Seven's concerted action and refused to permit the plaintiff to export any oil.\textsuperscript{80} Plaintiff then brought an antitrust suit against the Seven.\textsuperscript{81} Judge Mulligan, writing for the Second Circuit Court of Appeals, upheld the district court's dismissal,\textsuperscript{82} noting that any adjudication would

\textsuperscript{71} Id. The amendment itself has already proven to be yet a new source of litigation. See, e.g., \textit{Occidental Petroleum Corp. v. Buttes Gas & Oil Co.}, 331 F. Supp. 92 (C.D. Cal. 1971), aff'd, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950 (1972). There, the court construed very narrowly the exception provided by the amendment, and noted the necessity for strict construction. The act of state doctrine would continue to apply in any case that did not precisely fit the statutory language. Two cases serve to illustrate the court's analysis. In \textit{French v. Banco Nacional de Cuba}, 23 N.Y.2d 46, 242 N.E.2d 704, 295 N.Y.S.2d 433 (1968), the court refused to apply the amendment exception since it "refers to cases in which a claim of title or other right to property is asserted . . . based upon (or traced through) a confiscation or other taking . . . ." 23 N.Y.2d at 57, 242 N.E.2d at 712, 295 N.Y.S.2d at 444. In \textit{F. Palicio y Compania, S.A. v. Brush}, 256 F. Supp. 481 (S.D.N.Y. 1966), aff'd, 375 F.2d 1011 (2d Cir. 1967), the amendment was not invoked since there was found to be no violation of international law.


\textsuperscript{73} For the text of section 1 of the Sherman Act, see note 8 supra.

\textsuperscript{74} 410 F. Supp. at 23-25.

\textsuperscript{75} Id. at 14-15.

\textsuperscript{76} Id. at 15-16.

\textsuperscript{77} 550 F.2d at 71.

\textsuperscript{78} 410 F. Supp. at 16.

\textsuperscript{79} Id.

\textsuperscript{80} 550 F.2d at 71.

\textsuperscript{81} Id. at 71-72.

\textsuperscript{82} The district court held that the conspiracy did not cause any of the resulting damage, and plaintiff would have to establish that \textit{but for} the conspiracy, Libya would not have committed any aggressive acts. 410 F. Supp. at 24. These acts would require
have required an inquiry into the activities of a foreign sovereign.\textsuperscript{83} Hence, under the reasoning of \textit{Sabbatino}, the act of state doctrine was available here to effectively bar the plaintiff from adjudicating his claim.

The dissent viewed the act of state doctrine's availability to the defendant in this case as somewhat tenuous. It noted that the doctrine does not set up a jurisdictional bar to judicial review,\textsuperscript{84} nor does it prohibit judicial scrutiny. Rather, it requires only that the court examine the nature of the alleged conduct and its relation to the foreign sovereign.\textsuperscript{85} Should it be found that they are in fact the acts of a foreign sovereign, only then does it provide a proscription against a judicial determination of the validity of the acts.\textsuperscript{86} In short, the dissent was unwilling to confer antitrust immunity upon violators who could hide behind the shield of "foreign compulsion."\textsuperscript{87}

judicial inquiry into the conduct of Libyan officials and as such, would be foreclosed by the act of state doctrine. \textit{Id.}

\textsuperscript{83} 550 F.2d at 73. In concluding that plaintiff's complaint concerned nonjusticiable sovereign acts, Judge Mulligan relied upon \textit{Alfred Dunhill of London, Inc. v. Republic of Cuba}, 425 U.S. 682 (1976), where the Court distinguished a sovereign's \textit{public} acts (nonjusticiable) from its \textit{commercial} functions (justiciable). Judge Mulligan noted that \textit{Dunhill} clearly established that the expropriation of the property of an alien has been traditionally considered one of the public acts of a sovereign and therefore exempt from any judicial scrutiny. 550 F.2d at 73. Alternatively, the acts under question here were clearly those of a sovereign since Libya had proclaimed them to be a political reprisal against the United States. \textit{Id.} For a discussion of \textit{Dunhill}, see notes 108-15 and accompanying text infra.

\textsuperscript{84} 550 F.2d at 79 (Van Graafeiland, J., dissenting). \textit{See} text accompanying note 57 \textit{supra}.

\textsuperscript{85} 550 F.2d at 79 (Van Graafeiland, J., dissenting).

\textsuperscript{86} \textit{Id.} at 79-80 (Van Graafeiland, J., dissenting).

\textsuperscript{87} \textit{Id.} (Van Graafeiland, J., dissenting). The issue of "foreign compulsion" as a defense to an antitrust action is an interesting one. The dissent accepted the holding of \textit{Cantor v. Detroit Edison Co.}, 428 U.S. 579 (1976), that "state authorization, approval, encouragement or participation in restrictive private conduct confers no antitrust immunity upon the wrongdoer." 550 F.2d at 80 (Van Graafeiland, J., dissenting) (citing \textit{Cantor v. Detroit Edison Co.}, 428 U.S. at 592). At issue in \textit{Cantor} was a private violation of the Sherman Act, where the action had been approved by the state. The defendant, a private utility supplying electricity to southeastern Michigan, furnished free light bulbs to its residential customers. 428 U.S. at 582. Its marketing practice had been sanctioned by the state public service commission. Plaintiff, a retail druggist selling light bulbs, brought the action alleging a restraint of competition in violation of the Sherman Act. \textit{Id.} at 581. The Supreme Court refused to find a state exemption to the antitrust laws. \textit{Id.} at 600-03.

"Approval" versus "compulsion" has often been at issue in the international sphere as well. In \textit{Westinghouse Elec. Corp. v. Rio Algom Ltd.}, 617 F.2d 1248 (7th Cir. 1980), an antitrust action against international uranium producers, the act of state doctrine was found not to apply. While the governments of the defendant companies had been sympathetic to the economics of the defendant, there was no finding that defendants' conduct had been mandated by the governments. \"[W]hen a foreign sovereign simply approves or condones certain conduct, the act of state doctrine is not a defense.\" 617 F.2d at 1254.
In *Timberlane Lumber Co. v. Bank of America*, 88 the Ninth Circuit Court of Appeals came to grips with the fundamental elements underlying the *Sabbatino* case, 89 and fashioned its own balancing test to determine which situations would require an act of state defense. Judge Choy, writing for the court, rejected as inapplicable the act of state defense employed by the district court. Specifically, Judge Choy pointed out that "the doctrine does not bestow a blank-check immunity upon all conduct blessed with some imprimatur of a foreign gov-

n.21.

In *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1979), where plaintiff's suppliers were compelled by Venezuelan authorities to engage in a boycott designed to deny plaintiff the Venezuelan crude oil required for his refining operations, the court held that where it is found that a defendant has been "compelled by regulatory authorities . . . to boycott plaintiff . . . such compulsion is a complete defense to an action under the antitrust laws." *Id.* at 1296. The court went on to explain:

When a nation compels a trade practice, firms there have no choice but to obey. Acts of business become effectively acts of the sovereign. The Sherman Act does not confer jurisdiction on United States courts over acts of foreign sovereigns. By its terms, it forbids only anticompetitive practices of persons and corporations.

*Id.* at 1298 (footnote omitted). See also Fugate, Antitrust Jurisdiction and Foreign Sovereignty, 49 Va. L. Rev. 925 (1962):

The real question is whose acts are the subject of inquiry. If the acts are those of a foreign government within its own jurisdiction, then the antitrust exception applies. The situation is the same if the foreign government through its laws, regulations, or orders, requires parties to perform the anticompetitive acts. If, on the other hand, the acts complained of are in reality those of private parties who seek to hide behind the cloak of foreign law, the courts will attach antitrust liability.


88. 549 F.2d 597 (9th Cir. 1976). Plaintiff alleged that defendant and others in both the United States and in Honduras conspired to prevent it from milling lumber there and exporting it to the United States, thus maintaining a monopoly over the Honduran export business. Plaintiff claimed further, that the intent and effect of the conspiracy was to interfere with the export to the United States of Honduran lumber for use there by plaintiff, thereby directly and substantially affecting the commerce of the United States. The district court accepted the defendant's argument that the injuries allegedly suffered resulted from the acts of the Honduran government in connection with the enforcement of security interests in its Mayan plant, and that therefore, American courts were precluded from reviewing such actions based on the act of state doctrine. *Id.* at 605.

89. See text accompanying note 63 *supra.*
ernment."\(^{90}\) Dissatisfied with the traditional applications of the effects test of *Alcoa*, \(^{91}\) Judge Choy suggested in its place a balancing of interests test based on principles of international comity. \(^{92}\) His approach entailed the evaluation of three distinct issues, beginning with an inquiry into whether the alleged restraint affected, or was intended to affect, the foreign commerce of the United States. \(^{93}\) Next, he asked if the restraint was of such a type and magnitude so as to be cognizable as a violation of the Sherman Act. \(^{94}\) Finally, Judge Choy posed the somewhat normative question, based on notions of international comity and fairness, of whether the extraterritorial jurisdiction of the United States should be asserted to cover the alleged violation. \(^{95}\) In

\(^{90}\) 549 F.2d at 606.

\(^{91}\) *Id.* at 611-12. Judge Choy's uncertainty as to the adequacy of the *Alcoa* effects test was based upon a fundamental weakness which he found the test to contain. His analysis was that such a test fails to take into account interests of nations other than the United States. *Id.* at 612. For the formulation of the effects test, see notes 38 & 39 *supra.*

\(^{92}\) 549 F.2d at 612-13. The premise from which Judge Choy started was that, as espoused by the Court in *Sabatin*, the act of state doctrine is neither compelled by the nature of sovereignty nor international law, nor the Constitution itself, but rather, from the judiciary's concern for its possible interference with the conduct of foreign affairs by the political branches of government. *Id.* at 605-06 (citing Banco Nacional de Cuba v. *Sabatin*, 376 U.S. at 423). By Judge Choy's interpretation, *Sabatin* did not lay down any fixed, inflexible rule, but rather specifically addressed itself to a "balance of relevant considerations." *Id.* at 606 (quoting Banco Nacional de Cuba v. *Sabatin*, 376 U.S. at 428). Judge Choy, therefore, enumerated the various factors to be considered.

The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

*Id.* at 614.

\(^{93}\) 549 F.2d at 615.

\(^{94}\) *Id.*

\(^{95}\) *Id.* Judge Choy found support for his position not only among the commentators, see, e.g., K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 446 (1958); Falk, *International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order*, 32 *TEMP. L.Q.* 295, 304, 306 (1959); Fortenberry, *Jurisdiction Over Extraterritorial Antitrust Violations—Paths Through the Great Grimpen Mire*, 32 *OHIO ST. L.J.* 519, 539-45 (1971); Simson, *The Return of American Banana: A Contemporary Perspective on American Antitrust Abroad*, 9 *J. Irr'l. L. & Econ.* 233, 244-46 (1974); Trautman, *The Role of Conflicts Thinking in Defining the International Reach of American Regulatory Legislation*, 22 *OHIO ST. L.J.* 586, 588 (1961), but among the case law as well. Judge Choy relied on the Supreme Court decision in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). There, the Court held that the involvement of the Canadian government in the alleged monopolization of the United States uranium market did not require dismissal of the action. Since the Court found no approval by the government of the monopolization, it could be inferred that the Canadian interest was slight, and clearly
Timberlane, Judge Choy noted that because there was little indication of any conflict with Honduran policy in enforcing a Sherman Act violation, and because the magnitude of the effects alleged by the claimant appeared to be substantial, the court should vacate the dismissal of the district court and remand the case for reconsideration. 96

Three years later, in 1979, a modified Timberlane analysis was espoused by the Third Circuit in Mannington Mills, Inc. v. Congoleum Corp. 97 In Mannington, the court used the Alcoa effects test to support its finding that it had jurisdiction98 even though the antitrust violation occurred abroad and was specifically approved by the foreign government. Only then did the court consider a list of comity factors to be used in determining whether the jurisdiction, once found, should be exercised. 99

Picking up on the distinction between the varying approaches of Timberlane and Mannington,100 the District Court for the Southern District of New York in Dominicus Americana Bohio v. Gulf & Western Industries, Inc.,101 accepted the balancing test in general and pro-
ceeded to evaluate the various factors that would impact upon the propriety of asserting jurisdiction. Dominicanus evinced a relatively expansionist view of the extraterritorial application of the Sherman Act. It extended the "effects" holding of Alcoa and concluded that the territorialism of American Banana had indeed been rendered obsolete. The only apparent limit on jurisdiction set by the court would be in what it termed "the extreme case." Only "a lawsuit that challenges the validity per se of an act of a foreign government is non-justiciable." For the Southern District, act of state again played a crucial role, as evidenced by its reliance on Alfred Dunhill of London, Inc. v. Republic of Cuba. Dunhill involved an action brought by leading cigar manufacturers against Cuban cigar importers for the purchase price of cigars that had been shipped to the importers from the manufacturers' plants which had been nationalized by the Cuban government. In a five-to-four decision, the Supreme Court reversed the Second Circuit and held that the act of state doctrine would not apply to the Cuban government's repudiation of a debt, allegedly owing to petitioner, since such repudiation was not considered to be a genuine act of state.

The Court wrote:

If a state chooses to go into the business of buying and selling

102. Id. at 688. Some of the factors enumerated included the degree of conflict with foreign law, the relative importance of the alleged antitrust violations in the Dominican Republic, the availability of a remedy there, and the existence of any agreement between the United States and the Dominican Republic regarding antitrust policy. Id. Some of the factors relied upon by Judge Carter were the same as those espoused by the Mannington court. For a list of the factors considered there, see 595 F.2d at 1297-98.

103. 473 F. Supp. at 687. See text accompanying note 38 supra. In Dominicanus, the court stated:

According to the Alcoa rule, even wholly foreign conduct may come within the sweep of the antitrust laws if it has a sufficient effect on the interstate or foreign commerce of the United States. . . . Indeed it is probably not necessary for the effect on foreign commerce to be both substantial and direct as long as it is not de minimus.

473 F. Supp. at 687 (citation omitted).


105. 473 F. Supp. at 687. Indeed, Judge Carter of the Southern District of New York labeled American Banana as not a seminal decision, but, rather, an aberration, noting that it was apparently the only foreign trade case lost by the Department of Justice for want of jurisdiction. Id.

106. Id. at 689.

107. Id.

108. Id. at 689-90 (citing Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976)).


110. 425 U.S. at 690.
commodities, its right to do so may be conceded so far as the federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function. . . . When a state enters the market place seeking customers it divests itself of its quasi sovereignty pro tanto, and takes on the character of a trader. . . .

In so holding, the Court explicitly noted the distinction between a state's sovereign and commercial functions, and refused to extend the doctrine to situations where the sovereign had descended to the level of an entrepreneur.

Justice Marshall, in his dissenting opinion, stated that he would have held that the act of state doctrine exempts such commercial acts from judicial scrutiny. He questioned the wisdom of attempting the articulation of any broad exception to the act of state doctrine within the confines of a single case. The Court in Sabbatino, aware of the variety of situations

111. _Id._ at 696 (citing Ohio v. Helvering, 292 U.S. 360, 369 (1934)).
112. 425 U.S. at 696-97. In particular, the Court relied on a letter it received from the Department of State through its legal adviser which declared: "[W]e do not believe that the Dunhill case raises an act of state question because the case involves an act which is commercial, and not public in nature." _Id._

Additionally, the Court found support for its position in the new theory of "restrictive" sovereign immunity, as espoused by the famed _Tate Letter_ from the Department of State to the Attorney General, enunciating the view of the executive toward questions of foreign jurisdiction. _Id._ at 698. For the full text of the letter, see 26 Dep't State Bull. 984-85 (1952).

The Court also discussed the continuing trend toward a theory of restrictive immunity as necessitated by the increased participation of sovereigns in the international commercial market. 425 U.S. at 701-03.

A similar exception to the act of state doctrine is the so-called "Bernstein Exception" noted in First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972). There, the Court stated:

We conclude that where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, 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 doing, we of course adopt and approve the so-called Bernstein exception to the act of state doctrine. We believe this to be no more than an application of the classical common-law maxim that "[t]he reason of the law ceasing the law itself also ceases."

_Id._ at 769 (citations omitted).

The "Bernstein Exception" was derived from Bernstein v. N.V. Nederlandsche-Amerikassche, 210 F.2d 375 (2d Cir. 1954), where it was held that in cases in which the executive publically advises the court that the act of state doctrine need not be applied, the court should proceed to examine the legal issues raised by the acts of a foreign sovereign within its own territory as it would any other legal question before it. _Id._ at 375-76.

113. 425 U.S. at 706.
114. _Id._ at 714 (Marshall, J., dissenting).
presenting act of state questions and the complexity of the
relevnt considerations, eschewed any inflexible rule in favor of
a case-by-case approach. . . . The carving out of broad excep­
tions to the doctrine is fundamentally at odds with the careful
case-by-case approach adopted in Sabbatino.116

This commercial/political dichotomy that emerged with great clar­
ity in Dunhill, became one of the two critical issues to be determined
by the Ninth Circuit in International Association of Machinists v.
OPEC.116 While the court gave the issue of sovereign immunity with
respect to commercial activities only a cursory review,117 its analysis of
this issue remains fundamentally important to an understanding of its
decision. The court's focus in determining whether activity was com­
cmercial or noncommercial centered around the text of the Foreign So­
eign Immunities Act (FSIA).118 Under the Act, the courts are obliged
to employ an objective nature-of-the-act test in determining whether
activity is commercial and, therefore, not immune.119

The activity under attack in OPEC was price fixing by OPEC,
which IAM claimed to be commercial since its presumed purpose was
profit.120 A proper classification of the activity was crucial but by no
means clear. Debate over the nature of commercial activity vis-a-vis
state activity was wide ranging. The district court was convinced that

115. Id. at 728 (Marshall, J., dissenting). Justice Marshall noted that “the precise
contours of the restrictive theory of sovereign immunity, on which the commercial act
exception is based, are themselves unclear.” Id. at n.14 (Marshall, J., dissenting).
116. 649 F.2d at 1354.
117. Unlike the district court, the court of appeals chose not to apply sovereign
immunity, but instead, applied the act of state doctrine. Id. at 1357-61. See note 19 supra.
118. 649 F.2d at 1357-58. For a discussion of the FSIA, see note 14 and accompanying
text supra.
119. 649 F.2d at 1357. The FSIA states, in pertinent part: “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 to its purpose.” 28 U.S.C. § 1603(d). Unlike the
subjective “purpose test,” which asks whether the act was undertaken for sovereign ends,
the “nature test” focuses on the nature of the act itself and is therefore much narrower,
since even the most commercial activity may be found to manifest some underlying gov­
ernmental purpose. 649 F.2d at 1357 n.6.
120. 649 F.2d at 1357-58. The court of appeals largely adopted the reasoning of the
district court, which stated:
The legislative history in the House Report . . . refer[s] to a foreign state's com­
mercial acts as “those which private persons normally perform,” and “of the
same character as . . . might be made by a private person. . . .” If the activity
is one which normally could be engaged in by a private party, it is a commercial
activity and the foreign state is not entitled to immunity. . . . If the activity is
one in which only a sovereign can engage, the activity is noncommercial.
commercial activity was to be defined very narrowly, and thus found OPEC's activity to be within the range of governmental functions. It recognized:

The control over a nation's natural resources stems from the nature of sovereignty. By necessity and by traditional recognition, each nation is its own master in respect to its physical attributes. The defendants' control over their oil resources is an especially sovereign function because oil, as their primary, if not sole, revenue-producing resource, is crucial to the welfare of their nations' peoples.

The district court was satisfied that OPEC was acting as a sovereign and not as a proprietor, particularly since prior to any commercial interest OPEC was found to have had at the time of the trial, it had regulated the extraction of oil via taxation and royalty agreements, actions which were unquestionably sovereign functions.

121. 477 F. Supp. at 567.

122. Id. Specifically, the court recognized that it "can and should examine the standards recognized under international law. The United Nations, with the concurrence of the United States, has repeatedly recognized the principle that a sovereign state has the sole power to control its natural resources." Id. The court relied on a resolution of the General Assembly, which stated:

_Bearing in mind_ its resolution 1515 (XV) of 15 December 1960, in which it recommended that the sovereign right of every State to dispose of its wealth and its natural resources should be respected, _Considering_ that any measure in this respect must be based on the recognition of the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests, and in respect for the economic independence of States, . . . _Declares_ that;

1. The right of people and nations to permanent sovereignty over their national wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.


123. 477 F. Supp. at 568. The court went on to cite the testimony of the court-appointed expert, Dr. M. A. Adelman, a Massachusetts Institute of Technology economist:

It is difficult or impossible to separate the OPEC governments as governments from their role as oil producers. They began their price fixing role by levying taxes on foreign companies operating within their borders. The oil revenues are the great bulk of governmental revenues. Indeed for the OPEC nations supplying most of the oil, the oil revenues are the great bulk of the whole national product.

Id. The court also placed reliance on Parker v. Brown, 317 U.S. 341 (1943), where a California state program designed to control the marketing of raisins so as to restrict competition and maintain prices was held to be an act of government, since such acts were for the benefit and protection of the public welfare. 477 F. Supp. at 568 (citing Parker v. Brown, 317 U.S. at 350).

124. 477 F. Supp. at 568-69. The district court stated:

Thus, the defendants were engaging in this governmental conduct setting terms
The court of appeals adopted the district court's reasoning and gave its own stamp of approval to the notion that decisions about oil policy were of the essence of sovereignty to the OPEC nations.\textsuperscript{128} This essence of sovereignty, therefore, necessitated an inquiry into the act of state doctrine.\textsuperscript{128} The court concluded that OPEC was indeed acting as a sovereign and not in any commercial capacity which would preclude consideration of either foreign sovereign immunity or the act of state doctrine.\textsuperscript{127}

\textit{Id.} at 569 n.14 (emphasis in original).

The court found further support for its holding in an implicit recognition by the United States of the sovereign nature of these activities. The court referred specifically to consent decrees entered into with the Seven Sister oil companies, granting specific "exceptions" and "permissive provisions" to these companies to engage in price fixing when required to do so by the law of foreign nations. \textit{Id.} at 569.

125. 649 F.2d at 1358.

126. \textit{Id.}

127. \textit{Id.} Whether in fact OPEC's activities were noncommercial remains an interesting question, notwithstanding the court's conclusion.


OPEC's pricing and production policies have been characterized by such supporters not as profit motivated, but rather, as measures designed to assure the continued availability of a nonrenewable natural resource. Shibata, \textit{supra}, at 266. The imposition of such conservation measures has been said to be
Central to the court's reasoning was an analysis of the act of state doctrine itself. Judge Choy, writing for the court, began by reiterating the doctrine's classic formulation found in Underhill v. Hernandez. He noted that the doctrine recognizes the "institutional limitations of the courts and the peculiar requirements of successful foreign relations." Acknowledging the necessity of the doctrine, Judge Choy reasoned that the executive branch and not the judiciary is most capable, indeed, singly permitted, to render judgment concerning issues central to our foreign relations.

Without hesitation, the court was quick to point out that the act of state doctrine had not been severely limited by modern legislation. In support, it cited Occidental Petroleum Corp. v. Buttes Gas & Oil Co., which rejected the contention that the doctrine had been a question which falls readily within the domestic jurisdiction of sovereign states. Customary international law does not seek to outlaw such a practice, and treaties for trade liberalization, such as the General Agreement on Tariffs and Trade (GATT), often allow a general exception in favor of measures relating to the conservation of exhaustible natural resources.

Id. Shibata continued, "[i]Indeed, the right of every country freely to dispose of its national wealth is an integral part of the universally acknowledged principle that a State possesses sovereignty over all of its natural resources." Id. at 268 (footnote omitted).

The language used to explicate the act of state doctrine generally indicated a desire on the part of the court to abstain from rendering a judgment due to the serious diplomatic and political consequences such judgment might have. The court explicitly defined the purposes of the doctrine as an attempt to effect a separation between the judicial and executive branches in the conduct of foreign policy. 649 F.2d at 1358-59. The court was evidently persuaded by the view that it lacked the authority to issue a decision either for or against OPEC since to do so would in effect, represent a meddling with the executive's control over foreign policy. Id. In particular, the court was well aware of the role of oil in international relations, noting, for example, a judicial recognition in prior cases of the growing world energy crisis. Id. at 1360.

128. 649 F.2d at 1358 (citing Underhill v. Hernandez, 168 U.S. 250 (1897)). For the Underhill formulation, see text accompanying note 55 supra.

129. 649 F.2d at 1358. The act of state doctrine was analogized to the political question doctrine in domestic law, a rule requiring the courts to defer to the executive and the legislature when those branches are better equipped to resolve politically sensitive questions. Id.

130. Id. The court stated:

When the courts engage in piecemeal adjudication of the legality of the sovereign acts of states, they risk disruption of our country's international diplomacy. The Executive may utilize protocol, economic sanctions, compromise, delay, and persuasion to achieve international objectives. Ill-timed judicial decisions challenging the acts of foreign states could nullify these tools and embarrass the United States in the eyes of the world.

Id.

131. Id. at 1359. See the Sabbatino Amendment, 22 U.S.C. § 2370(e)(2) (1976). For the text of section 2 of the Sabbatino Amendment, see note 70 supra.

132. 649 F.2d at 1359 n.7 (citing Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 111 (C.D. Cal. 1971), aff'd, 461 F.2d 126 (9th Cir.), cert. denied, 409
"sapped of its vitality and rationale" by the Sabbatino Amendment.\(^{133}\)

Without much inquiry into the finding by the district court that OPEC's behavior was noncommercial,\(^{134}\) the court was satisfied that \emph{Dunhill} was inapplicable.\(^{135}\) \emph{Dunhill} held that \emph{purely} commercial activity may not rise to the level of an act of state and, therefore, would not require judicial deference under the act of state doctrine.\(^{136}\) In distinguishing, both conceptually and pragmatically, the act of state doctrine from the more general concept of foreign sovereign immunity and the FSIA,\(^{137}\) the court provided itself with a clever escape from the commercial exception carved by the \emph{Dunhill} Court. Quite simply, the court stated that while the FSIA ignores the underlying purpose of a state's action,\(^{138}\) the act of state doctrine does not,\(^{139}\) since an essential element of act of state is an evaluation of a sovereign's motivations for a public interest basis.\(^{140}\) The court's interpretation of \emph{Dunhill}, cou-

\footnotesize{U.S. 950 (1972)).

\(^{133}\) 649 F.2d at 1359 n.7.


\(^{135}\) 649 F.2d at 1360. For a discussion of \emph{Dunhill}, see notes 108-15 and accompanying text \emph{supra}.

\(^{136}\) 425 U.S. at 697-98.

\(^{137}\) 649 F.2d at 1359. While acknowledging a similarity between the two doctrines, the court pointed to significant distinctions. Generally, it noted that while sovereign immunity speaks to the jurisdiction of the court, act of state is not jurisdictional, but rather "a prudential doctrine designed to avoid judicial action in sensitive areas."\(^{138}\) \emph{Id}. The court further noted:

Sovereign immunity is a principle of international law, recognized in the United States by statute. It is the states themselves, as defendants, who may claim sovereign immunity. The act of state doctrine is a domestic legal principle, arising from the peculiar role of American courts. It recognizes not only the sovereignty of foreign states, but also the spheres of power of the co-equal branches of our government.

\emph{Id}. \(^{139}\) 649 F.2d at 1360. Under the FSIA the test for sovereign immunity is the "nature of the act" test. \emph{See} note 107 and accompanying text \emph{supra}. Until the passage of the FSIA, courts had followed a purpose approach. \emph{See generally} Victory Transp. Inc. v. Comisaría General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964), \emph{cert. denied}, 381 U.S. 934 (1965); Aerotrade, Inc. v. Republic of Haiti, 376 F. Supp. 1281 (S.D.N.Y. 1974); Ocean Transp. Co. v. Republic of Ivory Coast, 269 F. Supp. 703 (E.D. La. 1967).

\(^{139}\) 649 F.2d at 1360.

\(^{140}\) \emph{Id}. \emph{See} Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 607 (9th Cir. 1976). For a discussion of \emph{Timberlane}, see notes 88-96 and accompanying text \emph{supra}. In \emph{Timberlane}, Judge Choy referred to the Restatement of Foreign Relations Law's limitation on the deference of American courts: "[A] court in the United States . . . will refrain from examining the validity of an act of a foreign state by which that state has exercised its jurisdiction to give effect to its public interests." 549 F.2d at 607 (citing \emph{Restatement (Second) of the Foreign Relations Law of the United States} § 41 (1965)) (emphasis by the court). Judge Choy also cited the reporter's comment to § 41: "\emph{Comment d. Nature of act of state. An 'act of state' as the term is used in this Title involves the public interests of a state as state, as distinct from its interest in providing"}
pled with the findings of the district court that OPEC's price fixing activity had a significant sovereign component, led the court of appeals to the proposition that certain "seemingly commercial activity will trigger act of state considerations." When the state qua state acts in the public interest, its sovereignty is asserted. The courts must proceed cautiously to avoid an affront to that sovereignty. Because the act of state doctrine and the doctrine of sovereign immunity address different concerns and apply in different circumstances, we find that the act of state doctrine remains available when such caution is appropriate, regardless of any commercial component of the activity involved.

Based on this reasoning, a court may find the act of state doctrine applicable notwithstanding any ostensibly commercial activities. The court cautioned, however, that the inquiry does not end with consideration of the public interest factor. Alluding to the flexible approach advanced by Sabbatino, the court adopted as the next step an application of the balancing test suggested there by Justice Harlan. Accordingly, it reiterated that the "'touchstone' or 'crucial element' in a determination as to the propriety of judicial intervention, is the potential for interference with our foreign relations." With this test in mind, the court recognized the significant role played by oil in international relations. The court took explicit notice of the fact that the United States has a substantial interest in the "petro-politics" of the Middle East, and that both the executive and

the means of adjudicating disputes or claims that arise within its territory." Id. (citing Restatement (Second) of the Foreign Relations Law of the United States § 41 (1965)).

141. 477 F. Supp. at 568.
142. 649 F.2d at 1360.
143. Id. at 1360 (emphasis added).
144. 376 U.S. 400 (1964). For a discussion of Sabbatino, see notes 58-65 and accompanying text supra.
145. 649 F.2d at 1360. In Sabbatino, Justice Harlan observed that "some aspects of international law touch more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches." 376 U.S. at 428.
146. 649 F.2d at 1360 (citing Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 607 (9th Cir. 1976)). In Timberlane, Judge Choy expressed the opinion that "[w]e wish to avoid 'passing on the validity' of foreign acts. Similarly we do not wish to challenge the sovereignty of another nation, the wisdom of its policy, or the integrity and motivation of its action." 549 F.2d at 607 (citations omitted).
legislative branches are intimately involved in what is indisputably a sensitive area. In eschewing any judicial involvement in a realm best left to the executive, the court posited a two-fold justification for remaining neutral. To award IAM the relief it sought—an injunction against OPEC—would run a substantial risk of affronting the OPEC nations themselves, as well as interfering with the efforts of the executive branch to effect favorable relations with them. Any granting of relief would amount to an order by a United States court instructing a foreign sovereign to alter its policies of allocating its own natural resources. If, on the other hand, the court were to recognize the legality of OPEC's actions, its bargaining power would be greatly strengthened in the event Congress or the Executive should later choose to condemn such action. Accordingly, Judge Choy, author of the OPEC decision, was averse to finding any compelling necessity to render judgment in the case.

The final substantive issue relevant to the court's holding was the availability of internationally accepted legal principles upon which a judicial decision could be based. The analysis of Sabbatino again provided the yardstick for the court. Finding no clear international consensus as to the propriety or impropriety of monopoly practices in the global community, the court, like Justice Harlan in Sabbatino, was

148. 649 F.2d at 1361.
149. Id.
150. Id.
151. Id.
152. Generally, the Sabbatino holding suggested that courts consider the degree of codification and consensus in the global community regarding any particular area of law before entering a finding relative to the specific law under consideration. The Court wrote:

It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.

376 U.S. at 428.
153. The court refused to find any international consensus concerning cartels and production agreements despite the suggestion of amici that royalties and production quotas were sovereign practices. 649 F.2d at 1361 n.9. The amici cited, inter alia, the Connally Hot Oil Act, 15 U.S.C. § 715 (1976), in which

[i]t is declared to be the policy of Congress to protect interstate and foreign commerce from the diversion and obstruction of, and the burden and harmful effect upon, such commerce caused by contraband oil as herein defined, and to encourage the conservation of deposits of crude oil situated within the United States.

649 F.2d at 1361 n.9. Also cited by amici were the United States' payments to farmers not to produce wheat, and Japan's voluntary reduction of television and automobile production to maintain prices. Id.
The international perception as to the merits, if any, of monopoly, is, as noted by the court, not distinguished by any marked degree of uniformity. For a brief review of the antitrust policies of various nations, see W. Fugate, FOREIGN COMMERCE AND THE ANTITRUST LAWS 468-91 (2d ed. 1973).

That the American perspective as to the impropriety of monopoly is by no means the ultimate solution is abundantly clear and evidenced by the myriad criticisms that have emerged. See, e.g., Devine, Foreign Establishment and the Antitrust Law: A Study of the Antitrust Consequences of the Principle Forms of Investment by American Corporations in Foreign Markets, 57 Nw. U.L. Rev. 400, 409 n.39 (1962). For a specific instance of this divergence of views, intermeshed with the question of extraterritorial application of antitrust law, see British Nylon Spinners Ltd. v. Imperial Chem. Indus. Ltd., (1953) 1 Ch. 19 (C.A.), where the British appellate court enjoined enforcement of several provisions of an antitrust decree. The implications have been interpreted to include the establishment of the “illegality” of attempts to apply the antitrust laws extraterritorially. See, e.g., Haight, International Law and Extraterritorial Application of the Antitrust Laws, 83 YALE L.J. 659, 641 (1954) (“However backward and benighted the United States may think the rest of the world is over the matter of monopolies and restraints of trade, the truth is that she cannot, even if she wants to, enforce her sincere and deep convictions upon countries whose outlook is entirely different.”); Kahn-Freund, English Contracts and American Antitrust Laws; The Nylon Patent Case, 18 MOD. L. REV. 65 (1955). See also [1980] 963 ANTITRUST & TRADE REG. REP. (BNA) A-10, which reported the adoption by 41 British Commonwealth nations of a resolution against United States enforcement of multiple damage antitrust actions. But see Fugate, Antitrust Jurisdiction and Foreign Sovereignty, 49 VA. L. REV. 925 (1963) where the author commented:

[A] reporter’s note to the 1961 draft of the Restatement of the Foreign Relations Law of the United States . . . comments upon the uniformity of antitrust decisions on this point and concludes that there is no merit to the argument that such “extra-territorial” application of the antitrust laws is contrary to international law. As that Note points out, even in British Nylon Spinners, Ltd. v. Imperial Chemical Industries Ltd., where the British courts refused to permit a British company to carry out the order of an American court in an antitrust case, the British courts were careful not to say that the American court had acted beyond its jurisdiction.

Id. at 931; Vanity Fair Mills, Inc. v. T. Eaton Co., 133 F. Supp. 522, 528-29 (S.D.N.Y. 1955), modified, 234 F.2d 633 (2d Cir. 1956).

154. 659 F.2d at 1361. Whether there does in fact exist international law relative to extraterritorial application of domestic law is subject to varying interpretations.

In some instances, it has been common for nations to apply domestic laws to acts performed beyond their borders. In general, this extraterritorial application has been tolerated when the countries involved have similar laws and thereby agree that the conduct should be regulated. The same has not been true when extraterritorial application extends to acts that were not illegal in the country of performance. This has been most evident in the areas of international trade and commerce, where approaches to economic regulation, as well as substantive laws, rarely coincide.

lation of any new international law. There was certainly enough precedent to support a finding that some activities, i.e., commercial ones, would not be insulated by the act of state doctrine. Dunhill made this limitation on act of state perfectly clear. The court's failure to apply any type of rigorous analysis to the question of commerciality, however, left it without a basis to hold any way other than it did.

It is clear that the judicial trend has come full cycle. With the OPEC case, a return to the doctrine of American Banana and the principle of strict territoriality is apparent, albeit seemingly confined to antitrust actions brought against foreign nations themselves as opposed to corporations operating within foreign locales. The expansive jurisdiction asserted by Judge Hand in Alcoa has proven to be wholly inapplicable when the actions of a foreign sovereign become ripe for judicial scrutiny. Yet, because of the approach taken in OPEC, the prospect of any extraterritorial application of United States antitrust laws remains clouded. Rather than assert any firm policy or definitive statement of the law, the court left through the back door, and simply declined to review what are potentially serious international legal complications. Not only does the act of state doctrine provide a convenient defense for foreign antitrust violators, but it also shields the court from the nasty chore of having to come to terms with the real issues that are

155. "But it appears that the vast weight of authority and, more importantly, the practice of states, indicate that such an application of the antitrust law is perfectly legal under the law of nations." Fortenberry, Jurisdiction Over Extraterritorial Antitrust Violations—Paths Through the Great Grimpen Mire, 32 Ohio St. L.J. 519, 533 (1981). In support of the proposition that existing international law is capable of resolving these problems, see Restatement (Second) of the Foreign Relations Law of the United States § 18 (1965); P. Jessup, Transnational Law 64 (1956); Falk, International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order, 32 Temp. L.Q. 295, 300-02 (1959); Katzenbach, Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law, 65 Yale L.J. 1087, 1150-52 (1956).

156. See notes 108-15 and accompanying text supra. The OPEC court could have adopted Justice Marshall's analysis in Dunhill as to why Cuba's activity should have been viewed as that of a sovereign. Justice Marshall wrote:

The seizure of the funds, like the initial seizure on September 15, reflected a purpose to exert sovereign power to its territorial limits in order to effectuate the intervention of ongoing cigar manufacturing business. It matters not that the funds have been determined by a United States court in this case to have belonged to Dunhill rather than the cigar manufacturers. What does matter is that Cuba retained the money in the course of its program of expropriating what it viewed as part and parcel of the business.

425 U.S. at 729 (Marshall, J., dissenting) (footnotes omitted). It is not unreasonable to suggest that under this analysis, OPEC's pricing activities could assume a totally sovereign character if viewed as an integral part of its more general program of resource management.

157. For a discussion of American Banana, see notes 31-33 and accompanying text supra.

158. See notes 37-39 and accompanying text supra.
certain to intensify in coming years as the global paths of national communities become more and more intertwined.\footnote{159}

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\footnote{159. Fortunately, the court may soon be receiving the help it has been looking for in the form of legislation just recently enacted by the Senate. S. 1010, 96th Cong., 2d Sess., 126 Cong. Rec. S13813 (1981) establishes a Presidential commission to oversee the application of the United States antitrust laws to violations occurring broad. For commentary on the new legislation, see Wallace, \textit{Changing American Antitrust Laws in a Changing World}, 26 N.Y.L.S. L. Rev. 609 (1981).

In addition to the new commission, the Reagan administration has recently made clear its policy with respect to the extraterritorial enforcement of the United States antitrust laws. Speaking before the Union Internationale des Avocats, Attorney General William French Smith commented that there was "some basis in reality for criticism that the United States has adopted much too broad a view of its jurisdiction over some multinational economic activities." Taylor, \textit{U.S. Revising Antitrust Stand}, N.Y. Times, Sept. 1, 1981, § D, at 11, col. 1. The Justice Department, Smith continued, will "urge United States courts to defer in some international law cases to the policies of foreign governments that have the predominant interests in the conduct in question," noting that "we think there may be areas where accommodations and adjustments may be made that haven't been made in the past to avoid jurisdictional conflicts with foreign countries." \textit{Id.}