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SUING OPEC

*Spencer Weber Waller**

Record gasoline prices, large regional price disparities, and outright shortages in certain areas of the country over the summer of 2000 and beyond have made the international oil companies and the Organization for Petroleum Exporting Countries ("OPEC")¹ into public enemies in a manner not seen since the energy crises of the 1970s. As in the past, Congress and the public have turned to antitrust for a solution. Congress held hearings² and bullied the Federal Trade Commission ("FTC") into investigating whether high gasoline prices in the Midwest were the product of unlawful collusion among the oil companies.³ While the FTC's investigation did not result in any enforcement action, it seems highly unlikely that anyone (including the politicians) actually thought that higher prices were the result of an unlawful conspiracy between members of the oil industry.⁴ It would be unnecessary for such inviting targets

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1. The structure, formation and early operation of OPEC are discussed in JOHN EVANS, *OPEC AND THE WORLD ENERGY MARKET: A COMPREHENSIVE REFERENCE GUIDE* (Gavin Brown ed., 2d ed. 1993); M.A. Ajomo, *An Appraisal of the Organization of the Petroleum Exporting Countries (OPEC)*, 13 *TEX. INT'L L.J.* 11 (1977); Farin Mirvahabi, *Claims to the Oil Resources in the Persian Gulf: Will the World Economy be Controlled by the Gulf in the Future?*, 11 *TEX. INT'L L.J.* 75 (1976); Mark R. Joelson & Joseph P. Griffin, *The Legal Status of Nation-State Cartels Under United States Antitrust and Public International Law*, 9 *INT'L LAW.* 617 (1975); Andrew C. Udin, Comment, *Slaying Goliath: The Extraterritorial Application of U.S. Antitrust Law to OPEC*, 50 *AM. U. L. REV.* 1321 (2001); Gail Marie King, Comment, *Cartel Pricing in the International Energy Market: OPEC in Perspective*, 54 *OR. L. REV.* 643 (1975).

2. Hearings in the House of Representatives were held before the International Relations Committee in February, 2000, the Judiciary Committee in March, 2000, and the Commerce Committee in June, 2000.

3. See *Midwest Gasoline Prices Hearing, Before the House Comm. on Commerce*, 106th Cong. (2000) (statement of Robert Pitofsky, Chairman, Fed. Trade Comm.), available at <http://www.ftc.gov/os/2000/06/gasolinecommerce.htm> (last visited Dec. 20, 2002).

4. The investigation was assigned to the Chicago Field office of the FTC, which specializes in consumer protection cases and has not handled a major competition investigation in years.

of the public's wrath to engage in explicit collusion when the same results could be obtained by unilaterally and lawfully riding the waves of supply and demand.

If antitrust is unlikely to be a successful weapon against domestic and international oil companies, OPEC once again becomes an inviting target. OPEC has never been a popular entity with the American public. In the public's perception, it epitomizes a greedy, rapacious international cartel that preys on the American public in defiance of our 110-year tradition of market competition embodied in the Sherman Act. Why should we not unleash the full power of the federal antitrust agencies,⁵ state antitrust enforcers, and private treble damage litigation (perhaps class actions as well) against a group of foreign nations acting against American interests?

Congress apparently pursued this line of thinking in a slew of bills and resolutions that sought to punish OPEC members if oil production did not increase and prices did not begin to fall.⁶ Congress introduced several bills to make it easier to sue OPEC under the antitrust laws by abolishing certain defenses and immunities thought to stand in the way of such a suit.⁷ Congressional leaders further grilled antitrust enforcement agency personnel as to why they had not already taken such action.⁸ Eager to please the

5. The federal antitrust laws are enforced by the Antitrust Division of the Justice Department as well as the FTC. The Antitrust Division has exclusive jurisdiction over the criminal enforcement of these laws but shares civil enforcement with the FTC. The agencies coordinate their investigations so as not duplicate effort in the same manner. *See generally* SPENCER WEBER WALLER, INTERNATIONAL TRADE AND U.S. ANTITRUST LAW § 4 (2001) [hereinafter WALLER, INTERNATIONAL TRADE].

6. *See, e.g.*, No Oil Producing and Exporting Act of 2001, S.665, 107th Cong. (2001) (so-called NOPEC legislation); Foreign Trust Busting Act, H.R. 4731, 106th Cong. (2000) (allowing law suits against foreign energy cartels); International Energy Fair Pricing Act of 2000, H.R. 4732, 106th Cong. (requiring review of all U.S. programs to determine if each is aiding OPEC and eliminating such aid); H.R. Con. Res. 276, 106th Cong. (2000) (strongly urging the President to file WTO complaint against OPEC member nations for unlawfully imposing quantitative restrictions in petroleum exports); Oil Price Reduction Act of 2000, S. 2182, 106th Cong. (2000) (eliminating U.S. foreign aid to OPEC nations); Oil Price Reduction Act of 2000, H.R. 3822, 106th Cong. (2000); S. Res. 263, 106th Cong. (2000). Many of these proposals are reviewed in Udin, *supra* note 1, at 1366-70.

This is not the first time that Congress has attempted to "solve" the problem of OPEC through legislation. *See* Albert Gore, Jr., *The Cartel Restriction Act of 1979: Response to a Global Economic Problem*, 12 VAND. J. TRANSNAT'L L. 273 (1979) (discussing bill introduced by then Representative Al Gore to restrict act of state doctrine and foreign compulsion doctrine in wake of OPEC and uranium cartel decisions). The doctrinal changes to these defenses have largely been accomplished through Supreme Court and lower court decisions. *See infra* notes 128-51 and accompanying text.

7. S. 665 (authorizing Department of Justice and FTC to file antitrust lawsuits against OPEC in U.S. courts and proving that sovereign immunity and act of state defenses would be unavailable in any such suit).

8. *See supra* note 2.

Congressional overseers who control budgets and nominations of key personnel, the antitrust agencies came forward with a variety of reasons why OPEC could not be sued in United States courts for its admittedly anticompetitive actions.⁹

Congress was apparently left with the impression that it is either impossible or extremely difficult to sue OPEC. This is not entirely unreasonable, since OPEC was the target of private antitrust actions in the 1970s which were dismissed, first under the doctrine of sovereign immunity,¹⁰ and later on appeal under the Act of State Doctrine.¹¹

While a federal antitrust action against OPEC would be a futile and counterproductive effort to conduct American foreign policy in a federal courtroom, particularly in light of the aftermath of the attacks of September 11, 2001, there are, in fact, no real doctrinal barriers to doing so. None of the classic international antitrust defenses would be available to the OPEC defendants if such a law suit were brought (however foolishly) by the federal government nor in all likelihood in a suit brought by either the states or a private plaintiff. The actions of OPEC would most likely be characterized as "commercial activity" permitting jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"). However, this is a matter of characterization that could be the easiest path for a district court judge looking to avoid adjudicating the merits of this type of controversial case.¹² Since the last OPEC decisions, the Supreme Court has gutted the Act of State Doctrine so that it would not be an effective defense for OPEC or virtually any other foreign antitrust defendant.¹³ The doctrine of foreign sovereign compulsion would not apply to any challenge to OPEC itself, and would at most serve to protect a private defendant if sued for unlawful conduct compelled by the OPEC nations.¹⁴ Finally, the Supreme Court has virtually eliminated the nebulous and frequently unsuccessful doctrine of comity.¹⁵ Moreover, the federal government has stated numerous times that it does not regard itself to be bound by these defenses if it determines that it is in the overall best

9. See *Solutions to Competitive Problems in the Oil Industry: Hearing Before the House Comm. on the Judiciary*, 106th Cong. (2000) (Statement of Richard G. Parker, Director, Bureau of Competition, Fed. Trade Comm.), available at <http://www.ftc.gov/os/2000/03/opectestimony.htm> (last visited Dec. 20, 2002).

10. *Int'l Ass'n of Machinists v. OPEC*, 477 F. Supp. 553 (C.D. Cal. 1979).

11. *Int'l Ass'n of Machinists v. OPEC*, 649 F.2d 1354 (9th Cir. 1981).

12. See *infra* notes 73-90 and accompanying text.

13. See *infra* notes 128-48 and accompanying text.

14. See *infra* notes 149-51 and accompanying text.

15. See *infra* notes 152-206 and accompanying text.

interests of the United States to bring an antitrust enforcement action involving international commerce.¹⁶

Does that mean it is open season on OPEC, and the executive branch is derelict in its duties for not taking action? Should private plaintiffs and state governments be lining up for their shot at public enemy number one, enriching themselves in the process? No, of course not. There are doctrines of standing and antitrust injury that would bar virtually all private law suits for damages against the OPEC nations.¹⁷ There are also long-standing concerns over the role of the states in foreign affairs that would properly bar most state enforcement actions in this situation.¹⁸

Regardless of the attractiveness of private suits, why has the Antitrust Division and the FTC remained silent in the face of this threat to competition? Even without any serious doctrinal barriers to such a lawsuit, little would be accomplished, except a clumsy and futile attempt to obtain an unenforceable remedy that would come at great cost to the foreign policy of the United States. The late Kingman Brewster warned that antitrust law in the foreign arena should not be enforced to the full extent of the law where doing so would be detrimental to the overall interests of the United States.¹⁹ The Antitrust Division and the FTC know this lesson well. They also know that OPEC cannot be punished in any meaningful way through the United States' antitrust laws.

OPEC's power has waxed and waned as market conditions have changed and the individual needs of its members have become more pressing than the benefits of collective action.²⁰ Moreover, the foreign policy interests of the United States have so far overridden whatever perceived benefits might arise from taking enforcement action under the antitrust laws. This will be the enduring truth for the short and medium terms no matter the extent of Congressional rage and public frustration with prices at the pump.

This article is a look inside Pandora's Box. Sure, you can sue OPEC under the antitrust laws (at least if you are the federal government), but how dumb can you get?

16. See *infra* notes 207-09 and accompanying text.

17. See *infra* notes 219-32 and accompanying text.

18. See *infra* notes 234-60 and accompanying text.

19. See generally KINGMAN BREWSTER, JR., *ANTITRUST AND AMERICAN BUSINESS ABROAD* (1958).

20. See EVANS, *supra* note 1, at 393-705.

I. HAVEN'T WE BEEN HERE BEFORE?

While OPEC has been a high profile concern of competition policy since its formation, it has only been the subject of two private antitrust actions. There have been no governmental challenges to OPEC under the antitrust laws and the antitrust agencies have declined to participate in either of the private cases. The first suit was dismissed because the Ninth Circuit Court held that the OPEC nations were immune from the antitrust laws under two different theories.²¹ A second, pending suit originally granted a default judgment and injunction against OPEC itself, but that decision was vacated and the suit is proceeding toward a decision on the merits.²² While crystal balls are notoriously difficult to use, it appears that the first case is now bereft of most of its analytical support because of subsequent Supreme Court cases dealing with transnational litigation not directly related to the antitrust field.

A. *The First OPEC Decision*

The first antitrust case to directly attack OPEC was filed in the 1970s at the height of the energy crisis and public frustration with the economic and political power of the Arab states belonging to OPEC.²³ A private antitrust case seeking treble damages and injunctive relief against OPEC as an organization and its thirteen member states was filed in December, 1978 in the United States District Court for the Central District of California. The plaintiff was the International Association of Machinists and Aerospace Workers which alleged that its members had been damaged through the price-fixing activity of OPEC. No defendant ever appeared. The court was mindful that the FSIA prohibited entry of a default judgment against a foreign nation without proof and a finding that the plaintiff was entitled to relief.²⁴ The court conducted a full hearing using briefs from a variety of amici and heard evidence from the plaintiffs and various court-appointed experts.²⁵

21. Int'l Ass'n of Machinists v. OPEC, 649 F.2d 1354 (9th Cir. 1981).

22. Order Vacating Default Judgment and Injunction, and Setting Briefing Schedule on Process and Jurisdictional Issues (N.D. Ala., May 2, 2001).

23. While OPEC had non-Arab member nations such as Indonesia, Ecuador, Gabon, and Venezuela, and other nations like Norway, profit substantially from OPEC-led price increases, the Middle Eastern OPEC nations have defined its identity with the United States public.

24. 28 U.S.C. § 1608(e) (2000).

25. Interestingly, one of those amici was represented by now-Justice Antonin Scalia, the author of one of the subsequent Supreme Court decisions which undercut the Act of State rationale relied upon in

1. *The Trial Court Decision*

At the close of the trial, the court granted judgment in favor of the defendants and sought to erect a multi-tiered thicket of defenses and immunities barring liability.²⁶ First, the Court determined that OPEC as an entity was dismissed from the litigation because it had not been, and could not be, lawfully served.²⁷ The court also held that the claims for damages had to be dismissed under the "direct purchaser" doctrine that bars suits for damages, except by persons who directly purchased from the defendants. The court, however, chose to consider the request for injunctive relief on the merits.²⁸ The court also held that foreign nations were not "persons" within the meaning of the Sherman Act and therefore could not be sued.²⁹ Finally, for good measure, the court held that the plaintiffs failed to prove proximate cause connecting the defendants' alleged price fixing to any domestic oil price increases.³⁰ The court's principal holding was that the defendant nations were immune from jurisdiction under the FSIA because control and regulation of a nation's natural resources is sovereign, rather than commercial, in nature.³¹

the Ninth Circuit decision in *OPEC*. See *infra* notes 128-39 and accompanying text. Then-Professor Scalia in fact appeared in the matter on appeal before the Ninth Circuit for the defendants-appellees. The United States was invited to participate in both the district court and appellate proceeding but neither did so, nor took any position in the matter.

26. *Int'l Ass'n of Machinists v. OPEC*, 477 F. Supp. 553 (C.D. Cal. 1979). The district court *OPEC* opinion is discussed and analyzed from different perspectives in several contemporary student law notes. See Stanley E. Hilton, Note, *IAM v. OPEC: The Demise of the Restrictive Theory of Sovereign Immunity and of the Extraterritorial Effect of the Sherman Act Against Foreign Sovereigns*, 41 U. PITT. L. REV. 841 (1980) (arguing that the Sherman Act should apply); Lawrence Crocker, Note, *Sovereign Immunity and the Suit Against OPEC*, 12 CASE W. RES. J. INT'L L. 215 (1980) (arguing that the district court misapplied legal doctrine but reached the correct result).

27. 477 F. Supp. at 560. For a different conclusion on the amenability of OPEC itself to suit in the United States, see *Prewitt Enterprises v. OPEC*, 2001-1 Trade Cas. (CCH) ¶ 73,246. See generally E.C. Lashbrooke, Jr., *Suits Against International Organizations in Federal Court: OPEC, a Case Study*, 12 CAL. W. INT'L L.J. 305 (1982).

28. 477 F. Supp. at 560-63.

29. *Id.* at 570-72.

30. *Id.* at 572-74.

31. *Id.* at 565-69. See also notes 73-90 *infra* and accompanying text for an in-depth discussion of the issue of sovereign versus commercial activities under the FSIA.

2. *On Appeal*

On appeal, the Ninth Circuit affirmed on different grounds.³² Of the myriad of issues addressed by the district court, the Ninth Circuit only discussed sovereign immunity and the Act of State Doctrine. The court noted that the FSIA directed courts to “look upon the act itself rather than underlying sovereign motivations.”³³ Despite thus hinting that the district court had misapplied the codified version of sovereign immunity under the FSIA, the court stated:

The district court was understandably troubled by the broader implications of an anti-trust action against the OPEC nations. The importance of the alleged price-fixing activity to the OPEC nations, cannot be ignored. Oil revenues represent their only significant source of income. Consideration of their sovereignty cannot be separated from their near total dependence upon oil. We find that these concerns are appropriately addressed by application of the act of state doctrine. While we do not apply the doctrine of sovereign immunity, its elements remain relevant to our discussion of the act of state doctrine.³⁴

The essence of the Ninth Circuit’s act of state analysis is set forth in the first sentence of that section of the opinion which states: “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.”³⁵ The court relied on some of the classic act of state cases in declaring that the act of state had constitutional roots in the separation of powers and was similar to the political question doctrine.³⁶

The court next distinguished sovereign immunity from the Act of State Doctrine. In contrast to the jurisdictional aspects of sovereign immunity, the act of state was “a prudential doctrine designed to avoid judicial action in sensitive areas.”³⁷ This distinction was crucial to the court, which then refused to recognize any commercial activities exception in the act of state context:

While purely commercial activity may not rise to the level of an act of state, certain seemingly commercial activity will trigger act of state considerations. As the district

32. *Int’l Ass’n of Machinists v. OPEC*, 649 F.2d 1354 (9th Cir. 1981).

33. *Id.* at 1358.

34. *Id.*

35. *Id.*

36. *Id.* at 1358-59. For a discussion of the now-discarded *Sabbatino* line of act of state cases, see *infra* notes 109-26 and accompanying text.

37. *Id.* at 1359.

court noted, OPEC's 'price-fixing' activity has a significant sovereign component. While the FSIA ignores the underlying purpose of a state's action, the act of state doctrine does not. This court has stated that motivations of the sovereign must be examined for a public interest basis. 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.³⁸

The court bolstered its conclusion with brief discussions of the international political sensitivity of the dispute, the futility of the remedy being sought by the plaintiffs, and the lack of international consensus against price-fixing as further reasons to abstain from deciding the case under the Act of State Doctrine. Thus, OPEC's status under the antitrust laws has rested on this decision for more than twenty years, while the law upon which the decision was based has evolved away from the principles enunciated by either the district court or the Ninth Circuit.

B. *Prewitt v. OPEC*

In 2001, a district court reached the opposite conclusion in a consumer class action against OPEC itself, but not its member states. In *Prewitt Enterprises, Inc. v. OPEC*,³⁹ a gas station operator sued OPEC on behalf of all private entities who purchased refined petroleum products in the United States after March, 1999. Plaintiffs sought injunctive relief, but not damages,⁴⁰ for violations of Sections 1 and 2 of the Sherman Act relating to OPEC's price-fixing and production quotas.⁴¹

As in the earlier litigation, OPEC did not appear or otherwise respond to the case. Following an order to show cause why a default judgment should not be entered, and after an evidentiary hearing, the court granted the default judgment and entered an injunction against OPEC from further violation of the antitrust laws.⁴² The court reserved judgment on the request for attorneys'

38. *Id.* at 1360 (citation omitted).

39. 2001-1 Trade Cas. (CCH) ¶ 73,246.

40. In seeking injunctive relief under Section 16 of the Clayton Act, but not treble damages under Section 4 of the Clayton Act, the plaintiffs largely circumvented the "indirect purchaser" doctrine which bars damage suits from those who did not deal directly with the defendants. *Id.* at 90,132. *See infra* Part IX.

41. 2001-1 Trade Cas. at 90,127.

42. *Id.*

fees and reimbursement of litigation expenses to counsel for plaintiff and the class.

The court directly confronted the prior *OPEC* decision and rejected its result and reasoning on three separate grounds. First, the court concluded that OPEC's activities plainly constituted commercial activity, that the earlier *OPEC* decision had not fully considered the commercial activities exception for the act of state set forth by the plurality of the Supreme Court in *Alfred Dunhill*, and that such an analysis would command a majority of the Supreme Court today.⁴³ The court also held that the acts of the OPEC members took place outside their territory, thus falling within an established exception to the Act of State Doctrine.⁴⁴ Finally, the court noted the narrowing of the act of state defense generally as a result of the Supreme Court's decision in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp. Int'l*.⁴⁵

The litigation was transferred to the Chief Judge of the Northern District of Alabama. After considering extensive amicus briefs from the OPEC nations, the new judge vacated the default judgment and injunction in a brief order without analysis and has set a briefing schedule for the defendant's motion to dismiss.⁴⁶

Given that *OPEC* was against the member nations of OPEC, and *Prewitt* is against OPEC itself, it is not clear, at this stage, whether different conclusions will be reached, or if the two decisions will ultimately rest on the same legal theories. What is clear is that the legal basis for the original *OPEC* decision is no longer the solid bed rock that it was in 1976. The Supreme Court may have opened the way for antitrust suits against OPEC quite inadvertently, when it eliminated or narrowed the most applicable international antitrust defenses in routine non-antitrust cases that raised none of the explosive issues of a case against OPEC or its members.

II. SUIING THE SOVEREIGN

An issue which some courts, including the district court in the original *OPEC* case, see as distinct from immunity of the sovereign is whether the

43. *Id.* at 90,131-32 (citing *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 696-99 (1976)). See generally 1 SPENCER WEBER WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 8.13 (3d ed. 1997 & Supp.) [hereinafter WALLER, ANTITRUST].

44. 2001-1 Trade Cas. at 90,132.

45. 493 U.S. 400 (1990). See *infra* notes 128-39 and accompanying text.

46. Order Vacating Default Judgment and Injunction, and Setting Briefing Schedule on Process and Jurisdictional Issues (N.D. Ala., May 2, 2001).

Sherman Act and other American antitrust statutes were intended to regulate the actions of governments in the first place. If not, it would follow that foreign governments may not be sued, not because they have immunity, but because their conduct is not regulated by the statute. In discussing the Sherman Act's applicability to actions of a domestic state, the Supreme Court has stated:

The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. . . . There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only "business combinations." That its purpose was to suppress combinations to restrain competition and attempts to monopolize by *individuals and corporations*, abundantly appears from its legislative history.⁴⁷

Where a state imposes a trade restraint "as an act of the government"⁴⁸ the Sherman Act thus is not applicable. This interpretation of the Act was based in part on notions of federalism, but comity considerations in the international sphere arguably lead to the conclusion that the Sherman Act does not regulate the conduct of foreign states. The district court in the first *OPEC* decision so held, although that ruling was gratuitous in light of its simultaneous holding that the governments enjoyed sovereign immunity for the claims at issue.⁴⁹

Two other courts have also stated that the conduct of foreign sovereigns was not actionable under the Sherman Act.⁵⁰ However, in those cases no governments were named as parties and the courts' essential point was that the private defendants should not be held liable for actions taken by a foreign sovereign.

If the issue were to reach the Supreme Court, it is unlikely that the Court would adopt the sweeping conclusion that the Sherman Act has no application to actions of foreign governments. The Court has already held that foreign governments are "persons" as that term is used in the Clayton and Sherman Acts.⁵¹ Although that was in the context of foreign governments as plaintiffs rather than defendants, the ruling lays the textual basis for a conclusion that

47. *Parker v. Brown*, 317 U.S. 341, 351 (1943) (emphasis added, citations omitted). See also *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992); *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991); *Patrick v. Burget*, 486 U.S. 94 (1988); *Hoover v. Ronwin*, 466 U.S. 558, 567-69 (1984).

48. 317 U.S. at 352.

49. *Int'l Ass'n of Machinists v. OPEC*, 477 F. Supp. 553, 570-72 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981).

50. *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 78 n.14 (2d Cir. 1977); *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298 (D. Del. 1970).

51. *Pfizer Inc. v. Gov't of India*, 434 U.S. 308, 311 (1978).

foreign governments may be sued under the antitrust laws. With that textual basis, the Court will require a showing of "some overriding public policy which negates the construction of coverage."⁵² Comity might be cited as such a policy, but the principles of comity are already incorporated into American law through limitations on extraterritorial jurisdiction, the Act of State Doctrine, and, of course, sovereign immunity. Where none of these provides a defense for a foreign sovereign, as when it is engaged in commercial activities within American borders, it is difficult to see an overriding policy interest that would bar suit.⁵³

The susceptibility of a foreign sovereign to suit must therefore turn on a construction of the antitrust statutes and related rules of judicial restraint, and not on an absolute rule of nonapplicability. Otherwise, foreign governments with impunity could organize and implement restrictive commercial practices that are highly damaging to the American economy and that do not deserve immunity from attack under the Sherman Act.

III. THE FOREIGN SOVEREIGN IMMUNITIES ACT

A foreign government's interest in a company under antitrust complaint raises the question of sovereign immunity. As in the earlier *OPEC* case,⁵⁴ a foreign government may itself be sued for the manner in which it regulates privately owned businesses within its territory. Before reaching the merits of antitrust claims in such suits, a court must ask whether sovereign immunity precludes the consideration of antitrust sanctions.⁵⁵

Sovereign immunity determinations were once shared by the executive and judicial branches. As a general rule, a foreign sovereign enjoyed immunity in United States courts for its public acts, but not for its private or

52. *Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 397 (1978) (holding that municipalities may be sued under the antitrust laws).

53. See *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384, 397 (D. Del. 1978); Douglas H. Meal & Joel P. Trachtman, Comment, *Defenses to Actions Against Foreign States Under the United States Antitrust Laws*, 20 HARV. INT'L L.J. 583, 604-09 (1979). But cf. James F. Bouerle & Kevin I. MacKenzie, Note, *American Antitrust Liability of Foreign State Instrumentalities: A New Application of the Parker Doctrine*, 11 CORNELL INT'L L.J. 305 (1978) (arguing that *Parker* may bar some suits against foreign sovereigns even where all other defenses are inapplicable).

54. *Int'l Ass'n of Machinists v. OPEC*, 477 F. Supp. 553 (C.D. Cal. 1979).

55. A sovereign immunity defense is jurisdictional in nature, and thus must be decided by the court even if the defendant fails to appear to assert the defense. *Id.* at 564-65; 28 U.S.C. § 1608(e) (2000) (providing that a default judgment may not be entered against a foreign state "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court").

commercial acts.⁵⁶ In *United States v. Deutsches Kalisyndikat Gesellschaft*,⁵⁷ the United States sued to enjoin the violation of the antitrust laws by a French corporation which sold potash within the United States. France owned the majority of the capital stock of the corporation. The court held, over the protest of the French Ambassador, that the French corporation could be sued despite the plea of sovereign immunity, because a private corporation, "being an entity distinct from its stockholders, [cannot claim] immunity . . . on the ground that it and the government of France are identical in any respect."⁵⁸

Departures from this approach were not uncommon, however. One court held, in the course of the international petroleum investigation, that a commercial oil company was entitled to sovereign immunity because thirty-five percent of its stock was owned by the British government and it performed certain public functions in supplying the British navy.⁵⁹ In a subsequent antitrust investigation of the ocean shipping industry, the same court reserved enforcement of a subpoena upon Philippine National Lines, owned by the Philippine government, despite an explicit State Department determination that sovereign immunity was inappropriate.⁶⁰ The court concluded that the safer course was to deny enforcement until the antitrust prosecutors provided further details on the alleged commercial activities of National Lines and on the need for the requested documents.⁶¹ Such judicial vicissitudes were complemented by the fact that political factors occasionally weighed in the State Department's consideration of immunity pleas.⁶²

56. The Department of State formally adopted this position in 1952. Letter of Jack B. Tate, Acting Legal Advisor, to Philip B. Perlman, Acting Attorney General (May 19, 1952), in DEP'T ST. BULL., June 1952, at 984-85. The Department's determinations in sovereign immunity disputes were generally regarded as binding on the judicial branch, and in the absence of a Departmental determination the court would determine the matter on its own. See *Republic of Mex. v. Hoffman*, 324 U.S. 30 (1945); *Ex parte Republic of Peru*, 318 U.S. 578 (1943).

57. 31 F.2d 199 (S.D.N.Y. 1929).

58. *Id.* at 202. The Department of State submitted a letter in the case expressing its view that foreign governments engaged in ordinary commercial transactions in the United States enjoyed no special privileges or immunities.

59. *In re Investigation of World Arrangements*, 13 F.R.D. 280, 288-91 (D.D.C. 1952).

60. *In re Grand Jury Investigation of the Shipping Indus.*, 186 F. Supp. 298 (D.D.C. 1960).

61. *Id.* at 318-20.

62. See Note, *Sovereign Immunity-Limits of Judicial Control*, 18 HARV. INT'L L.J. 429, 430 (1977). Even where the State Department narrowly construed the immunities of foreign sovereigns in commercial matters, the interest of a foreign sovereign in a business subject to antitrust attack resulted, on occasion, in the omission of a foreign party from the roster of defendants as a matter of diplomacy and administration. In the case of the Chilean Nitrate and Iodine Sales Corporation, the Department of Justice not pressed the action against the Chilean corporation at the request of the Secretary of State "in the interest of maintaining friendly relations between the Government of Chile and this Government." See *The Federal Antitrust Laws* (CCH) 195 (1942). The proceedings against the foreign oil companies in the cartel investigation were

In an effort to eliminate such vagaries, Congress enacted the FSIA in 1976.⁶³ The Act codified the restrictive principle of sovereign immunity (under which commercial activities were subject to suit) and vested exclusively in the judicial branch the job of resolving immunity claims. Detailed rules were set out on serving process on foreign sovereigns and on the attachment or execution of their assets.⁶⁴ The Act did not purport to change any substantive law,⁶⁵ but Congress clearly saw the legislation as expanding the rights of United States citizens in their dealings with foreign sovereigns.⁶⁶

The critical provisions likely to affect antitrust litigation can be quickly summarized. It is now settled that the FSIA is the exclusive source of subject matter jurisdiction over suits involving foreign states or instrumentalities.⁶⁷ District courts have original jurisdiction over suits against foreign states.⁶⁸

ultimately dropped on similar grounds. See *infra* note 265 and accompanying text.

63. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602-1611). *Argentine Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), was an action by two Liberian corporations against Argentina in United States district court to recover for damage by Argentina to plaintiffs' ships during the Falklands War. The Supreme Court held that the FSIA provides the sole basis for obtaining jurisdiction over an action against a foreign state and none of its exceptions applied to the facts presented in this case. See also *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486-89 (1983).

64. No discussion is included here on the questions of service of process, 28 U.S.C. § 1608, attachment of assets, 28 U.S.C. §§ 1609-10, or execution of judgments, 28 U.S.C. § 1611. For a discussion of these and other provisions see JOSEPH W. DELLAPENA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* (1988).

65. See, e.g., H.R. REP. NO. 94-1487 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6610 ("The bill is not intended to affect the substantive law of liability."). See also *Boxer v. Gottlieb*, 652 F. Supp. 1056, 1056, 1060 (S.D.N.Y. 1987) (finding that provisions of FSIA were not intended to create a new federal cause of action, but to provide access to federal courts for resolution of ordinary legal disputes involving a foreign sovereign); *Jackson v. People's Rep. of China*, 794 F.2d 1490, 1496 (11th Cir. 1986) (FSIA does not apply retroactively to confer subject matter jurisdiction in an action against People's Republic of China for payment of defaulted bearer bonds).

66. H.R. REP. NO. 94-1487 at 6-8 (1976), reprinted in 1976 U.S.C.C.A.N. at 6604, 6604-06. However, the FSIA does not apply retroactively to a cause of action arising from debt instruments issued by the Russian Imperial Government in 1916. *Carl Marks & Co. v. Union of Soviet Socialist Republics*, 841 F.2d 26 (2d Cir. 1988). The *only* method to obtain jurisdiction over a foreign sovereign is under the FSIA. Since this applies to civil and criminal acts, allegations of criminal activities under a RICO claim would be precluded from jurisdiction under that Act. *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 750 F. Supp. 838, 843-44 (N.D. Ohio 1990).

67. *Argentine Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).

68. 28 U.S.C. § 1330(a) (2000). The section is phrased in terms of "nonjury civil action[s]" against foreign states. Some courts have read this not as a limitation on the scope of the section, but as a requirement that suits against foreign states be tried without juries. See *Jones v. Shipping Corp. of India*, 491 F. Supp. 1260 (E.D. Va. 1980); *Williams v. Shipping Corp. of India*, 489 F. Supp. 526 (E.D. Va. 1980); *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384, 396 (D. Del. 1978); H.R. REP. NO. 94-1487

The term "foreign state" is broadly defined to include foreign governmental agencies or instrumentalities, including corporations that are majority-owned by a foreign state or political subdivision.⁶⁹ The statute states a general rule of immunity for foreign states, but that immunity is subject to provisions of prior international agreements and to exceptions provided in the Act itself.⁷⁰

at 13, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611-12. In order to avoid constitutional questions, other courts have ruled that state-owned commercial entities may be subjected to jury trials when sued under 28 U.S.C. § 1332(a)(2), providing for diversity jurisdiction in suits against citizens of foreign states. *See* *Houston v. Murmansk Shipping Co.*, 87 F.R.D. 71 (D. Md. 1980), *vacated by* 667 F.2d 1151 (4th Cir. 1982); *Lonon v. Companhia de Navegacao Lloyd Basileiro*, 85 F.R.D. 71 (E.D. Pa. 1979); *Icenogle v. Olympic Airways, S.A.*, 82 F.R.D. 36 (D.D.C. 1979), *noted in Recent Decision*, 13 VAND. J. TRANSNAT'L L. 219 (1980). Venue for suits against foreign states is governed by 28 U.S.C. § 1391(f), *amended by* § 5 of the FSIA.

The *Williams* holding that the FSIA compels a nonjury trial was affirmed, 653 F.2d 875 (4th Cir. 1981), and the contrary ruling in *Houston* was vacated. *Houston*, 667 F.2d 1151 (4th Cir. 1982). The Second, Third, and Fifth Circuits have also joined those courts construing the Act as precluding jury trials against foreign sovereigns, including state-owned commercial entities. *Bailey v. Grand Trunk Lines New Eng.*, 805 F.2d 1097 (2d Cir. 1986); *Goar v. Compania Peruana de Vapores*, 688 F.2d 417 (5th Cir. 1982); *Ruggiero v. Compania Peruana de Vapores "Inca Capac Yupanqui,"* 639 F.2d 872 (2d Cir. 1981); *Rex v. Cia. Peruana de Vapores, S.A.*, 660 F.2d 61 (3d Cir. 1981), *noted in* Monroe Leigh, *Judicial Decision*, 76 AM. J. INT'L L. 385, 393 (1982). *Accord* *Kraikeman v. Sabena Belgian World Airlines*, 674 F. Supp. 136 (S.D.N.Y. 1987); *First Nat'l Bank of Mobile v. Kaufman*, 593 F. Supp. 1189, 1192-93 (N.D. Ala. 1984).

69. 28 U.S.C. § 1603(a)-(b) (2000).

As a general matter, entities which meet the definition of an "agency or instrumentality of a foreign state" could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.

H.R. REP. NO. 94-1487 at 15-16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6614. For a holding by an antitrust court that a state trading company of a socialist country is within this definition, *see* *Outboard Marine Corp.*, 461 F. Supp. at 394-95.

70. 28 U.S.C. § 1604 (2000). *See* *Joseph v. Office of Consulate Gen. of Nigeria*, 830 F.2d 1018 (9th Cir. 1987) (holding that defendant's torts in renting houses in California falls within the tortious activity exception to immunity (§ 1605(a)(5)). In addition, the lease contained a waiver of immunity, which the court found to be an implied consent to an American court's jurisdiction.).

Those include predictable exceptions for cases of waiver⁷¹ and for certain counterclaims.⁷²

IV. COMMERCIAL ACTIVITY

For antitrust purposes, the most important exception is for commercial activities. Foreign states are not immune from a suit:

[I]n 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. . . .⁷³

The term commercial activities is defined in the Act as meaning "either a regular course of commercial conduct or a particular transaction or act."⁷⁴ There is also the additional key sentence: "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."⁷⁵

The legislative history suggests that conduct that private persons normally perform should be regarded as commercial, even where the object of the

71. 28 U.S.C. § 1605(a)(1) (2000). Some courts have held that a defense under the Act is waived if a foreign country fails to appear in a proceeding to raise sovereign immunity as an affirmative defense. *Von Dardel v. Union of Soviet Socialist Rep.*, 623 F. Supp. 246, 252-53 (D.D.C. 1985), *vacated by* 736 F. Supp. 1 (D.D.C. 1990); *In re Oil Spill*, 491 F. Supp. 161, 167-68 (N.D. Ill. 1979). It is now clear, however, that the Act defines the scope of subject matter as well as personal jurisdiction. *See De Sanchez v. Banco Cent. de Nicar.*, 770 F.2d 1385, 1389 (5th Cir. 1985); *Olsen v. Gov't of Mex.*, 729 F.2d 641, 644 (9th Cir. 1984). "Accordingly, even if the foreign state does not enter an appearance to assert an immunity defense, a district court still must determine that immunity is unavailable under the Act." *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 494 n.20 (1983). *See also Meadows v. Dominican Rep.*, 628 F. Supp. 599 (N.D. Cal. 1986), *aff'd*, 817 F.2d 517 (9th Cir. 1987); *Practical Concepts, Inc. v. Rep. of Bolivia*, 613 F. Supp. 863 (D.D.C. 1985), *vacated by* 811 F.2d 1543 (D.C. Cir. 1987). On the other hand, the failure to assert sovereign immunity in a responsive pleading will give rise to a waiver. *Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico S.A.*, 727 F.2d 274, 277-78 (2d Cir. 1984). *Cf. Drexel Burnham Lambert Group, Inc. v. Comm. of Receivers for A.W. Galardi*, 12 F.3d 317, 325-28 (2d Cir. 1994); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377-78 (7th Cir. 1985) (discussing circumstances that will support an implied waiver of sovereign immunity). *See also Joseph v. Office of Consulate Gen. of Nig.*, 830 F.2d 1018 (9th Cir. 1987) (waiver of immunity contained in lease).

72. 28 U.S.C. § 1607 (2000).

73. 28 U.S.C. § 1605(a)(2) (2000).

74. 28 U.S.C. § 1603(d) (2000).

75. *Id.* *See also* *Env'tl. Tectonics Corp. v. W.S. Kirkpatrick & Co.*, 659 F. Supp. 1381 (D.N.J. 1987), *aff'd in part, rev'd in part*, 847 F.2d 1052 (3d Cir. 1987), and *aff'd*, 493 U.S. 400 (1990).

activity is to fulfill a governmental purpose.⁷⁶ For example, contracting to buy provisions for the armed services or to repair an embassy building are to be treated as commercial, since private parties normally negotiate and sign contracts. On the other hand, if the activity is normally done only by governments—such as imposing a tariff or issuing export licenses—immunity is available even if there are important business or commercial motivations behind the government action.⁷⁷ Of course, a particular activity may normally

76. H.R. REP. NO. 94-1487, at 14, 16, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615.

77. *Id.* See also *United Eram Corp. v. Union of Soviet Socialist Rep.*, 461 F. Supp. 609 (S.D.N.Y. 1978) (executing contract for cultural performances pursuant to intergovernmental cultural exchange program was a commercial activity); *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 Before the Subcomm. on Administrative Law and Government Relations of the House Comm. on the Judiciary*, 94th Cong. 53 (1976) (statement of Monroe Leigh, Legal Adviser of the Department of State) ("the courts would inquire whether the activity in question is one which private parties ordinarily perform or whether it is peculiarly within the realm of governments"). Under this approach, it seems clear that *In re Investigation of World Arrangements*, 13 F.R.D. 280, 288-91 (D.D.C. 1952), has been legislatively overruled. Accord ANTITRUST DIV., U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 8 n.21 (1977) [hereinafter ANTITRUST GUIDE]. There the court found the Anglo-Iranian Oil Company immune from enforcement of an antitrust subpoena because of its partial government ownership and services in supplying the British navy with petroleum. See WALLER, ANTITRUST, *supra* note 43, § 2.16. See also *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Rep.*, 877 F.2d 574 (7th Cir. 1989) (holding that contracts executed by Greece to reimburse the hospital and an organ bank for the cost of kidney transplants performed on Greek citizens in the United States are not a uniquely governmental function); *Tex. Trading & Milling Corp. v. Rep. of Nigeria*, 647 F.2d 300, 308-10 (2d Cir. 1981) (holding that contracts for the purchase of cement for infrastructure construction projects are commercial in nature). See also *McDonnell Douglas Corp. v. Rep. of Iran*, 758 F.2d 341, 349 (8th Cir.) (holding that a contract by a foreign government to purchase military equipment constitutes commercial activity). Compare with *MOL, Inc. v. Peoples Rep. of Bangladesh*, 736 F.2d 1326, 1329 (9th Cir. 1984) (holding that a contract relating to the export of rhesus monkeys, a natural resource, is sovereign activity). The *MOL* decision is criticized tellingly in Marc A. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 INT'L & COMP. L.Q. 302, 308-09 (1986).

In *Letelier v. Rep. of Chile*, 748 F.2d 790 (2d Cir. 1984), the court observed that activity should not be deemed "'commercial' as a whole simply because certain aspects of it are commercial." *Id.* at 796. Moreover, the court stated, "not every act of a foreign state that could be done by a private citizen in the United States is 'commercial activity.' The court must inquire whether the activity is of the type an individual would customarily carry on for profit." *Id.* at 797 (citation omitted). See also *Practical Concepts, Inc. v. Rep. of Bolivia*, 613 F. Supp. 863, 869-70 (D.D.C. 1985), *vacated by* 811 F.2d 1543 (D.C. Cir. 1987) (holding that a contract for the design and implementation of a plan for development of Bolivia's rural areas was commercial in nature despite some indicia of governmental activity in other aspects of the contract); *Chisholm & Co. v. Bank of Jamaica*, 643 F. Supp. 1393 (S.D. Fla. 1986) (holding that assisting in obtaining lines of credit for the corporation was commercial, even though the bank was promoting a government economic recovery program by engaging in such activity); *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 947 F.2d 218 (6th Cir. 1991) (misappropriation of trade secrets by a French government-owned firm was characterized as a commercial act and thus within the exception to sovereign immunity). But see *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985) (stating that the appropriate inquiry is whether "the gravamen of the complaint [is] a sovereign activity..."). See generally Note, *Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach*, 83 COLUM. L. REV.

be conducted by private firms in the United States, but by government agencies in a foreign country. In such cases the Justice Department has left open the possibility of some deference to foreign mores.⁷⁸

In two early antitrust cases construing the legislation, the courts reached different results when they applied the commercial exception.⁷⁹ The facts of the two cases were radically different, however. The first court had no difficulty in finding that a Polish trading company's manufacture and export of golf carts into the United States were commercial in nature.⁸⁰

A different result obviously was reached in the private litigation against OPEC.⁸¹ When the defendant governments failed to appear, the district court undertook its own study of OPEC's price-setting efforts and concluded that they were accomplished through taxation of private companies, production controls administered by "conservation" laws, and direct price quotations on government-owned oil.⁸² The first two functions were deemed clearly governmental in nature.⁸³ The third, while commercial at first blush, was merely a different "medium" by which the OPEC governments were performing sovereign acts.⁸⁴ The court noted considerable acceptance within the United Nations, and indeed by the United States, of the sovereign right of states to exercise control over the extraction and exploitation of their natural resources.⁸⁵ Thus:

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.⁸⁶

1440 (1983).

78. U.S. Dep't of Justice & Fed. Trade Comm., *ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS* § 3.2 (1995) [hereinafter 1995 INTERNATIONAL GUIDELINES]; 1977 ANTITRUST GUIDE, *supra* note 77, at 8 n.21.

79. *Int'l Ass'n of Machinists v. OPEC*, 447 F. Supp. 553 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981); *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384 (D. Del. 1978).

80. *Outboard Marine Corp.*, 461 F. Supp. at 394-96.

81. *OPEC*, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981). *See also* *Mastercard Int'l v. Dean Witter*, 1993-2 Trade Cas. (CCH) ¶ 70,352 (S.D.N.Y. 1993) (dismissal of antitrust counterclaim for failure to plead commercial activities exception); *Rios v. Marshall*, 530 F. Supp. 351 (S.D.N.Y. 1981) (stating that regulation of labor is not commercial activity).

82. *OPEC*, 477 F. Supp. at 567-68.

83. 477 F. Supp. at 568.

84. *Id.* at 567-69 & n.14.

85. *Id.* at 567-68.

86. *Id.* at 568.

Accordingly, the court concluded that OPEC's cartel-like activities were governmental rather than commercial in nature.⁸⁷ The district court's analysis of sovereign immunity was understandable but wrong in the 1970s, under the "nature not purpose" standard for the commercial activity exception of the FSIA and even more clearly so today. The first *OPEC* decision came at the high water mark of state involvement in the extraction of natural resources. Since that time, most nations have privatized key aspects of their extractive industries, making it even more clear that the activities of the OPEC nations are the kinds of activities customarily engaged in by private firms, and hence not immune under FSIA.

Even the Ninth Circuit admitted this flaw in the district court's opinion but nonetheless found a way around it to avoid adjudicating the merits of the case. While questioning the district court's sovereign immunity analysis, the court of appeals affirmed on act of state grounds.⁸⁸ The appellate court obviously thought that there was a significant commercial component to the government's activities,⁸⁹ but concluded that such a component posed no difficulties for application of the Act of State Doctrine.⁹⁰ While this was probably an accurate interpretation of the Act of State Doctrine in the 1970s, subsequent events strongly suggest that this defense would no longer be available to shield OPEC or its member states from liability today.

V. THE ACT OF STATE DOCTRINE

The Act of State Doctrine is often misused and confused with other defenses such as governmental compulsion or sovereign immunity. Its application does not turn on the identity of the defendants⁹¹ or upon a showing of compulsion. The Act of State Doctrine is not some vague doctrine of

87. *Cf. Carey v. Nat'l Oil Corp.*, 453 F. Supp. 1097, 1102 (S.D.N.Y. 1978), *aff'd on other grounds*, 592 F.2d 673 (2d Cir. 1979). In this contract and tort action, the district court concluded that Libya's induced breach of an oil supply contract by the Libyan national oil company was a governmental rather than commercial activity. The court's reliance on Libya's foreign policy objectives in taking the action is difficult to square with the statute's mandate that "[t]he commercial character of an activity shall be determined by reference to [its] nature . . . rather than by reference to its purpose." 28 U.S.C. § 1603(d) (2000).

88. *Int'l Ass'n of Machinists v. OPEC*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

89. 649 F.2d at 1360.

90. *Id.*

91. The defense generally arises in the context of suits against private parties, but it may also be available where the foreign sovereign itself is a defendant. See Meal & Trachtman, *supra* note 53, at 627-54.

abstention, but a principle of decision that is binding on both federal and state courts. However, act of state issues only arise when a court must decide, *i.e.*, when the outcome of the case turns upon the effect of official action by a foreign sovereign.⁹²

A note of caution is needed before exploring the evolving case law and underpinnings for the Act of State Doctrine. In the words of a recent American Bar Association monograph: "It is often difficult to discern any rationale for distinguishing which acts give rise to the doctrine and which do not."⁹³ The monograph concludes: "In reality, there may be no one 'doctrine,' but rather a number of concerns stemming from different sources, and having different weights depending on the factual context in which they appear."⁹⁴ What is equally significant is that the Supreme Court's most recent pronouncement on the Act of State Doctrine has cut back the scope of the doctrine dramatically in precisely the way that undermines the earlier act of state holding in the Ninth Circuit's *OPEC* decision.

A. *The Traditional Formulation*

The Act of State Doctrine originated outside the antitrust field. In the course of a revolution in Venezuela, an American citizen applied to the local military commander for permission to leave that country to return to the United States. Permission was refused for some time, and when the American ultimately returned home, he sued the commander for unlawful detention and harassment by army troops for the period he was detained in Venezuela. Chief Justice Fuller rejected the claim in words that have become the "classic American statement"⁹⁵ of the Act of State Doctrine:

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.⁹⁶

Since the defendant was acting as a government official, this ended the case.

92. *W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp.*, 493 U.S. 400 (1990).

93. ABA ANTITRUST SECTION, MONOGRAPH NO. 20, SPECIAL DEFENSES IN INTERNATIONAL ANTITRUST LITIGATION 23 (1995).

94. *Id.* at 24.

95. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964).

96. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). *See also* *Ricaud v. American Metal Co.*, 246 U.S. 304, 309 (1918); *Oetjen v. Cen. Leather Co.*, 246 U.S. 297, 302-03 (1918).

Justice Holmes introduced this thinking to the antitrust field in *American Banana Co. v. United Fruit Co.*⁹⁷ In that case, the plaintiff alleged that the United Fruit Company prevailed upon the government of Costa Rica to seize plaintiff's Central American plantation and to thereby eliminate it as a competitor. Citing Chief Justice Fuller, Justice Holmes concluded that "a seizure by a state is not a thing that can be complained of elsewhere in the courts."⁹⁸ The question of United Fruit's connivance in the foreign sovereign's act was also dismissed:

[I]t is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law.⁹⁹

In *United States v. Sisal Sales Corp.*,¹⁰⁰ a different result was obtained. There, the government charged that the defendants conspired to monopolize the sisal trade in the Yucatan Peninsula of Mexico, with effects on United States imports. The Court distinguished *American Banana* because the sisal conspiracy was formed within the United States, included acts within the United States, and caused effects in the United States. In noting discriminatory legislation passed by the Mexican and Yucatan governments to aid this conspiracy, the Court stated: "but by their own deliberate acts, here and elsewhere, [the defendants] brought about forbidden results within the United States."¹⁰¹ The opinion is not wholly satisfying to scholars, but evidently the Court believed that, apart from the actions of the Mexican

97. 213 U.S. 347 (1909). *American Banana* was not an act of state case. The case was decided on the ground that the antitrust laws have no extraterritorial application. *Id.* at 357. This holding was substantially overruled in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704-05 (1962) and then in its entirety by *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993). *American Banana*'s comments on the act of state doctrine are equally suspect following *W.S. Kirkpatrick & Co. v. Envil. Tectonics Corp.*, 493 U.S. 400, 407-08 (1990).

98. 213 U.S. at 357-58. Noting the puzzling nature of this statement, Justice Scalia, in *W.S. Kirkpatrick*, stated that *Underhill* stands for "the proposition that a seizure by a state cannot be complained of elsewhere—in the sense of being sought to be declared *ineffective* elsewhere." 493 U.S. at 407. Because the plaintiff in *American Banana* "was not trying to undo or disregard the governmental action, but only obtain damages from private parties who had procured [the action]," the statement arguably implies that "suit would not lie if a foreign state's actions would be, though not invalidated, impugned." *Id.*

99. 213 U.S. at 358.

100. 274 U.S. 268 (1927).

101. *Id.* at 276.

authorities, there were sufficient private acts here and abroad to sustain the Justice Department's charges.¹⁰²

At this stage of its development, the Act of State Doctrine thus precluded an American court from questioning the validity of the public actions of a foreign state committed within its own territory.¹⁰³ Any challenge to such actions, under the American constitutional scheme, should be addressed to the executive branch and pursued, if at all, through diplomatic channels.¹⁰⁴ The courts, in the interests of "the highest considerations of international comity and expediency,"¹⁰⁵ must accept the foreign act as lawful. The rule:

[D]oes not deprive the courts of jurisdiction once acquired over a case. It requires only that, when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision.¹⁰⁶

102. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), did not involve an act of state issue since plaintiffs' injuries were caused directly by defendants' intervening private (and noncompelled) acts. Thus, several courts have concluded that *Sisal* and *Continental Ore* have not undermined the act of state holding of *American Banana*. See, e.g., *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 73-75 (2d Cir. 1977); *Gen. Aircraft Corp. v. Air America, Inc.*, 482 F. Supp. 3, 6-7 (D.D.C. 1979). The Justice Department, however, has argued the contrary. See Briefs for the United States as Amicus Curiae, *Hunt v. Mobil Oil Corp.*, No. 76-1403 (Sup. Ct. 1977 Oct. Term), and *Mitsui & Co. v. Ind. Inv. Dev. Corp.*, No. 79-552 (Sup. Ct. 1979 Oct. Term).

American Banana, however, was not an act of state case. The Supreme Court in *Kirkpatrick* stated that *Continental Ore* substantially overruled *American Banana*'s holding that the antitrust laws had no extraterritorial application and whatever *American Banana* said by way of dictum that might be relevant to the act of state case before the Court has not survived *Sisal*. See *W.S. Kirkpatrick*, 493 U.S. at 407-08 (1990).

103. See RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 41 (1965); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443(1) (1987), which limits the doctrine to the taking by a foreign state of property within its own territory and acts of a governmental character by a foreign state within its own territory and applicable there. Its applicability to acts of a foreign government with respect to property outside its own territory, acts by a government not recognized by the United States, acts allegedly in violation of a treaty, or commercial acts of a foreign government, such as a breach of contract, has not yet been decided by the Supreme Court.

104. *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 304 (1918); see also *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

105. *Oetjen*, 246 U.S. at 304-05.

106. *Ricaud v. American Metal Co.*, 246 U.S. 304, 309 (1918). See also *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 602 (9th Cir. 1976) ("A motion to dismiss based on the act of state doctrine raises such a Rule 12(b)(6) objection, not a jurisdictional defect."). See also *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1113 (5th Cir. 1985) ("the basis of the doctrine is not jurisdictional but prudential"); *Int'l Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1359 (9th Cir. 1981) ("The law of sovereign immunity goes to the jurisdiction of the court. The act of state doctrine is not jurisdictional."). Accord *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 520 (2d Cir. 1985).

Accordingly, where a claim directly attacked the lawfulness of a governmental action (as in the case against the Venezuelan commander),¹⁰⁷ the Act of State Doctrine was a complete defense. Similarly, where a suit against a private party was predicated on a claim that a foreign state had acted wrongfully, as in *American Banana*,¹⁰⁸ the act of state again defeated the suit.

B. Sabbatino et al.

In three significant cases, all dealing with expropriations by the Cuban government, the Supreme Court signaled some shifts from the classic formulation of the Act of State Doctrine.¹⁰⁹ The lessons of these cases are not entirely clear, largely because of widely divided voting in the latter two.

The Court was generally united in *Banco Nacional de Cuba v. Sabbatino*,¹¹⁰ where it held that the Act of State Doctrine applied even with regard to a claim that a foreign expropriation violated customary international law. The Court declared that the doctrine rested on separation of powers principles, its basic rationale being the need to avoid judicial action that might interfere with the conduct of foreign affairs by the executive.¹¹¹ However, the Court specifically rejected "laying down or reaffirming an inflexible and all-encompassing rule."¹¹² Whether the doctrine should apply in a particular case should depend on a "balance of relevant considerations," focusing on whether judicial inquiry into the validity of the foreign state's act would disturb "the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs."¹¹³

The Court may not have had in mind an ad hoc balancing process. Its decision not to address the validity of the Cuban expropriation was explained by considerations which would be generally applicable in all expropriation disputes (principally, the desire not to interfere with executive branch

107. *Underhill v. Hernandez*, 168 U.S. 250 (1897).

108. 213 U.S. 347 (1909).

109. *Alfred Dunhill of London, Inc. v. Rep. of Cuba*, 425 U.S. 682 (1976); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

110. 376 U.S. 398 (1964). Only Justice White dissented from Justice Harlan's opinion for the Court.

111. *Id.* at 423. The Court concluded that the doctrine was based in American law, rather than derived from principles of international law or comity. Comity nevertheless plays a derivative role, since the Court explained its separation of powers rationale as necessary to avoid judicial action that would "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.*

112. *Id.* at 428.

113. *Id.* at 427-28.

negotiations). Nevertheless, *Sabbatino* seemed to signal that the judiciary has greater freedom to apply or reject the doctrine in particular situations than was true under its traditional formulation.

First Nat'l City Bank v. Banco Nacional de Cuba (hereinafter *Citibank*)¹¹⁴ involved two factual distinctions from *Sabbatino*. The American's expropriation claim was raised as a set-off to a suit by the Cuban government, and the State Department made affirmative representations that no foreign policy damage would result if the validity of the expropriation were adjudicated.¹¹⁵ There also had been important changes in the Court's membership since *Sabbatino*. These factors coalesced to form a slim majority of the Court prepared to allow adjudication of the particular expropriation.¹¹⁶

Justice Rehnquist, joined by the Chief Justice and Justice White, concluded that the rationale for judicial abstention was wholly undercut where the Executive represented that no foreign policy damage would result if the courts heard the merits of the case.¹¹⁷ While rejecting that rationale, Justice Douglas concurred because "fair dealing" mandated that a defendant be allowed to assert any set-off that would reduce or eliminate a foreign state's claim against him.¹¹⁸ Justice Powell, appointed to the Court since *Sabbatino*, concurred on another ground. He accepted the "balancing of relevant considerations" approach of *Sabbatino*, and found that such balancing weighed in favor of adjudicating Cuban expropriation decrees, absent a demonstrable countervailing foreign policy consideration.¹¹⁹

Against this divided majority of five, a solid block of four Justices argued in dissent that the rationale and conclusion of *Sabbatino* were fully applicable to the *Citibank* case. The dangers of judicial interference with the Executive's

114. 406 U.S. 759.

115. *Id.* at 764.

116. *First Nat'l City*, 406 U.S. 759.

117. *Id.* at 768. This view represented an acceptance of the *Bernstein* exception to the act of state doctrine, dating from a lower court decision to adjudicate the validity of Nazi seizures of Jewish property after the court had been informed by the State Department that there were no foreign policy objections to such adjudication. See *Bernstein v. N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375 (2d Cir. 1954). In *Sabbatino*, the Court did not opine on the validity of the *Bernstein* exception since the executive branch had argued in favor of application of the Act of State Doctrine. 376 U.S. at 420.

118. 406 U.S. at 770-73. But see *Tejarat v. Varsho-Saz*, 723 F. Supp. 516, 521 (C.D. Cal. 1989), holding that a government-owned bank organized under the laws of the Republic of Iran could assert the Act of State Doctrine to bar an Iranian citizen's set-off defense in an action by the bank alleging that the defendant fraudulently converted funds from the bank by causing it to wrongfully transfer the funds into accounts controlled by the defendant.

119. 406 U.S. at 773.

conduct of foreign policy were present despite the State Department's judgment to the contrary.¹²⁰

In *Dunhill*,¹²¹ the last of the trilogy, the Court failed to undo the confusion of *Citibank*. The petitioner claimed that the Cuban government refused to return certain monies that petitioner had paid in error to a government-controlled cigar manufacturer. The payment was for cigars purchased by petitioner from a company that had subsequently been expropriated by the Cuban government. Despite amicus urgings by the executive branch for substantial trimming of the Act of State Doctrine,¹²² the Court could muster a majority for only a very narrow proposition—that the Cuban government had failed to meet its burden of showing that its refusal to repay monies to petitioner on the commercial claim amounted to an act of state.¹²³

Four justices would have gone further to establish a general commercial exception to the Act of State Doctrine.¹²⁴ Justice Stevens declined to cast his swing vote for such a rule.¹²⁵ As in *Citibank*, a block of four dissenting Justices would have applied the Act of State Doctrine to bar adjudication over Cuba's action.¹²⁶

120. *Id.* at 776 (Brennan, J., dissenting). Since Justices Douglas and Powell also rejected Justice Rehnquist's view that the position of the executive branch was conclusive on nonapplication of the Act of State Doctrine, the Court rejected the *Bernstein* exception by a six to three vote. *Id.* at 760. However, at least one court noted the anomaly of an act of state defense raised in a government enforcement action, given that the doctrine's rationale is to protect the independence of the executive branch. *Assoc. Container Transp. (Austl.) Ltd. v. United States*, 705 F.2d 53, 61 (2d Cir. 1983) (rejecting defense).

121. *Alfred Dunhill of London, Inc. v. Rep. of Cuba*, 425 U.S. 682 (1976).

122. The Justice and State Departments argued that the Act of State Doctrine should be abandoned where it was claimed that a foreign state's act was in violation of international law and, alternatively and more narrowly, that the doctrine was inapplicable to commercial acts of a foreign state. The 1995 International Guidelines at § 3.33 continue to assert that the act of state does not apply to commercial activities. See 1995 INTERNATIONAL GUIDELINES, *supra* note 78.

123. 425 U.S. at 694-95 (citation omitted):

[T]he only evidence of an act of state other than the act of nonpayment by interveners was 'a statement by counsel for the interveners, during trial, that the Cuban Government and the interveners denied liability and had refused to make repayment.' But this merely restated respondents' original legal position and added little, if anything, to the proof of an act of state. No statute, decree, order or resolution of the Cuban Government itself was offered in evidence. . . .

Dunhill, however, "implies that evidence of an official proclamation is not required where the facts [are] sufficient to demonstrate that the conduct in question was a public act of those with authority to exercise sovereign powers." *Tejarat v. Varsho-Saz*, 723 F. Supp. 516, 518 (C.D. Cal. 1989).

124. 425 U.S. at 695-706.

125. *Id.* at 715. See 1995 INTERNATIONAL GUIDELINES, *supra* note 78, § 3.33.

126. 425 U.S. at 715 (Marshall, J., dissenting).

The lessons of this trilogy are limited, but nonetheless important. First, a strong majority of the Court supports the *Sabbatino* view that the Act of State Doctrine imposes no rigid rule against judging the acts of foreign states in all circumstances. Instead, the rule arises from a need for practical accommodation between the judicial and executive branches on matters affecting foreign policy, and this rationale should determine the doctrine's applicability in particular cases. Second, ad hoc representations by the executive branch that foreign policy concerns do not require judicial abstention in particular cases will not be regarded as binding on the judiciary. Third, there is some sentiment for a distinction between commercial and governmental acts in application of the doctrine. However, a majority of the Court is not yet persuaded. Finally, the executive branch is not likely to argue for sweeping application of the Act of State Doctrine.¹²⁷

C. Kirkpatrick

In a unanimous decision authored by Justice Scalia, the Supreme Court clarified the scope of the Act of State Doctrine in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*¹²⁸ At issue in *Kirkpatrick* was whether the Act of State Doctrine barred a United States court from entertaining a cause of action that does not rest upon the asserted invalidity of an official act of a foreign sovereign, but required imputing to foreign officials an unlawful motivation in the performance of such an official act.

Environmental Tectonics was an unsuccessful bidder on a military procurement contract awarded by the Republic of Nigeria. The successful bidder, *Kirkpatrick & Co.*, had made arrangements with a Nigerian citizen, whereby the citizen would endeavor to secure the contract for *Kirkpatrick*. The Nigerian citizen and *Kirkpatrick* agreed that, in the event the contract was awarded to *Kirkpatrick*, *Kirkpatrick* would pay two Panamanian entities controlled by the Nigerian citizen a "commission" equal to twenty percent of the contract price, which would, in turn, be given as a bribe to officials of the

127. In a substantial number of amicus presentations since *Sabbatino*, the executive branch has argued against application of the doctrine. Similarly, Congress has attempted to narrow application of the Act of State Doctrine in expropriation cases, see 22 U.S.C. § 2370(e)(2) (2000), although the courts have construed that effort narrowly. See, e.g., *Hunt v. Coastal States Gas Prod. Co.*, 583 S.W.2d 322 (Tex. 1979). See *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 521 n.2 (2d Cir. 1985) (applicability of act of state doctrine "may be guided but not controlled by the position, if any, articulated by the executive [W]hether to invoke the . . . doctrine is ultimately and always a judicial question.").

128. 493 U.S. 400 (1990).

Nigerian government. Nigerian law prohibited both the payment and the receipt of bribes in connection with the award of government contracts.¹²⁹

Environmental Tectonics filed suit under the Racketeer Influenced and Corrupt Organizations Act (RICO),¹³⁰ the Robinson-Patman Act,¹³¹ and the New Jersey Anti-Racketeering Act.¹³² Kirkpatrick moved to dismiss on the ground that the action was barred by the Act of State Doctrine.

The Supreme Court held that the Act of State Doctrine was inapplicable because nothing in the case required the Court to declare invalid and, thus, ineffective as a rule of decision for United States courts, the official act of a foreign sovereign. Under *Kirkpatrick*, act of state issues arise only when the outcome of the case turns upon the effect of official action by a foreign sovereign. *Kirkpatrick* thus overruled a line of lower cases which applied the Act of State Doctrine to dismiss cases involving an examination of the motives of a foreign government in taking action.¹³³ The Court noted that, in every case in which the Supreme Court has held the Act of State Doctrine applicable, the relief sought or the defense interposed would have required a United States court to declare invalid the official act of a foreign sovereign performed in its own territory.¹³⁴ Because the legality of the Nigerian contract was not a question to be decided in *Kirkpatrick*, there was no occasion to apply the rule of decision that the Act of State Doctrine requires. The Court emphasized that the doctrine does not establish an exception to the Court's power to decide cases and controversies properly presented to it for those cases and controversies that may embarrass foreign governments.¹³⁵ It merely

129. *Id.* at 402.

130. 18 U.S.C. § 1962 (2000).

131. 15 U.S.C. § 13 (2000).

132. N.J. STAT. ANN. § 2C:41-2 (1995).

133. Many of these discarded cases in fact involved antitrust challenges to the granting or withholding of oil concession rights in the Middle East. See, e.g., *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 77 (2d Cir. 1977); *Occidental Petroleum Corp. v. Butte Gas & Oil Co.*, 331 F. Supp. 92, 100 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972).

134. 493 U.S. at 406.

135. *Id.* at 409. The current version of the Act of State Doctrine thus cannot even be analogized to the political question doctrine which is a general doctrine of justiciability that bars the courts from hearing cases where there is: 1) a matter that has been constitutionally committed to another branch of government; 2) a lack of judicial standards for the resolution of the matter; 3) a decision calling for resolution of policy questions of a kind clearly calling for nonjudicial discretion; 4) inability to decide the case without disrespecting other branches of government; 5) an unusual need to follow prior political decision; or 6) the potential for embarrassment of other branches of government. As Professor Tribe concludes: "The 'act of state' cases provide perhaps the best illustration both of the uses and of its rejection of political question analysis in the foreign affairs context." 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 373 n.44 (3d ed. 2000). But cf. *767 Third Avenue Assocs. v. Consulate Gen. of Yugo.*, 218 F.3d 152 (2d Cir. 2000)

requires that, in the process of deciding such cases, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.¹³⁶ *Kirkpatrick* thus drove a stake through the key portions of the original *OPEC* Ninth Circuit decision which applied the Act of State Doctrine because of the potential of embarrassing the executive branch by analogy to the domestic political question doctrine.¹³⁷

Kirkpatrick and its progeny further leave open the possibility of holding that the *Sabbatino* balancing process may in some cases override an act of state defense even where the validity of the foreign act is at issue.¹³⁸ The increasing hostility of the executive, legislative, and judicial branches toward the Act of State Doctrine in recent years has encouraged the judiciary to reject the defense when raised post-*Kirkpatrick*¹³⁹ and bodes poorly if raised again in the *OPEC* context.

D. Specific Limitations on the Doctrine

There are a number of potential exceptions to the Act of State Doctrine, even in the limited circumstances where it applies at all. The potential exception for commercial activities is the most relevant for any renewed consideration of *OPEC*'s position under United States antitrust law.¹⁴⁰

While the issue has not yet been resolved by the Supreme Court, the doctrine will probably be held inapplicable to commercial acts of a state. Justice White was undoubtedly correct in his plurality opinion in *Dunhill* which stated that "subjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts."¹⁴¹ Congress endorsed this basic judgment in the FSIA of 1976, which subjected foreign sovereigns to the possibility of suit for their commercial acts so long as there was a requisite impact on United States

(in non-act of state context, political question doctrine used to dismiss suit seeking to determine and allocate successor liability for former Yugoslavian consulate debt).

136. 493 U.S. at 409.

137. See Int'l Ass'n of Machinists v. OPEC, 649 F.2d 1358 (9th Cir. 1981).

138. See, e.g., Grupo Protexa, S.A. v. All American Marine Slip, 20 F.3d 1224 (3d Cir. 1994).

139. See Lamb v. Phillip Morris, Inc., 915 F.2d 1024 (6th Cir. 1990).

140. Standard formulations of the Act of State Doctrine contain an exception for acts outside the territory of the foreign sovereign and for public acts that were the product of corruption. See WALLER, ANTITRUST, *supra* note 43, § 8.13. Neither of these exceptions appear to relate to *OPEC*'s conduct.

141. Alfred Dunhill of London, Inc. v. Rep. of Cuba, 425 U.S. 682, 703-04 (1976).

commerce.¹⁴² The Justice and State Departments have also maintained that the Act of State Doctrine should not apply to commercial acts.¹⁴³ Thus, one must predict that the distinction between commercial and governmental acts will prove relevant in the act of state area.¹⁴⁴

142. 28 U.S.C. § 1605(a)(2) (2000). See *supra* notes 73-90 and accompanying text. The House Report encouraged the judiciary to apply this distinction to the Act of State Doctrine. H.R. REP. NO. 94-1487, at 20 n.1 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6619 n.1. In dictum, one court has stated that the question of whether the Act of State Doctrine embraces commercial acts should now be considered "in light of the congressional enactment of the FSIA." *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384, 398 n.28 (D. Del. 1978). The court concluded, in any event, that the Act of State Doctrine is not applicable to acts of a government-owned commercial entity. *Id.* at 398.

143. See 1995 INTERNATIONAL GUIDELINES, *supra* note 78, § 3.33; 1977 ANTITRUST GUIDE, *supra* note 77, at 55; Letter from Monroe Leigh, Legal Adviser of the Department of State, to the Solicitor General (Nov. 26, 1976), reprinted in *Alfred Dunhill of London*, 425 U.S. at 706. The 1988 Department of Justice Guidelines do not take a position on the existence of a commercial acts exception to the Act of State Doctrine.

144. The court in *Dominicus Americana Bohio v. Gulf & Western Indus.*, 473 F. Supp. 680 (S.D.N.Y. 1979), appeared ready to conclude that commercial acts were not within the doctrine, although it found the existing record insufficient for a final ruling. *Id.* at 689-90. The court read *Hunt* as adopting this position in dictum, although it is not clear that the Second Circuit intended to go that far. *Id.* at 690. See also *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 73 (2d Cir. 1977). In *Compania de Gas de Nuevo Laredo, S.A. v. Entex, Inc.*, 686 F.2d 322, 326 (5th Cir. 1982), the court discounted *Dominicus* as a misreading of *Hunt*. Moreover, in *Braka v. Bancomer, S.N.C.*, 762 F.2d 222 (2d Cir. 1985), the Second Circuit expressly rejected the contention that *Hunt* had adopted the commercial-activity exception: "We leave for another day consideration of the possible existence in this Circuit of a commercial exception to the act of state doctrine under *Dunhill*." *Id.* at 225.

In contrast, the court in *General Aircraft Corp. v. Air America, Inc.*, 482 F. Supp. 3 (D.D.C. 1979), applied the Act of State Doctrine in refusing to examine the motivations behind foreign government procurement decisions. Similarly, in applying the doctrine in a dispute over foreign governmental procurement of military fighter aircraft, another court characterized the plaintiff's claim as requiring it "to inquire into sensitive questions of vital concern of the military security of those foreign governments." *Northrop Corp. v. McDonnell Douglas Corp.*, 498 F. Supp. 1112, 1121 (C.D. Cal. 1980). Under the commercial/governmental line drawn in the FSIA, procurement normally falls within the commercial category.

General Aircraft and the district court ruling in *Northrop* were criticized and found not controlling in *Sage Int'l, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896, 910-11 (E.D. Mich. 1981). That antitrust case involved claims that the defendant used illegal kickbacks to sell armored cars and parts to foreign governments, driving plaintiff from the market. The court observed that the FSIA had permitted suits against foreign sovereigns on military procurement contracts and found no basis for believing that foreign policy problems would arise from adjudicating plaintiff's claim. In *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300 (3d Cir. 1982), the court agreed with *General Aircraft* and the *Northrop* district court that military procurement was not within the commercial activity exception, but the court nevertheless held that the balancing test did not mandate application of the Act of State Doctrine under the particular facts. Similarly, the lower court's ruling in *Northrop* was reversed on appeal on this same ground. *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1047-49 (9th Cir. 1983). Several decisions expressly declined to resolve whether to adopt a commercial activity exception to the Act of State Doctrine. See, e.g., *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1115 (5th Cir. 1985); *Braka*, 762 F.2d at 225.

This does not answer the question of how to distinguish between commercial and governmental acts for this purpose. The standard set forth in the FSIA focuses on the nature, rather than the purpose, of the conduct in question.¹⁴⁵ This same approach was applied for act of state purposes in litigation, where the court concluded that Brazil's denial of import permits was within the doctrine since it was the sort of conduct normally performed by governments rather than by private parties.¹⁴⁶ It could be argued that the separation of powers rationale of the Act of State Doctrine and its deference to state actions "giv[ing] effect to its public interests"¹⁴⁷ tend toward greater emphasis on purpose rather than nature. But this would seem to question congressional judgments made in the FSIA, where similar policy arguments pertain, and for convenience alone there is likely to be a strong desire among judges to apply the same standards under both the Act of State Doctrine and the FSIA.¹⁴⁸

VI. THE FOREIGN SOVEREIGN COMPULSION DEFENSE

The OPEC defendants would not be able to take advantage of another frequently discussed, but seldom litigated, special defense in international antitrust litigation. The foreign sovereign compulsion defense may provide

145. 28 U.S.C. § 1603(d) (2000).

146. *Bokkelen v. Grumman Aerospace Corp.*, 432 F. Supp. 329, 334 (E.D.N.Y. 1977). The nature test was applied in *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983). There the court held that "[g]ranting a concession to exploit natural resources entails an exercise of powers peculiar to a sovereign" because such an action "[w]ould not have been taken by a private citizen." 712 F.2d at 408. See also *Callejo*, 764 F.2d at 1116; *Braka*, 762 F.2d at 225; *Sage Int'l*, 534 F. Supp. at 905.

147. See RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 41 (1965).

148. See *Letelier v. Rep. of Chile*, 488 F. Supp. 665, 674 (D.D.C. 1980) (to construe the Act of State Doctrine differently from the FSIA "would totally emasculate the purpose and effectiveness of the Foreign Sovereign Immunities Act by permitting a foreign state to reimpose [through the act of state doctrine] the so recently supplanted framework of sovereign immunity as defined prior to the Act."). See also *Sage Int'l*, 534 F. Supp. at 906-08 (while not adopting the "mechanical" commercial exception of the FSIA, a court applying the Act of State Doctrine should give deference to the legislative preference for a narrow doctrine). But see *Int'l Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1360 (9th Cir. 1981) (footnote omitted):

The act of state doctrine is not diluted by the commercial activity exception which limits the doctrine of sovereign immunity. While purely commercial activity may not rise to the level of an act of state, certain seemingly commercial activity will trigger act of state considerations. . . . While the [Immunities Act] ignores the underlying purpose of a state's action, the act of state doctrine does not. . . . 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 [judicial] caution is appropriate, regardless of any commercial component of the activity involved.

a safe harbor for a private defendant who has been compelled to engage in conduct which violates United States antitrust law. While the contours and exceptions of the defense are hotly debated,¹⁴⁹ the defense has only been successful once¹⁵⁰ and has been otherwise rejected in each case because the court determined that the defendants acted pursuant to the advice, encouragement, or prodding of a foreign government but had not been subject to outright compulsion.¹⁵¹ Whatever comfort this defense may provide, it has no application in the OPEC context, since it is the behavior of the foreign governments themselves that is being examined and not that of private firms stuck between the rock of OPEC's commands and the hard place of United States antitrust law.

VII. THE GUTTING OF COMITY

Sovereign immunity, the act of state, through all of its protean transformations, and the foreign compulsion defense all derive much of their analytical heft from the underlying doctrine of international comity, the respect and deference a sovereign nation must show to the actions and important interests of a fellow sovereign.

In the antitrust context, for a time, comity became a separate basis for not asserting or exercising jurisdiction over a case which placed the United States in conflict with another nation. Here too, the Supreme Court has recently gutted the doctrine of virtually all of its vitality and made it unlikely that comity alone would enable a district court to abstain or decline jurisdiction in an antitrust suit against the OPEC nations.

Prior to the Supreme Court's decision in *Hartford Fire Ins. v. California*,¹⁵² it seemed likely that the *Timberlane*¹⁵³ approach, which deemphasizes the effects test in favor of a more complex and multivariable comity analysis, would be influential, if not controlling, in foreign commerce litigation. The *Hartford Fire* litigation began with a series of state attorneys general bringing an antitrust challenge against a group of insurance companies, reinsurance companies, underwriters, brokers, individuals, and the Insurance Services Office. The complaint alleged that the defendants

149. See generally Spencer Weber Waller, *Redefining the Foreign Compulsion Defense in U.S. Antitrust Law: The Japanese Auto Restraints and Beyond*, 14 LAW & POL'Y INT'L BUS. 747 (1982).

150. *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970).

151. See generally WALLER, ANTITRUST, *supra* note 43, § 8.19-21.

152. 509 U.S. 764 (1993).

153. *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976).

conspired to eliminate certain forms of insurance coverage in the United States and engaged in boycotts and other forms of intimidation to enforce their conspiracy. A number of the defendants were located in England and had acted in a manner which was lawful under English law and the Lloyd's insurance exchange rules. These defendants moved to dismiss the counts against them on the basis of lack of subject matter jurisdiction and, alternatively, on comity grounds.¹⁵⁴

The district court proceeded to analyze the question of whether to exercise jurisdiction based on comity utilizing the Ninth Circuit's *Timberlane* standard.¹⁵⁵ While the court analyzed all seven of the factors set forth in *Timberlane*, the real focus was on the degree of conflict with foreign law or policy. The court held that the degree of conflict between United States antitrust and English law and policy was "substantial" based on: the nature of English regulation of the insurance industry and the Lloyd's insurance market; England's unmitigated hostility toward the extraterritorial application of United States antitrust law; and the passage and enforcement of the British blocking statute, the Protection of Trading Interests Act.¹⁵⁶ Following a quick rush through the other *Timberlane* factors, many of which weighed against the exercise of jurisdiction, the court concluded that: "the conflict with English law and policy which would result from the extra-territorial application of the antitrust laws in this case are not outweighed by other factors."¹⁵⁷

The Ninth Circuit applied the same basic framework, but reached a different conclusion.¹⁵⁸ The Ninth Circuit held that once conduct has a direct, substantial, and reasonably foreseeable effect on American commerce it will be "only in an unusual case that comity will require abstention from the exercise of jurisdiction."¹⁵⁹ The court agreed that there was a significant

154. *Hartford Fire*, 509 U.S. at 769.

155. *Timberlane* required the analysis of "the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the 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 an 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 compared with conduct abroad." *Id.* at 614.

156. See generally WALLER, ANTITRUST, *supra* note 43, § 4.17 for a more extensive discussion of blocking statutes.

157. *In re Ins. Antitrust Litig.*, 723 F. Supp. 464, 490 (N.D. Cal. 1989).

158. *In re Ins. Antitrust Litig.*, 938 F.2d 919 (9th Cir. 1991). The Ninth Circuit also embarked on an unnecessary analysis of the Foreign Trade Antitrust Improvements Act ("FTAIA"), concluding probably erroneously that the FTAIA supported the existence of subject matter jurisdiction, but concluded, probably correctly, that the FTAIA did not affect the subsequent comity analysis. *Id.* at 931-32.

159. *Id.* at 932.

conflict with English law and policy, but that every other factor, especially the significance of the effects and the intent to affect the United States, counseled heavily toward the exercise of jurisdiction.¹⁶⁰

The Supreme Court affirmed the Ninth Circuit in a 5-4 decision which diminished, if not eliminated, the role of comity.¹⁶¹ In the brief portion of the opinion that dealt with the foreign defendants, Justice Souter first dismissed the contention that the United States courts lacked subject matter jurisdiction, stating: "[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."¹⁶²

The Court then focused on the question of whether international comity counseled against the exercise of jurisdiction in the case before it. The majority held that the only substantial question was whether there was a "true conflict between domestic and foreign law."¹⁶³ The Court then held that there was no "true" conflict because the defendants were not required by English law to violate the Sherman Act and were able to comply with both English and American law.¹⁶⁴ Thus, in the majority's view, there was no conflict warranting abstention on comity grounds. Having raised and disposed of the defendants' argument in a single paragraph, the Court concluded by stating that there was "no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity."¹⁶⁵

160. *Id.* at 933-34.

161. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

162. *Id.* at 796.

163. *Id.* at 798 (citing *Société Nationale Industrielle Aérospatiale v. United States Dist. Court*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part)). According to prominent commentators, Justice Souter's "true conflict" test was simply a misreading of the *Aérospatiale* case and the *Restatement (Third) of Foreign Relations Law of the United States* cited by Justice Souter. See Andreas F. Lowenfeld, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*, 89 AM. J. INT'L L. 42 (1995); Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The Hartford Fire Case*, 1993 SUP. CT. REV. 289.

164. 509 U.S. at 799. The Department of Justice had previously defined a true conflict more broadly. In the 1988 International Guidelines, the Department asserted that: "A true conflict may arise, however, if anticompetitive conduct within the jurisdiction of the U.S. antitrust laws is encouraged or promoted by the law or policy of a foreign sovereign." U.S. Dep't of Justice & Fed. Trade Comm., ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 5 (1988) [hereinafter 1988 INTERNATIONAL GUIDELINES]. The Department of Justice took the narrower position ultimately adopted by the Court in its amicus brief in the *Hartford Fire* litigation and largely relied on the language from *Hartford Fire* in the 1995 Guidelines. See 1995 INTERNATIONAL GUIDELINES, *supra* note 78, § 3.2.

165. 509 U.S. at 799.

Justice Scalia countered the majority's brevity on the subject of comity with an extensive dissent. First, Justice Scalia agreed that the federal district court had subject matter jurisdiction since the plaintiff had asserted non-frivolous claims under the Sherman Act, raising a proper federal question vesting the Court with subject matter jurisdiction.¹⁶⁶ He then characterized the question of the extraterritorial reach of the Sherman Act as a question of substantive law of whether "Congress asserted regulatory power over the challenged conduct."¹⁶⁷ Justice Scalia grudgingly agreed with the majority that, at least as a matter of precedent, if not logic, "it is now well established that the Sherman Act applies extraterritorially."¹⁶⁸

Justice Scalia then based the remainder of his analysis on a second canon of statutory construction—that an act of Congress should be construed to comply with international law whenever possible.¹⁶⁹ He argued that a consideration of comity was necessary in order to apply the Sherman Act extraterritorially in accordance with international law.¹⁷⁰ Justice Scalia applied the reasonableness test of the *Restatement (Third) of Foreign Relations Law of the United States* as a reasonably accurate guide to international law requirements of comity.¹⁷¹ Justice Scalia ultimately concluded that the Sherman Act did not cover the activity of the defendants at issue in the litigation, regardless of whether there was some nominal or potential way that the defendants could have complied with both regulatory regimes.¹⁷²

The majority opinion in *Hartford Fire* can be read broadly to eliminate virtually all assertions of international comity as a defense in United States antitrust litigation. Read literally, *Hartford Fire* would balance the interests of the United States regulatory regime (antitrust) against foreign law and policy only where there was a "true conflict" and the defendants could not comply with one set of laws without violating the other country's law.¹⁷³ Comity would then be reduced to the level of the almost-never successful

166. *Id.* at 812 (Scalia, J., dissenting).

167. *Id.* at 813.

168. *Id.* at 814.

169. *Id.* at 814-15.

170. *Id.* at 817-18.

171. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987). Justice Scalia was careful to note that he was not necessarily adopting the precise formulations of the *Restatement* in every detail, but that his results would be the same "under virtually any conceivable [comity] test that takes account of foreign regulatory interests." 509 U.S. at 818.

172. 509 U.S. at 820-21.

173. *Id.* at 798-99.

foreign sovereign compulsion defense.¹⁷⁴ Worse yet, even in the event of outright compulsion, the courts might balance the respective national interests and proceed despite the defendant's proof that compliance with United States antitrust laws would have required violation of another country's laws.

Regardless of the flaws in *Hartford Fire*, it remains the law of the land until such time as the Supreme Court revisits the issue and reaches a different result.¹⁷⁵ The early results suggest that either *Hartford Fire* was too ambiguous to adequately guide the lower courts, or at a more fundamental level, that *Hartford Fire* did not "take" and the lower courts are engaged in a campaign of guerilla warfare to allow a more robust role for comity while paying lip service to the holding of *Hartford Fire* and its key concept of a "true conflict."

The Ninth Circuit treated extraterritoriality as if *Hartford Fire* never really existed in *Metro Industries v. Sammi Corp.*¹⁷⁶ The case involved allegations that the foreign defendant and others used exclusive design rights under Korean law to divide markets and exclude the plaintiff-importer from selling in the United States. The court first announced the somewhat startling conclusion that wholly foreign conduct would be examined under the rule of reason, even if the behavior in question would normally be treated as per se unreasonable in a domestic commerce case.¹⁷⁷

The court then dealt with the question of jurisdiction and comity by adhering to the jurisdictional rule of reason announced in *Timberlane*. The Court balanced all seven of the *Timberlane* factors. It found no conflict between national policies since the Korean policy did not compel the anticompetitive conduct alleged in the complaint.¹⁷⁸ It spent little time on the

174. See *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F.Supp. 1291 (D. Del. 1970) for the only successful application of the foreign compulsion defense in an antitrust case. See *supra* notes 148-50 and accompanying text.

175. In this regard, it is important to note that the decision was a 5-4 decision and Justices White and Blackmun, two members of Justice Souter's majority, subsequently left the Court.

176. 82 F.3d 839 (9th Cir. 1996).

177. *Id.* at 844-45. The only support cited by the court for the proposition that the standard for substantive illegality, rather than jurisdiction, changes in foreign commerce cases is a portion of the Areeda and Turner treatise. *Id.* at 845, citing 1 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 237 (1978). This is a distinctly minority position that has been rejected by most sources except for the 1977 version of the Antitrust Division's International Guidelines and a dissent by Justice Frankfurter in *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 605 (1951); see also U.S. DEPT. OF JUSTICE, ANTITRUST DIVISION, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 2-3 (1977). See generally WALLER, ANTITRUST, *supra* note 43, § 7.12-.13.

178. 82 F.3d at 847.

other factors except to note: "Considering all the factors, principles of comity and fairness do not deprive this court of jurisdiction."¹⁷⁹

While reaching a result in keeping with *Hartford Fire*, the Ninth Circuit also announced virtual defiance of the Supreme Court and stated that:

While *Hartford Fire Ins.* overruled our holding in *Timberlane II* that a foreign government's encouragement of conduct which the United States prohibits would amount to a conflict of law, it did not question the propriety of the jurisdictional rule of reason or the seven comity factors set forth in *Timberlane I*.¹⁸⁰

In its *Nippon Paper* decision, the First Circuit showed greater fidelity to the majority opinion in *Hartford Fire*.¹⁸¹ Although *Nippon Paper* concerned the question of extraterritoriality itself, and not comity, the First Circuit nonetheless adopted the conventional view of the *Hartford Fire* majority and stated:

Comity concerns would operate to defeat the exercise of jurisdiction only in those few cases in which the law of foreign sovereign required a defendant to act in a manner incompatible with the Sherman Act or in which full compliance with both statutory schemes was impossible.¹⁸²

Senior Judge Charles S. Haight, Jr. of the United States District Court for the Southern District of New York has played a key role in the interpretation of *Hartford Fire*. He issued two decisions dismissing different complaints on comity grounds without any clear showing of the kind of true conflict contemplated by Justice Souter's majority opinion.¹⁸³

In *Filetech S.A.R.L. v. France Telecom*,¹⁸⁴ the plaintiff sued a publicly owned French telecommunication company for monopolizing certain markets for the sale of subscriber information by refusing to sell the plaintiff-customer information in a particular form. Judge Haight had no difficulty holding that subject matter jurisdiction was present because of the direct, substantial and foreseeable effects of the defendant's conduct in the United States.¹⁸⁵ He then

179. *Id.*

180. *Id.* at 846 n.5.

181. *United States v. Nippon Paper Industries*, 109 F.3d 1 (1st Cir. 1997).

182. *Id.* at 8.

183. *Filetech S.A.R.L. v. France Telecom*, 978 F. Supp. 464 (D.N.Y. 1997); *Trugman-Nash, Inc. v. New Zealand Dairy Bd.*, 954 F. Supp. 733 (S.D.N.Y. 1997), *rev'g upon reconsideration*, 942 F. Supp. 905 (S.D.N.Y. 1996).

184. 978 F. Supp. 464 (S.D.N.Y. 1997).

185. *Id.* at 483.

found that he was bound by the jurisdictional rule of reason analysis in *Timberlane* as the governing law of the Second Circuit.¹⁸⁶

Judge Haight then addressed whether *Hartford Fire* changed the application of *Timberlane*.¹⁸⁷ In light of the language of *Hartford Fire* and the subsequent holdings on comity within the Second Circuit, Judge Haight had little choice but to conclude that "a party seeking the dismissal of a Sherman Act case on the grounds of international comity must first demonstrate that a true conflict exists between the Sherman Act and relevant foreign law."¹⁸⁸ He then concluded that only after the threshold of a true conflict was passed would the court examine the familiar *Timberlane* factors.¹⁸⁹

Judge Haight believed that the issue of how to determine whether or not a true conflict existed within the meaning of *Hartford Fire* was a question of first impression.¹⁹⁰ Most peculiarly, the court held that it could only conclude that French law *may* require what the Sherman Act *may* forbid, but this was sufficient to proceed with, and to satisfy, the comity analysis under *Timberlane*.¹⁹¹ Judge Haight then concluded that the other *Timberlane* factors favored dismissal and did not require elaborate discussion.¹⁹² Although Judge Haight's rather transparent defiance of *Hartford Fire* was promptly reversed by the Second Circuit,¹⁹³ he ultimately dismissed the litigation again on remand under the FSIA.¹⁹⁴

The use of comity in *Trugman-Nash, Inc. v. New Zealand Dairy Bd.* was even more complicated.¹⁹⁵ There, the dispute centered around the role of the governmentally created dairy board in the export of cheese for sale in the United States. Judge Haight accepted the teachings of *Hartford Fire* in a more straightforward way and characterized the issue as whether New Zealand law

186. *Id.* at 473.

187. He also considered whether the FTAIA required any change in the *Timberlane* analysis but concluded that it did not. *Id.* at 478-79.

188. *Id.* at 478.

189. *Id.*

190. In *Hartford Fire Ins. v. California*, the parties agreed that no such conflict was present. 509 U.S. 764, 799 (1993). In a Second Circuit decision involving international comity in a bankruptcy proceeding, the parties stipulated that such a conflict was present. *In re Maxwell Communication Corp.*, 93 F.3d 1036, 1049 (2d Cir. 1996).

191. 978 F. Supp. at 478-79.

192. *Id.* at 481.

193. *Filetech S.A. v. France Telecom, S.A.*, 157 F.3d 922 (2d Cir. 1998).

194. *Filetech S.A. v. France Telecom, S.A.* 2001-1 Trade Cas. (CCH) ¶ 73,228 (S.D.N.Y. 2001) (holding that the defendant's commercial activity lacked the substantial effect on the United States as required under 28 U.S.C. § 1605).

195. See *Trugman-Nash, Inc. v. New Zealand Dairy Bd.*, 954 F. Supp. 733 (S.D.N.Y. 1997), *rev'g upon reconsideration*, 942 F. Supp. 905 (S.D.N.Y. 1996).

compelled the defendants to act in a way that violated American antitrust law.¹⁹⁶ The court then analyzed the text of the New Zealand Dairy Board Act of 1961 and concluded:

[T]he most that can be said for the defendant Board is that the New Zealand Parliament established a statutory scheme conferring comprehensive powers upon it, and that the Board's conduct alleged here is perfectly consistent with New Zealand law and policy. That is the showing made by the English reinsurers in *Hartford*; but, as that case holds, it is not sufficient to create a conflict with American antitrust law.¹⁹⁷

On reconsideration, Judge Haight reached the opposite conclusion and ultimately dismissed the complaint.¹⁹⁸ First, he concluded that the practical effect of the 1961 Dairy Board Act required the prohibition of the sales at issue in the litigation, thus creating a true conflict under *Hartford Fire*.¹⁹⁹ He further held, more questionably, that the existence of a true conflict was not the only consideration under *Hartford Fire* and that controlling Second Circuit law required him to apply the full range of *Timberlane* factors (presumably defining true conflict in accordance with *Hartford Fire*).²⁰⁰ Without further analysis, he concluded that those factors pointed in the direction of declining jurisdiction.²⁰¹

Outside the antitrust area, the courts have also applied comity expansively despite the language of *Hartford Fire*. For example, both the district court and the Second Circuit in *In re Maxwell Communications Corp.*, relied on notions of comity to hold that English, rather than American, law would govern the avoidance of certain transactions at issue in the bankruptcy proceedings. In the district court opinion, Judge Scheindlin relied on Justice Scalia's dissent in *Hartford Fire* for the proposition that "comity is 'wholly independent' of the presumption against extraterritoriality and applied even if the presumption has been overcome or is otherwise inapplicable."²⁰² Moreover, the court stated that *Hartford Fire* did not apply in the bankruptcy context and that the Bankruptcy Code did not impose the kind of regulatory regime that governs conduct in the same manner as the antitrust laws.²⁰³ Thus,

196. 942 F. Supp. at 909.

197. *Id.* at 912-13.

198. *Trugman-Nash*, 954 F. Supp. at 734.

199. *Id.* at 736.

200. *Id.* at 737.

201. *Id.*

202. *In re Maxwell Communication Corp.*, 186 B.R. 807, 823 (S.D.N.Y. 1995).

203. *Id.* at 823-24.

the court concluded that *Hartford Fire* did not bar the use of comity to dismiss the complaint.

The Second Circuit reached the same result, but used very different and less inflammatory reasoning.²⁰⁴ The Second Circuit relied on Justice Souter's notion of a "true conflict," but held that such a conflict existed between United States and English bankruptcy law based upon the parties' agreement that American and English bankruptcy avoidance law would produce different and conflicting results with respect to the transaction at issue.²⁰⁵ The court then affirmed the dismissal of the case based on comity on the grounds that England's interest had "primacy" using the factors set forth in the *Timberlane* decision.²⁰⁶

The Second Circuit took a similarly expansive view of comity in the trademark context in *Sterling Drug, Inc. v. Bayer AG*.²⁰⁷ In a case where the opposing parties both held rights in the same trademark under the laws of the United States and Germany, the court held that *Hartford Fire* did not bar the application of international comity even though no true conflict existed. In dismissing the complaint on the grounds that United States' interests were secondary to those of Germany in the dispute, the court relied on the language of *Hartford Fire*, where the Supreme Court noted that it had not addressed "other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity."²⁰⁸

The executive branch has taken an additional swipe at comity beyond the damage done in *Hartford Fire*. In both the 1988 and 1995 International Antitrust Guidelines, the Antitrust Division, joined by the FTC in 1995, pledged to take comity into account in the exercise of their prosecutorial discretion, but contend that comity does not apply once the government decides to bring an enforcement action.²⁰⁹ The Agencies believe that comity is based entirely on separation of powers rationale and that the courts should not "second-guess the executive branch's judgment as to the proper role of comity."²¹⁰ The government's support for this dubious proposition is thin.²¹¹

204. See *In re Maxwell Communication Corp.*, 93 F.3d 1036 (2d Cir. 1996).

205. *Id.* at 1050.

206. *Id.* at 1051.

207. See 14 F.3d 733, 746 (2d Cir. 1994).

208. *Hartford Fire Ins. v. Calif.*, 509 U.S. 764, 799 (1993).

209. See 1995 INTERNATIONAL GUIDELINES, *supra* note 78, § 3.2; 1988 INTERNATIONAL GUIDELINES, *supra* note 164, § 5 n.167.

210. 1995 INTERNATIONAL GUIDELINES, *supra* note 78, § 3.2.

211. See *United States v. Baker Hughes, Inc.*, 731 F. Supp. 3, 6 n.5 (D.D.C. 1990), *aff'd on other grounds*, 908 F.2d 981 (D.C. Cir. 1990).

However, in the real world, few courts will have both the courage and the record evidence to overturn a carefully well-defended decision by the Agencies to bring a foreign commerce antitrust case, OPEC included.

The death of comity is more pronounced in the Supreme Court than in the lower courts. Nonetheless, the plain holding of *Hartford Fire*, and most of its subsequent application by the lower courts, suggest that comity is no longer a powerful or convenient tool for avoiding deciding the merits of cases the courts would rather not have to decide.

VIII. WHY PUBLIC INTERNATIONAL LAW DOES NOT SAVE THE OPEC NATIONS IN UNITED STATES COURT

The question of the legality of OPEC's conduct under public international law requires consideration of a series of ambiguous doctrines without definitive answers.²¹² Even if those questions are ultimately resolved in OPEC's favor, they do not provide a barrier to suit in United States courts.

The most frequently asserted defenses under international law depend on principles of public international law embodied in the alleged approval of OPEC by the United Nations General Assembly in its Resolution on Permanent Sovereignty Over Natural Resources,²¹³ and the Charter of Economic Rights and Duties of States.²¹⁴ Despite language in these instruments that arguably ratifies the activities of OPEC, these instruments must be viewed as traditional United Nations instruments which are non-binding and do not by themselves constitute international law.

Nor can these pronouncements be viewed as stating principles of customary international law. They did not nearly receive universal acceptance at the time of their passage, and certainly not for the kind of absolute rule that would insulate OPEC from all forms of municipal legal liability.²¹⁵ Over the

212. In 1975, Joelson and Griffin came to the same conclusion as to the ambiguity of international law but phrased their conclusion differently. "For our purposes it is sufficient to note that the various contradictory contentions are evidence that the status of the Arabs' activities under public international law is unsettled and may not presently fall within any of the recognized categories of illegal international conduct." Joelson & Griffin, *supra* note 1, at 638.

213. G.A. Res. 3171 U.N. GAOR, 28th Sess., Supp. No. 30, at 52, U.N. Doc. A/9400 (1973), reprinted in 13 I.L.M. 238 (1974).

214. G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9946 (1974), reprinted in 14 I.L.M. 251 (1975).

215. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 102-03 (1987) (rule of customary international law requires nearly unanimous acceptance as binding rule by community of nations).

intervening thirty years, the support for these propositions has waned as nation after nation has privatized its extractive industries, adopted more market-oriented economies and legal systems, adopted antitrust principles of its own, and begun to explore the international enforcement of these laws.

Closely related to this argument is the contention that OPEC enjoys immunity from municipal liability as either a lawful international commodity agreement or as a producers' association. These arguments are best addressed by Mark Joelson and the late Joseph Griffin, both highly sophisticated international antitrust practitioners who frequently defended foreign governments and firms and who by no means represent knee-jerk apologists for U.S. antitrust policy. In their analysis of a possible defense for OPEC under international law, they concluded:

It should be noted that there is no intergovernmental commodity agreement for oil as there is for other commodities, and that traditional commodity agreements, *i.e.*, multilateral agreements that provide for special arrangements beyond normal market mechanisms, can be distinguished from producer cartels. In the former, producer and consumer governments agree—often on the basis of political rather than business considerations—to manage the supply and price of a particular commodity for their mutual advantage. On the other hand, a producer cartel is an agreement among members of one side of the producer-consumer population to fix prices or control production for its own advantage regardless of the effect of consumers.²¹⁶

All of these contentions are unresolved since the rise of OPEC as an economic force and are unlikely to be resolved at the international level. More importantly for our purposes, they are simply irrelevant. While international law is part of the law of the United States,²¹⁷ Congress can enact a statute in violation of international law that must be enforced within the United States if it chooses to do so.²¹⁸ A United States court must therefore apply the law set down by Congress even if it results in a violation of public international law and the liability of the United States as a nation at the international level.²¹⁹

Congress has charged the courts with subject matter jurisdiction to enforce the antitrust laws and, to the extent that it chose to limit that jurisdiction in light of international law concerns, it did so in the FSIA.²²⁰ The

216. Joelson & Griffin, *supra* note 1, at 640.

217. *The Paquete Habana*, 175 U.S. 677 (1900).

218. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 115 (1987).

219. *Id.*

220. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602-1611).

FSIA was enacted after the rise of OPEC, passage of various United Nations pronouncements, and both the embargoes and price increases which marked the first energy crisis. Regardless of whether the United States was ever held responsible by an international tribunal or other body, the courts are free, indeed duty-bound, to apply the statutory law of the United States.

IX. WHY PRIVATE PLAINTIFFS MAY NOT GET RICH

One important difference between the first and second OPEC decisions is that the second case involved only a request for declaratory and injunctive relief. Assuming that OPEC is not currently planning to radically change its modus operandi because of the potential for an injunction entered in the United States District Court for the Northern District of Alabama, why then the litigation strategy to forego the main weapon in private antitrust litigation, namely the treble damage remedy which was alleged even in the first OPEC case?

The answer lies in intervening developments in the substance of antitrust doctrine rather than in the special international litigation defenses involving sovereign nations that are the principal focus of this article. However, to make sense of the strategy in *Prewitt* and to identify the right plaintiff in future cases against OPEC, a short discussion of what is referred to as the indirect purchaser doctrine is necessary.²²¹

In 1977, the Supreme Court decided *Illinois Brick Co. v. Illinois* which held that only plaintiffs who dealt directly with defendants violating the antitrust laws could sue for treble damages under the federal antitrust laws.²²² The Court based its decision on the need to protect defendants from inconsistent verdicts and possibly multiple recoveries, as well as the need to protect the courts from overly burdensome and lengthy proceedings to allocate damages among plaintiffs at different levels of the distribution chain.²²³ The Court permitted exceptions for cost plus contracts and situations where the defendant and the direct purchaser were corporate affiliates or co-conspirators, but these exceptions have been narrowly construed in subsequent decisions²²⁴ and do not appear to apply in the OPEC context.

221. See generally 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 346 (2d ed. 2000); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY § 16.6 (2d ed. 1999).

222. 431 U.S. 720 (1977).

223. *Id.* at 730-33.

224. *Kansas v. Utilicorp United Inc.*, 497 U.S. 199 (1990).

The Court has subsequently made clear that *Illinois Brick* only interprets the Clayton Act, a *federal* antitrust statute.²²⁵ Thus, the states are free to allow indirect purchaser suits under state antitrust law, which the majority of large states have done.²²⁶ Similarly, indirect purchaser suits, or their functional equivalents, may be available under federal antitrust laws other than the Clayton Act.²²⁷

All of this is critical because virtually no purchaser of gasoline in the United States qualifies as a direct purchaser under *Illinois Brick*. There are of course no direct purchasers from OPEC itself since it does not own or sell petroleum products. It is an international organization which is a forum for petroleum producing nations to set production levels and hence the price of oil. The direct purchasers from the OPEC nations are various state run or private oil companies which have entered into contractual arrangements with the governments.²²⁸ By the time gasoline is refined, transported, wholesaled, and sold to the consumer at the pump, a whole set of distribution levels have been used, raising the precise problems that animated *Illinois Brick* in the first place.

The implications of *Illinois Brick* leave private plaintiffs with the following options. The direct purchasers would have standing under *Illinois Brick* to bring treble damage actions against the OPEC member states (or at least their state owned instrumentalities), but they are unlikely to do so for business reasons. Suing your principal supplier would be suicidal, especially when in all likelihood any overcharges are passed on to customers further down the chain of distribution. It is no coincidence that no major international oil company has sued its supplier nation on antitrust grounds.²²⁹ The only challenges to OPEC have come from a union and a gas station operator either unconnected to or far down on the supply chain.²³⁰

225. *California v. ARC Am. Corp.*, 490 U.S. 93 (1989).

226. See Richard Wolfram & Spencer Weber Waller, *Contemporary Antitrust Federalism: Cluster Bombs or Rough Justice?*, in N.Y. STATE ANTITRUST L. 3 (2d ed. 2002), available at www.luc.edu/schools/law/antitrust/docs/federal.pdf (last visited Dec. 20, 2002).

227. *FTC v. Mylan Labs. Inc.*, 62 F. Supp. 2d 25, 37 (D.D.C. 1999) (interpreting suits for disgorgement under Section 13(b) of the Federal Trade Commission Act).

228. EVANS, *supra* note 1, at 139-41; Int'l Ass'n of Machinists v. OPEC, 477 F. Supp. 553, 561 (C.D. Cal. 1979).

229. In contrast, antitrust litigation has been instituted by several smaller disfavored oil companies who reached the point where there was nothing to lose by suing once their concessions had been terminated or awarded to rival companies. See, e.g., *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1977).

230. *Prewitt Enterprises, Inc. v. OPEC*, 2001-1 Trade Cas. (CCH) ¶ 73,246; Int'l Ass'n of Machinists

While indirect purchasers would be barred from federal treble damage suits, they could seek injunctive relief in federal courts as the class plaintiffs did in *Prewitt*.²³¹ Such suits remain unattractive to most plaintiffs and their counsel since, by definition, they do not seek monetary relief and at best prevailing plaintiffs would be reimbursed their counsel fees as a prevailing party under the Clayton Act.²³² We are left with a small group of potential plaintiffs consisting of the adventurous, the wealthy, and the publicity seekers who at the end of the day may get an injunction, but little means to enforce the injunction through the normal means of the contempt process or to ultimately affect the price or supply of petroleum.

The states and private parties would have better luck under state antitrust laws on *Illinois Brick* grounds. State attorneys general have the statutory ability to represent the state as a buyer and to represent natural persons within the state in a *parens patrie* capacity. This, combined with the fact that most states have passed an *Illinois Brick* repealer permitting indirect purchaser suits under state antitrust laws, means that there would be standing to bring either a private or state governmental treble damage antitrust action against OPEC member nations. This suit could even be brought in federal court assuming there were grounds for federal jurisdiction as either a diversity action²³³ or as a supplemental claim to some other federal question (*i.e.* a Clayton Act suit for injunction).²³⁴ Yet there remain troubling constitutional questions which make the states and citizens suing under their laws, imperfect enforcers against OPEC.

X. WHY THE STATES AND STATE ANTITRUST STATUTES SHOULD NOT GET INVOLVED

State attorneys general have very different incentives from other private plaintiffs. While private plaintiffs may be faulted for being insensitive to the political ramifications of their actions, the opposite may be true for state attorneys general. They are elected officials who must take into account the political ramifications for all of their actions. However, those considerations are inherently local and are likely to be unresponsive to the concerns of

v. OPEC, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981).

231. *Prewitt*, 2001-1 Trade Cas. (CCH) ¶ 73,246.

232. See generally AREEDA & HOVENKAMP, *supra* note 221, ¶¶ 325-27; 1 AM. BAR ASSOC., SECT. OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS (FOURTH) 758-60, 795-801, 909-16 (1997).

233. 28 U.S.C. § 1332 (2000).

234. See 28 U.S.C. § 1367 (2000).

citizens of other states, the nation as a whole, or the citizens and governments of foreign nations.

The states and private parties suing under state law understandably view things quite differently. Historically, state enforcement substantially preceded the enactment of the Sherman Act itself.²³⁵ The states' ability to sue on their own behalf and on behalf of their citizens is enshrined in federal legislation.²³⁶ Their ability to enact their own state antitrust statutes and empower their officials and private parties to sue under them flows from their sovereign status under the Constitution. The states further point to important antitrust litigation where either the states acted before the federal government or where the federal government took no action at all.²³⁷ They also point to the efficiency enhancing aspects of pooling resources and of collective investigation and prosecution of nationwide cases.²³⁸ Finally, the states have always argued, and it has long been considered one of the mainstays of antitrust federalism, that the state attorneys general are more sensitively attuned to the issues affecting the citizens of their states than the federal antitrust agencies can be.²³⁹ In some respects they can, therefore, better represent the public interest, even at the risk of coming under the sway of interest groups representing competitors of a potential antitrust defendant. As the economy has become globalized, and antitrust issues jump state and national borders, it is not surprising that state attorneys general have become more involved in matters that formerly would have been considered the sole, or at least primary, jurisdiction of the federal enforcement agencies.²⁴⁰

The mixed and conflicting incentives of state attorneys general and private plaintiffs under state law in the antitrust area are merely a subset of the general problem of state and local lawmaking and law enforcement which can

235. See James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495 (1987).

236. 15 U.S.C. § 15c (2000).

237. One prominent example is *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (antitrust suit by nineteen states against insurance companies, following decision by DOJ not to accept states' invitation to investigate the industry). See also Carole R. Doris, *Another View on State Antitrust Enforcement—A Reply to Judge Posner*, 69 ANTITRUST L.J. 345 (2001).

238. See the National Association of Attorneys General at http://www.naag.org/naag/about_naag.php (last visited Dec. 20, 2002) (describing as one of its goals the promotion of cooperation and coordination on interstate legal matters to foster a more responsive and efficient legal system for state citizens).

239. Wolfram & Waller, *supra* note 226, at 4. See also http://www.naag.org/naag/about_naag.php (last visited Dec. 20, 2002) (home page of National Association of Attorneys General discussing representation of the public interest by popularly elected attorneys general).

240. For example, the state attorneys general were actively involved in negotiating their settlement with the defendants in the international vitamins case. See Wolfram & Waller, *supra* note 226, at 38-39.

jeopardize the interests and rights of the United States at the international level. While the Constitution is sensitive to such concerns, it only provides a partial answer as to why the states cannot (as opposed to should not) enter this controversial arena.

Several branches of federal foreign affairs constitutional jurisprudence arguably stand in the way of a successful state antitrust suit against OPEC. First, the text of the Constitution strictly limits the role of the states in the area of foreign affairs.²⁴¹ A line of cases stretching back to the 1930s strongly suggest that the foreign affair powers is strictly federal. While drawing the line between presidential and congressional prerogatives is often difficult,²⁴² the cases are clear that the states may not act in matters such as foreign affairs which are exclusively the province of the federal government. For instance, in *Zschernig v. Miller*,²⁴³ the Supreme Court struck down an Oregon probate law which prohibited Soviet block citizens from inheriting personal property. The Court discussed the intrusion of the State into the field of foreign affairs "which the Constitution entrusts to the President and the Congress"²⁴⁴ and the need to prohibit interference with the conduct of foreign affairs by the federal government.²⁴⁵

The vitality of *Zschernig* itself is, however, a matter for lively debate. *Zschernig* itself ignored *Clark v. Allen*,²⁴⁶ an earlier case upholding a similar statute. Later cases have either approved certain nondiscriminatory state actions affecting foreign nations and multinational enterprise²⁴⁷ or invalidated state statutes on narrower grounds without citing *Zschernig* and its foreign policy rationale.²⁴⁸ This has led some scholars to conclude that *Zschernig* has

241. See U.S. CONST. art. I, § 10 (states may not enter into compacts with foreign nations without congressional approval); U.S. CONST. art. II, § 2 (vesting President with powers as commander in chief to enter into treaties with the advice and consent of Senate and to nominate and receive Ambassadors). See also U.S. ART. OF CONFED. art. IX (repealed 1788), available at <http://www.usconstitution.net/articles.html> (last visited Dec. 20, 2002).

242. Compare *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (President is the sole organ of nation in the conduct of foreign affairs) with *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (setting out sliding scale of when Presidential action in foreign affairs is permissible depending on prior actions and acquiescence of Congress). Cf. *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (importance of congressional acquiescence in Presidential settlement of foreign claims).

243. 389 U.S. 429 (1968).

244. *Id.* at 432.

245. *Id.* at 441.

246. 331 U.S. 503 (1947).

247. See *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994).

248. See *supra* notes 223-27 and accompanying text.

been either effectively overruled or is no longer needed in a post cold war world.²⁴⁹

Regardless of the strength of *Zschernig* and its progeny, there are still a number of strong constitutional reasons to prevent the states, or a private actor under state law, from taking action which would jeopardize the foreign policy objectives of the United States. The Supreme Court has been far stricter in holding that state statutes are preempted by federal law when the state statute touches closely on foreign relations. In *Crosby v. Nat'l Foreign Trade Council*,²⁵⁰ the Supreme Court unanimously struck down Massachusetts laws that imposed sanctions on firms and individuals doing business with the repressive government in Myanmar because of a conflict with the more comprehensive federal sanctions vesting broader, but more discretionary powers, with the President.

Similarly, in *United States v. Locke*,²⁵¹ the Supreme Court unanimously overturned a Washington state statute and regulations governing oil tanker liability because of its conflict with federal law in the area. In *Locke*, the Court found the regulation of interstate and international transportation to be a matter of inherently federal concern.²⁵² Against a background of comprehensive federal regulation and a web of treaties, the Court found the need for a single voice and consistency to be paramount and held that the state regulatory scheme was preempted even where the state rules were similar to the federal requirements.²⁵³

A much more nuanced analysis would be needed, however, before a state law *antitrust* action would be overturned on these grounds. The existence of state antitrust laws are not preempted by the existence of the federal antitrust laws. In fact, the Supreme Court has specifically held that state antitrust laws are not preempted even if they differ significantly from their federal

249. Curtis A. Bradley & Jack L. Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 AM. J. INT'L L. 675, 678 n.23 (1998); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1266 (1999); Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649 (2002). But see Edward T. Swaine, *Crosby as Foreign Relations Law*, 41 V. J. INT'L L. 481 (2001) (affirming the importance of general foreign powers despite lack of explicit discussion in the Supreme Court opinion in *Crosby*); Howard N. Fenton III, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 NW. J. INT'L L. & BUS. 563 (1993).

250. 530 U.S. 363 (2000).

251. 529 U.S. 89 (2000).

252. *Id.* at 99. See also *Bethlehem Steel Corp. v. Bd. of Comm'rs*, 276 Cal. App. 2d 221 (2d Dist. 1969) (holding that the California Buy American Act is an unconstitutional invasion of the foreign affairs power of the federal government).

253. *Locke*, 529 U.S. at 115.

counterparts.²⁵⁴ There have been a number of foreign commerce antitrust cases initiated by the states both where the federal government has already acted,²⁵⁵ and, on occasion, where the federal government has refused to act.²⁵⁶ Moreover, the sovereign decision of the state to invoke its law enforcement power to bring an antitrust action against a foreign defendant is a very different matter than the usual analysis of a discriminatory state statute that is either preempted or which violates either the dormant commerce clause²⁵⁷ or the dormant treaty power.²⁵⁸

Challenging the constitutionality of a state law antitrust case against OPEC or its members directly raises the type of challenge to the foreign policy-making powers of the state that the courts typically duck.²⁵⁹ However, there is one consistent theme that emerges from the handful of foreign commerce/foreign policy decisions, namely, that the foreign policy of the United States is set in Washington, D.C. and not by the states. States may not legislate even within their traditional areas of competence when they make discretionary (or discriminatory) choices between and among our allies and enemies that create unpleasant consequences for our national foreign policy. That is the essence of *Zschernig* and its progeny.²⁶⁰ It is the picking and choosing that is the crux of the problem, not the application of facially neutral statutes which affect foreign commerce where the Court has been more lenient.²⁶¹

As in the sovereign immunity area, characterization is everything.²⁶² If this issue ever came before the Supreme Court, the Court would have to choose between respect for the federal exclusivity (or preeminence, if you

254. *California v. ARC America Corp.*, 490 U.S. 93 (1989).

255. See Wolfram & Waller, *supra* note 226.

256. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993). But see *In re Copper Antitrust Litig.*, 117 F. Supp. 2d 875 (W.D. Wisc. 2000) (mentioning but not resolving defendant's argument that application of state antitrust law to foreign commerce violated the commerce clause).

257. See, e.g., *Tupman Thurlow Co. v. Moss*, 252 F. Supp. 641 (M.D. Tenn. 1966).

258. For a discussion of the concept of the dormant treaty clause, see Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127 (2000).

259. But see *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999) (overturning state law on both preemption and foreign affairs grounds), *aff'd on preemption grounds sub nom.* *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

260. *Springfield Rare Coin Galleries v. Johnson*, 503 N.E.2d 300 (Ill. 1986); *Bethlehem Steel Corp. v. Bd. of Comm'rs*, 276 Cal. App. 2d 221, 229 (2d Dist. 1969).

261. *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994). But see *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979) (striking down a facially neutral ad valorem property tax because of potential interference with foreign commerce).

262. See *supra* notes 73-90 and accompanying text (analyzing whether OPEC member state conduct is a commercial activity or a sovereign regulation of natural resources).

prefer the revisionist view) in foreign affairs and the inherent sovereignty of the states. This is an extremely delicate matter where Congress has not been able to enact legislation one way or the other and the executive branch has deliberately chosen not to act.²⁶³

XI. HOW TO CONDUCT FOREIGN ECONOMIC POLICY

While no attractive private plaintiff or state actor is likely to emerge to challenge OPEC under the antitrust laws, the federal government remains free to challenge OPEC or its member nations under the antitrust laws or any other federal statutory grounds that may exist. There is little reason to think this is actually going to happen. OPEC has been in existence since 1960 and the federal government has pointedly refused to bring suit or to participate in any way in the private suits that have been brought. Broad questions of foreign policy, national security, dependence on foreign oil, the fight against terrorism, efforts to combat money laundering, and the continuing quagmire of Middle East politics presumably play a role in deciding that antitrust litigation would be inappropriate, despite the domestic political gains of bringing such a suit.²⁶⁴

It was Kingman Brewster who most directly raised the issue of the interface between the use of United States antitrust laws to attack international restraints and general foreign economic policy in *Antitrust and American Business Abroad*.²⁶⁵ Writing at the height of the cold war, Brewster used language that still resonates today:

The ideological, military, political, and economic challenge the United States now faces requires a reappraisal of inherited concepts, policies, and laws. What we do makes more difference to the rest of the world than it ever did before. And not least important, what the rest of the world thinks of what we do is more important than ever before. The conduct of our foreign business and our policies with respect to it are not an insignificant part of this picture.²⁶⁶

263. As the Canadian rock band Rush so trenchantly observed: "If you choose not to decide, you still have made a choice." Rush, *Freewill*, on PERMANENT WAVES (Mercury Records 1980).

264. See, e.g., Neela Banerjee, *The High, Hidden Cost of Saudi Arabian Oil*, N.Y. TIMES, Oct. 21, 2001, § 4 (Magazine), at 3 (analyzing the complicated diplomatic relationship between the United States and Saudi Arabia, the leading oil supplier to the U.S.).

265. BREWSTER, *supra* note 19.

266. *Id.* at 3.

Using the international oil industry as an example, Brewster then traced the ways that antitrust concerns rose and fell in response to foreign policy concerns and international events in the 1950s.

Perhaps the most dramatic zigzags of official policy toward the conduct of American foreign business are evidenced by the international oil policy of this decade. Although oil is in no sense typical of American business abroad, it is a symbol of the convulsions of the competitive policy beyond the water's edge. Korean War needs and disruption of world supplies by the Iranian expropriation led the government to authorize a pooling of foreign production information by the overseas American producers. Not long thereafter the Federal Trade Commission staff completed a report on the alleged international petroleum cartel. Shortly before its release, the government commenced a grand jury investigation of international oil companies. The foreign parties were soon dropped and a civil complaint was lodged against the five American majors. With this action pending, the Attorney General gave an opinion that participation of the five majors along with foreign companies in a consortium to reactivate Iranian production was not in violation of the antitrust laws. The government also found it necessary to promise antitrust immunity to the oil industry so that all resources could be pooled and jointly planned in order to mobilize an oil lift to meet the emergency needs of Western Europe when Suez was clogged. Outside the antitrust field, contrasting American interests were evidenced by the executive's unsuccessful claim for alleged overcharges for Middle East oil shipped to Europe under the Marshall Plan, while the Congress demonstrated its limited enthusiasm for free import oil competition by tacking a rider on the Reciprocal Trade Extension Act designed to keep oil imports down to their historic level, by voluntary action if possible, by Presidential fiat if necessary.²⁶⁷

Brewster's basic argument that the United States should seek to align its antitrust policy with the broader national interest is as valid today as it was in 1958.²⁶⁸ The goal is to promote the overall national interests and not merely to press antitrust policy to its arguable outermost legal limits. For Brewster, this meant reevaluating jurisdictional and other doctrines which created unnecessary conflicts with allies during the Cold War.²⁶⁹ While this may include restricting private treble damages law suits with strong foreign policy implications, at a minimum, it also means the national government (not just the antitrust agencies) fully considering the foreign policy implications of its

267. *Id.* at 4. Outside the oil field, foreign policy considerations have occasionally trumped competition concerns as well. Prominent examples include the Reagan Administration's decision not to proceed with recommended indictments against the foreign and domestic firms which allegedly forced the bankruptcy of Lake Airways. See WALLER, ANTRITRUST, *supra* note 43, § 4.11. In the international trade field, antitrust concerns have been frequently subordinated to trade and foreign and domestic political concerns in the instigation and negotiation of so-called "voluntary restraint agreements" limiting imports into the United States. See WALLER, INTERNATIONAL TRADE, *supra* note 5, § 14.

268. BREWSTER, *supra* note 19, at vii. See generally Spencer Weber Waller, *Antitrust and American Business Abroad Today*, 44 DEPAUL L. REV. 1251 (1995).

269. BREWSTER, *supra* note 19, at 442-58.

competition policy and declining to act unless there is a net gain for the United States. While the jurisdictional and other doctrinal barriers have fallen, the prosecutorial discretion of both the Justice Department and the FTC have so far been wisely exercised in refraining from jeopardizing the national interest by bringing a case that has little prospect of achieving a more competitive international oil market.

XII. CONCLUSION

There are few if any doctrinal obstacles for the *right* plaintiff to bring the *right* kind of case against OPEC or its member nations. A private plaintiff who was also a direct purchaser or who could make out the improbable claim that the OPEC member nations have conspired with the multinational oil companies would have a case that passes muster under any fair reading of the requirements of both United States antitrust law and the special defenses that apply to the anticompetitive actions of foreign governments. State attorneys general would have a harder time under their own state antitrust laws or their *parens patrie* powers in federal courts because of the likely interference with the exclusively federal foreign affairs power. That leaves the United States federal antitrust agencies, who could proceed with a case, but who have chosen not to do so in the past thirty years, despite the obvious domestic political incentive to attack an unpopular (to say the least) foreign entity and its member nations.

Does that mean an intrepid antitrust plaintiff will succeed in bringing OPEC to its knees, where others in the past have failed? Of course not. Despite the Supreme Court having unintentionally cleared away the dubious doctrinal underbrush that arguably justified the original *OPEC* decisions, it is highly unlikely that any court will let such a case past the pleadings stage. There is a palpable sense that this is precisely the type of case that courts should not be deciding on the merits. Doctrine is not so inflexible that existing defenses and immunities cannot be revived, twisted, applied by analogy, or simply tortured into dismissing or abstaining from deciding the suit.

This look inside Pandora's Box suggests a couple of equally troubling conclusions. In order to reach an eminently sensible conclusion, the courts, in the original *OPEC* case and the Cuban expropriation cases before them, distorted accepted doctrine that still echoes in the many less controversial international cases that followed. If *Prewitt* continues to be litigated, or additional actions are brought, the same thing would undoubtedly happen again.

Congress and the Supreme Court have crafted and interpreted doctrine to address the easy cases, and not the hard ones from which the defenses and immunities were designed to protect us. Note that I have said *us*, not *them* or the *defendants*. In the end, the FSIA, the Act of State Doctrine, and related notions should be interpreted to protect the courts from having to decide cases that they are ill-equipped to handle and that would be disastrous for the country if adjudicated on the merits. Our most fundamental foreign policies should be made at the federal level through diplomacy and the appropriate interaction between the executive and legislative branches and not via lawsuits.

So, why can't you sue OPEC? To paraphrase President Nixon, our chief executive at the time of the first energy crisis, you can do it but it would be wrong.²⁷⁰

270. THE PRESIDENTIAL TRANSCRIPTS 117-18 (Delacorte Press 1974) (Meeting: The President, John Dean and John Haldeman, Oval Office, Mar. 21, 1973, 10:12-11:55 a.m.).

