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Abstract

Part I of this Comment will discuss briefly the cases in which the defenses have been asserted. Part I will examine the underlying policies of each defense. In Part II of this Comment each of the defenses will be applied separately to the facts of a recent antitrust case, In re Uranium Antitrust Litigation. Finally, in Part III, the application of the separatist approach to those facts will be critiqued, and an alternative approach to the defenses will be discussed.

DEFENSES TO INTERNATIONAL ANTITRUST SUITS: AN AGGREGATE APPROACH

INTRODUCTION

The extraterritorial application[1] of the United States antitrust laws[2] has focused the attention of jurists and academics on the act of state, foreign sovereign immunity and foreign sovereign compul-

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1. "Extraterritorial application," as employed in this Comment, refers to the extension of United States antitrust laws to foreign defendants whose illegal conduct takes place, either in whole or in part, outside the territorial United States.

The only case in which a United States court exercised jurisdiction over parties whose illegal conduct took place wholly outside of the United States is United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945). The case is famous for enunciating the "effects" doctrine which confers jurisdiction on a United States court when any of the allegedly anticompetitive conduct has an effect within the territorial United States.

> We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States . . . . Both agreements would clearly have been unlawful, had they been made within the United States; and it follows from what we have just said that *both were unlawful, though made abroad, if they were intended to affect imports and did affect them.*

Id. at 443-44 (emphasis added).

Most of the cases in which the antitrust laws have been applied extraterritorially have had some portion of the allegedly violative conduct take place within the United States. *See generally* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) (Canadian acts took place partly within the United States); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) (United States corporation part owner of British conspirator); United States v. Sisal Sales Corp., 274 U.S. 268 (1927) (combination entered into in United States); United States v. Holophane Co., 119 F. Supp. 114 (S.D. Ohio 1954), *aff'd per curiam*, 352 U.S. 903 (1956) (domestic corporation involved in conspiracy); United States v. Imperial Chem. Indus. Ltd., 105 F. Supp. 215 (S.D.N.Y. 1952) (illegal acts committed in United States); United States v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947) (conspiracy entered into in United States).

The *Alcoa* "effects" test has recently been criticized by cases which seek to apply a more comprehensive balancing approach. *See* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597 (9th Cir. 1976). This controversy surrounding the proper test for jurisdiction remains unsettled. For a more in depth discussion of the jurisdictional difficulties surrounding the extraterritorial application of the antitrust laws, see generally, B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 19-78 (1979); Davidow, *Extraterritorial Application of U.S. Antitrust Law in a Changing World*, 8 LAW & POL'Y INT'L BUS. 895 (1976); Haight, *International Law and Extraterritorial Application of the Antitrust Laws*, 63 YALE L.J. 639 (1954); Simson, *The Return of American Banana: A Contemporary Perspective on American Antitrust Abroad*, 9 J. INT'L L. & ECON. 233 (1974); Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View From Abroad*, 11 CORNELL INT'L L.J. 195 (1978); Note, *Extraterritorial Application of United States Laws: A Conflict of Laws Approach*, 28 STAN. L. REV. 1005 (1976); Recent Development, 46 FORDHAM L. REV. 354 (1977).

2. The major antitrust laws are: The Sherman Anti-Trust Act of 1890, 15 U.S.C. §§ 1-7 (1976); The Clayton Anti-Trust Act, 15 U.S.C. §§ 12, 13, 14-21, 22-27 (1976); and The Wilson Tariff Act, 15 U.S.C. §§ 8-11 (1976).

sion defenses which are frequently asserted in the context of international antitrust litigation. Historically, United States courts have applied and analyzed each defense individually.[3] It has been suggested that this method is required by the different policies underlying each defense.[4] This separatist approach can lead to the anomalous situation in which an innocent defendant being unable to meet the requirements of each defense will be subjected to antitrust liability.[5] In such a situation, the separatist approach is inappropriate because it fails to recognize the policy considerations underlying the defenses.

Part I of this Comment will discuss briefly the cases in which the defenses have been asserted. Part I will examine the underlying policies of each defense. In Part II of this Comment each of the defenses will be applied separately to the facts of a recent antitrust case, *In re Uranium Antitrust Litigation*.[6] Finally, in Part III, the application of the separatist approach to those facts will be critiqued, and an alternative approach to the defenses will be discussed.

I. *THE DEFENSES*

A. *Act of State Doctrine*

The act of state doctrine is not mandated by the Constitution or by international law.[7] Rather, it is a product of federal common

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3. *See generally* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (act of state); The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812) (sovereign immunity); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979) (act of state); Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977) (act of state); Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597 (9th Cir. 1976) (act of state); Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965) (sovereign immunity) International Ass'n of Machinists & Aerospace Workers v. OPEC, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd*, 649 F.2d 1354 (9th Cir. 1981), *appeal docketed*, No. 81-645 (U.S. Nov. 9, 1981). (district court discussed sovereign immunity; circuit court discussed act of state). The only case in which foreign sovereign compulsion has been successfully argued is Interamerican Ref. Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D.Del. 1970).

4. Comment, *Defenses to Actions Against Foreign States Under the United States Antitrust Laws*, 20 HARV. INT'L L.J. 583, 656-61 (1979). *Accord* B. HAWK, *supra* note 1, at 27 (Supp. 1981).

5. Conversely, an admittedly guilty defendant could escape liability simply by meeting the mechanical requirements of one defense.

6. 480 F. Supp. 1138 (N.D. Ill. 1979).

7. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421-27 (1964). The doctrine does, however, have "constitutional" underpinnings. *Id.* at 423. "It arises out of the basic

law,[8] created to "maintain a certain stability and predictability in transnational transactions, to avoid friction between nations, to encourage settlement of these disputes through diplomatic means and to avoid interference with the executive control of foreign relations."[9] The act of state doctrine achieves these goals by barring adjudication acts by foreign governments in United States courts.[10]

The policies which prompted Chief Justice Fuller to first articulate the doctrine in *Underhill v. Hernandez*[11] were respect for sovereigns and the preservation of the dignity of nations.[12] In applying the doctrine, he stated:

> [e]very 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.[13]

This rigid approach survived for over fifty years until the Court decided *Banco Nacional de Cuba v. Sabbatino.*[14] The *Sabbatino* Court, "rather than laying down or reaffirming an inflexible and

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relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations." *Id.*

8. The act of state doctrine is not codified in any statute but rather was judicially developed. *See* Underhill v. Hernandez, 168 U.S. 250 (1897).

9. 376 U.S. at 447 (White, J., dissenting). *See* Note, *Sherman Act Jurisdiction and the Acts of Foreign Sovereigns*, 77 COLUM. L. REV. 1247, 1255 (1977); Comment, *Sherman Act Litigation: A Modern Generic Approach to Objective Territorial Jurisdiction and the Act of State Doctrine*, 84 DICK. L. REV. 645, 654 (1980); Comment, 12 SUFFOLK U.L. REV. 97, 101 (1978).

10. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 439 (1964); United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324, 327-28 (1937); Shapleigh v. Mier, 299 U.S. 468, 471 (1937); Ricaud v. American Metal Co., 246 U.S. 304, 310 (1918); Oetjen v. Central Leather Co., 246 U.S. 297, 303-04 (1918).

11. 168 U.S. 250 (1897).

12. *Id.* at 254. Implicitly, the Court could not infringe upon the acts of a foreign sovereign government without offending the sovereignty of that nation.

13. *Id.* at 252.

14. 376 U.S. 398 (1964). In 1960, respondents Farr, Whitlock & Co. contracted with an American owned, Cuban based company, Compania Azucarera Vertientes-Camaquey de Cuba (CAV), for the purchase of Cuban sugar. Shortly after this agreement was reached, Congress reduced the import quota for Cuban sugar. In reaction to this Congressional action, the Cuban government expropriated CAV's property and assigned the contract rights to Banco Nacional. Banco Nacional brought an action to recover on the assigned rights from Sabbatino, CAV's temporary receiver. Sabbatino defended against the suit on the ground

all-encompassing rule,"[15] balanced relevant factors including: (1) the degree of international consensus in the specific area of the law involved in the claim; (2) the importance of the issue raised by the action juxtaposed with United States foreign policy; and (3) whether the challenged government remained in existence.[16] Applying these considerations to the facts before it, the Court held that the act of state doctrine barred any adjudication of the validity of the Cuban expropriation.[17] The Court limited its holding, stating "we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government . . . even if the complaint alleges that the taking violates customary international law."[18]

The *Sabbatino* approach reflects a shift in the Court's focus from concern for embarrassment of the Executive in foreign policy matters to the separation of powers.[19] Post-*Sabbatino* courts have consistently accepted this policy view, which is more concerned with protecting the separation of powers than the dignity of foreign sovereigns.[20] Although courts agree on the policy underlying the act of state doctrine, they disagree on the manner of its application. Some courts take a rigid approach reminiscent of *Underhill*[21] while others employ the *Sabbatino* balance of relevant considerations.[22]

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that Cuba's expropriation violated international law and that Banco Nacional, therefore, did not validly hold the rights upon which the action was based. Banco Nacional argued that the act of state doctrine precluded the Court from judging the validity of Cuba's act. The district court found that the acts violated international law and granted summary judgment for the respondents. The circuit court affirmed. *Id.* at 401-07.

15. *Id.* at 428.

16. *Id.*

17. *Id.* The Court found that no international consensus regarding expropriation existed, and that the issues involved were of great importance to United States foreign policy. These findings coupled with the finding that the expropriating Cuban government was still in existence led the Court to hold as it did. *Id.* at 428-39.

18. *Id.* at 428.

19. *See supra* note 9 and accompanying text.

20. *See generally* International Ass'n of Machinists & Aerospace Workers v. OPEC, 649 F.2d 1354 (9th Cir.), *appeal docketed*, No. 81-645 (U.S. Nov. 9, 1981); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979); Hunt v. Mobil Oil Co., 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977); Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597 (9th Cir. 1976); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972).

21. *See, e.g.*, American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909); Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972).

The tension between the *Underhill* and *Sabbatino* approaches is apparent in the antitrust cases involving the act of state doctrine. The doctrine was first applied in an antitrust context to bar judicial review of a Costa Rican seizure allegedly induced by the plaintiff's competitor in *American Banana Co. v. United Fruit Co.*[23] *Ameri-*

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22. *See, e.g.*, Industrial Inv. Dev. Corp. v. Mitsui & Co., 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3rd Cir. 1979); Timberlane Lumber Co., v. Bank of Am. N.T. & S.A., 549 F.2d 597 (9th Cir. 1976).

The Sabbatino Amendment, 22 U.S.C. § 2370(e), was enacted immediately after the Supreme Court's decision. It provides that in expropriation cases:

> "[N]o court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law . . . [unless] the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States . . . .

22 U.S.C. § 2370(e)(2) (1976).The President, therefore, could control the application of the doctrine in foreign expropriation cases which violate international law.

The problem of Executive influence in the act of state doctrine also arises in the so called "Bernstein Exception." The "Bernstein Exception" states that the act of state doctrine bars judicial review *unless* the Executive clearly states otherwise. Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954); Bernstein v. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 173 F.2d 71 (2d Cir. 1949); Bernstein v. Van Heyghen Frères Société Anonyme, 163 F.2d 246 (2d Cir.), *cert. denied*, 332 U.S. 772 (1947). The propriety of the exception was not discussed in *Sabbatino* and is as yet unsettled. *See* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972) (a plurality decision regarding the propriety of the exception).

Finally, a third issue surrounding the act of state doctrine is whether there is a commercial activity exception. The Justice Department has taken the position that the defense does not apply to the commercial activities of a foreign government. *See* U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 54-55 (1977). The Justice Department relies on the case of Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) in support of its position. This means that the act of state doctrine would not be available as a defense in situations in which the foreign government was engaged in a commercial activity. Professor Hawk suggests that the Department's reliance on *Dunhill* is misplaced. B. HAWK *supra* note 1, at 133. "[A]t least five, and possibly six of the Justices on the Supreme Court have indicated that they would not as a rule apply the commercial activity exception to the act of state doctrine." *Id.* Professor Hawk suggests a possible solution to the commercial activity exception issue:

> Perhaps the best solution is to treat the commercial or non-commercial aspect of the foreign sovereign action as one consideration in a balancing of interests approach to determine whether the act of state doctrine applies, rather than applying the commercial activity limitation as rigid standard. While the commercial aspect of the action may favor application of the antitrust laws, other factors may be present which implicate considerations outweighing the United States' interest in application of this antitrust laws in a particular foreign situation.

Id.

23. 213 U.S. 347 (1909). American Banana alleged that United Fruit had induced the Costa Rican military to seize part of American Banana's plantation and cargo. The plaintiff also alleged that this action was in furtherance of a conspiracy to monopolize the production

can Banana represents a mechanistic approach to the act of state doctrine.[24] The Court did not engage in any policy analysis in reaching its decision; rather it merely restated the *Underhill* rule in territorial terms.[25] Although its precedential value has been questioned,[26] *American Banana* continues to be cited whenever the act of state doctrine is invoked.[27]

The most recent antitrust case to follow the mechanistic approach to act of state is *Hunt v. Mobil Oil Corp.*[28] The plaintiff, Hunt, alleged that the defendant oil companies had violated section 2 of the Sherman Act by conspiring to provoke Libya into nationalizing all of Hunt's Libyan assests. The district court held that the adjudication of Hunt's claim would "require inquiry into acts and conduct of Libyan officials, Libyan affairs and Libyan policies . . . ."[29] The court refused to engage in such an inquiry.[30] Writing for the Second Circuit, Judge Mulligan affirmed on appeal.[31]

The plaintiff, Hunt, asked the court to examine Libya's motivation in nationalizing Hunt's assets.[32] Judge Mulligan effectively

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and exportation of bananas from Central America. The Court affirmed the dismissal of the suit on two grounds: (1) the act of state doctrine and (2) by refusing to extend the Sherman Act to conduct which occurs wholly outside of the United States. *Id.* at 355-57.

24. *See* 376 U.S. at 416.

25. 213 U.S. at 357-58.

26. *American Banana* has been criticized primarily for its approach to the jurisdictional issue. *See, e.g.*, Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1291 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of Am. N.T. & S.A., 549 F.2d 597, 608 n.12 (9th Cir. 1976); Conservation Counsel of W. Austl., Inc. v. Aluminum Co. of Am., 518 F. Supp. 270, 274 (W.D. Pa. 1981).

27. *See, e.g.*, Hunt v. Mobil Oil Corp., 550 F.2d 68, 73-74 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977); Tabaclera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706, 712 (5th Cir. 1968); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 109 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972).

28. 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977). The Libyan government permitted oil companies, including Hunt's, to explore and produce crude oil in Libya. In 1970, Libya increased its "take" of crude oil from all Libyan producers. In 1971, Libya again attempted to increase its "take." The defendants and Hunt met to discuss the formation of a "united front" against Libya. The parties agreed, after receiving Justice Department consent, that no individual producer would make concessions to Libya without the consent of the others. In addition, if Libya cut back on the production of one party, the others would share the burden equally. In 1972, Libya demanded an increased "take" and 51% ownership of Hunt's equity. Hunt, relying on the agreement, resisted the demands. Libya terminated Hunt's concession and nationalized all of Hunt's assets. Hunt filed suit against the defendants, alleging that they had conspired to provoke Libya's nationalization in order to drive Hunt out of competition in the Middle East. *Id.* at 70-72.

29. 410 F. Supp. 10, 24 (S.D.N.Y. 1976).

30. *Id.* at 25.

31. 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

32. *Id.* at 78.

foreclosed any possibility that act of state would permit a motivational inquiry. He stated, "while the skilled pleader here has meticulously attempted to avoid the issue of validity [of the nationalization], its claim is admittedly not viable unless the judicial branch examines the motivation of the Libyan action and *that inevitably involves its validity.*"[33] The language is a clear reaffirmation, if not an extension, of *American Banana.*[34]

The court found Libya's actions to be genuine acts of a foreign sovereign, thereby eliminating the need for any further analysis.[35] By refusing to adjudicate Hunt's claim the court effectively protected the separation of powers. This result was acknowledged by the court, through not specifically analyzed as a basis for the decision.[36]

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33. *Id.* (emphasis added).

34. *American Banana* did not address the possibility of a motivational inquiry. *Hunt* extends the act of state doctrine to the motivation underlying the foreign acts. Currently, under *Hunt*, a court cannot examine the validity *or* the motivation underlying the foreign act. *See id.* at 78 n.14.

35. The *Hunt* court did not discuss the possibility of affording Hunt relief once it had determined that the Libyan act was an act of state. *Id.* at 79. A genuine act of state is one in which the government gives effect to its public interests. *See infra* note 50 and accompanying text.

36. 550 F.2d at 77-78. The *Hunt* court acknowledged that there was a political problem involved in the decision but considered that problem only for the purpose of mechanically applying the act of state doctrine. *Id.* at 73. The court did not engage in any interest analysis.

One court has suggested that "[t]he act of state doctrine is similar to the political question doctrine in domestic law. It requires that the courts defer to the legislative and executive branches when those branches are better equipped to resolve a politically sensitive question." International Ass'n of Machinists & Aerospace Workers v. OPEC, 649 F.2d 1354, 1358 (9th Cir.), *appeal docketed*, No.81-645 (U.S. Nov. 9, 1981). The circuit court in *OPEC*, the facts of which are discussed *infra*, notes 88-90, concentrated on the separation of powers consideration in applying act of state. However, Judge Choy writing for the court stated that "[l]ike the political question doctrine, [the] applicability [of the act of state doctrine] is not subject to clear definition. The courts balance various factors to determine whether the doctrine should apply." *Id.* at 1358-59. If Judge Choy is correct, then, while separation of powers might be the major consideration underlying act of state, it is not the sole one.

This implies that the court should also examine the factors involved in a political question analysis in order to determine whether the act of state doctrine should apply in a given situation. These factors are enunciated in Baker v. Carr, 369 U.S. 186, 217 (1962). A court would have to examine whether there is a textually demonstrable constitutional commitment of the issue to a coordinate political department, whether there is a lack of judicially discoverable and manageable standards for resolving the issue, whether it is impossible to decide the issue without an initial policy determination of a kind clearly for non-judicial discretion, whether the court's undertaking the resolution of the issue will show disrespect toward another branch of the government, whether there is an unusual need for strict adherence to a political decision already made and whether there is potential for political embarassment. *Id.*

Other courts have refused to take such an approach, preferring to address each policy consideration individually in light of the facts in each case.[37] In *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*,[38] the plaintiff alleged that the defendants had violated sections 1 and 2 of the Sherman Act[39] by obtaining a Honduran court order preventing Timberlane from operating its Honduran based lumbermill.[40] These actions were allegedly in furtherance of a conspiracy to drive Timberlane out of the Honduran lumber market.[41] The district court dismissed the suit under the act of state doctrine.[42] The circuit court vacated and remanded.[43] Judge Choy, writing for the Ninth Circuit, rejected any possibility that the act of state doctrine would be applicable solely because a foreign government was involved.[44] The court held that the applicability of the defense depended upon a balancing of all relevant considerations.[45] The court acknowledged that judicial interference with foreign relations was a major consideration but stated that as the importance of the issue to foreign policy decreased, the argument favoring judicial involvement became more compelling.[46]

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37. *See, e.g.*, Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597 (9th Cir. 1976).

38. 549 F.2d 597 (9th Cir. 1976). Timberlane had purchased its Honduran lumber mill from a family heavily in debt. Timberlane alleged that the defendants refused to allow Timberlane to settle the debts of the mill. Rather, defendants obtained a Honduran court order preventing the sale of the mill and subsequently preventing Timberlane from operating it.

39. *Id.* at 600.

40. *Id.* at 604-05.

41. *Id.*

42. *Id.* at 600.

43. *Id.* at 601.

44. *Id.* at 606.

45. *Id.* at 605-08. The balancing test which Judge Choy used was actually designed to resolve the jurisdictional issue. Judge Choy balanced (1) whether the alleged restraint affected or was intended to affect United States foreign commerce; (2) whether the alleged restraint was of the type and magnitude recognized as a violation of the Sherman Act; and (3) whether the Sherman Act should be applied as a matter of international comity and fairness. *Id.* at 613. Some commentators have suggested that this balancing test be applied to the issue of whether act of state should be applied. *See, e.g.*, Comment, *The Pitfalls of Act of State Analysis in the Antitrust Context: A Critique of* Hunt v. Mobil Oil, 6 DEN. J. INT'L L. & POL'Y 749 773-74 (1976); Note, IAM v. OPEC: *The Demise of the Restrictive Theory of Sovereign Immunity & of the Extraterritorial Effect of the Sherman Act Against Foreign Sovereigns*, 41 U. PITT. L. REV. 841, 857 (1980); Recent Decision, 18 VA. J. INT'L L. 321, 334-35 (1978).

46. 549 F.2d at 607. *See also* 376 U.S. at 428.

The court ruled that the act of state doctrine did not apply,[47] reasoning that a "sovereign act" exists when the sovereign government has exercised its jurisdiction to give effect to its public interests.[48] The Honduran government had not been named as a party.[49] The Honduran court proceedings were not "sovereign acts" within the meaning of the defense[50] and therefore, the justification for judicial abstention was weak.[51]

Another recent antitrust case in which a balancing test was employed is *Mannington Mills, Inc. v. Congoleum Corp.*[52] The plaintiff, Mannington, alleged that the defendant secured foreign patents by fraud and thus violated the United States antitrust laws.[53] The district court invoked the act of state doctrine and dismissed the action.[54] The circuit court disagreed and remanded for the development of an adequate record.[55]

The defendant, relying on the act of state defense, argued that a foreign patent could only be granted by "affirmative governmental actions"[56] and therefore was an act of state.[57] The circuit court stated:

> The grant of patents for floor coverings is not the type of sovereign activity that would be of substantial concern to the executive branch in its conduct of international affairs. Although enforcement of a decree in the present litigation may possibly present problems of international relations . . . the granting of the patents per se, in substance ministerial activity, is not the kind of governmental action contemplated by the act of state doctrine . . . .[58]

While not specifically rejecting *Hunt*, the opinion rejects *Hunt's* rigid approach in favor of the more flexible balancing ap-

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47. 549 F.2d at 608.
48. *Id.* at 607-08.
49. *Id.* at 608.
50. *Id.*
51. *Id.*
52. 595 F.2d 1287 (3d Cir. 1979).
53. *Id.* at 1290. Mannington sued Congoleum on the grounds that Congoleum had fraudulently received patents. Mannington alleged that Congoleum had made false statements concerning test data, United States patent applications and reaction and performance of some chemical compounds of vinyl. *Id.*
54. *Id.* at 1290.
55. *Id.*
56. *Id.* at 1293.
57. *Id.*
58. *Id.* at 1294.

proach.[59] The balancing tests used in *Timberlane* and *Mannington Mills* necessarily address the interests underlying the act of state doctrine while the *Hunt* approach disregards them. Nevertheless, *Hunt* remains viable.[60] *Timberlane* and *Mannington Mills* merely demonstrate that the courts are amenable to the use of balancing tests even though they tend to extend the courts' analyses.

B. *Foreign Sovereign Immunity*

The first articulation of the defense of foreign sovereign immunity by a United States court was in 1812. In *The Schooner Exchange v. McFaddon*[61] the Court upheld the French government's plea of immunity in an action against France for the attachment and repossession of a sailing vessel.[62] By granting France "absolute" immunity, *McFaddon* reflected the policy of protecting the

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59. *Id.* Again, the balancing test employed in *Mannington Mills* was used to resolve the jurisdictional issue. The court balanced the following factors:

> (1) Degree of conflict with foreign law or policy; (2) Nationality of the parties; (3) Relative importance of the alleged violation of conduct here compared to that abroad; (4) Availability of a remedy abroad and the pendency of litigation there; (5) Existence of intent to harm or affect American commerce and its foreseeability; (6) Possible effect upon foreign relations if the court exercises jurisdiction and grants relief; (7) If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; (8) Whether the court can make its order effective; (9) Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances (10) Whether a treaty with the affected nations has addressed the issue.

Id. at 1297-98 (footnotes omitted).

In addition to *Timberlane* and *Mannington Mills*, one other international antitrust case has criticized *Hunt*. In Industrial Inv. Dev. Corp. v. Mitsui & Co., 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980), the court held that the refusal of the Indonesian Department of Forestry to issue a timber cutting permit to the plaintiff did not amount to an act of state. *Id.* at 55-56. The court found no special factors which would outbalance the United States' interest in reaching the anticompetitive conduct. *Id.* at 53. "Precluding all inquiry into the motivation behind or circumstances surrounding the sovereign act would uselessly thwart legitimate American goals where adjudication would result in no embarrassment to executive department action." *Id.* at 55. Thus, *Mitsui* rejected both *Hunt's* general approach to act of state and its approach on the motivational issue.

60. There has been no Supreme Court decision overruling *Hunt* in favor of the balancing approach. The two approaches are currently competing for supremacy. For commentators criticizing *Hunt*, see, 12 SUFFOLK U.L. REV. 97, 113-15 (1978) and 18 VA. J. INT'L L. 321, 328 (1978).

61. 11 U.S. (7 Cranch) 116 (1812).

62. *Id.*

equality, territorial independence and dignity of foreign governments.[63]

The "absolute" theory was consistent with the prevailing conception of the sovereign in 1812. At that time, it was believed that sovereignty was embodied in figureheads who would be offended by actions which impinged upon their personal dignity and power. As the concept of sovereignty changed, so did the concept of foreign sovereign immunity and its underlying policies.[64] Commentators have noted, "[c]omplex and impersonal bureaucracies whose effectiveness [did] not depend on the inviolability of their national dignity and honor"[65] replaced the personal government.[66] This shift to an "impersonal" government redirected the focus of the foreign sovereign immunities defense, concentrating on the protection of foreign governments from harassing and interfering litigation.[67] This new policy focus changed the applicability of the defense because only public fuctions were given immunity.

In 1952, the United States adopted this "restrictive" theory of foreign sovereign immunity as embodied in the so-called Tate Letter.[68] This shift in policy was based on the principle of reciprocity, the need for protection of individuals who entered into commercial undertakings with foreign sovereigns, the erosion of sovereign immunity domestically and the general international trend toward adopting the "restrictive" theory.[69] Unfortunately, the Tate Letter

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63. *Id.* at 147. Hill, *A Policy Analysis of the American Law of Foreign State Immunity*, 50 FORDHAM L. REV. 155, 164 (1982). The "absolute" theory of foreign sovereign immunity completely protects the foreign government from suit, regardless of the nature or purpose of the transaction from which the suit arose. The sovereign, therefore, can only be sued with its consent. *See generally* Timberg, *Sovereign Immunity and Act of State Defenses: Transnational Boycotts and Economic Coercion*, 55 TEX. L. REV. 1, 5-8 (1976); Note, *supra* note 47, at 844; Recent Development, 4 BROOKLYN J. INT'L L. 146, 147 (1977).

64. Cooper, *Act of State and Sovereign Immunity: A Further Inquiry*, 11 LOY. U. CHI. L.J. 193 (1980).

65. Hill, *supra* note 63, at 193.

66. Cooper, *supra* note 64, at 199.

67. Hill, *supra* note 63, at 165. *See also* Comment, *Judicial Adoption of Restrictive Immunity for Foreign Sovereigns*, 51 VA. L. REV. 316, 321-24 (1965).

68. Letter from Jack B. Tate, Acting Legal Advisor of the Department of State, to the Acting Attorney General, *reprinted in* 26 DEP'T ST. BULL. 984 (1952).

69. Cooper, *supra* note 64, at 201.

(1) the trend in other countries toward the restrictive theory of sovereign immunity; (2) principles of reciprocity—since the United States did not claim immunity in foreign courts in contract or tort, the U.S. should deny immunity to foreign sovereigns in similar instances; (3) the erosion of sovereign immunity in domestic courts;

did not provide the courts with guidelines for applying the "restrictive" theory.[70] Often this led the courts to defer to the State Department for guidance when applying foreign sovereign immunity in a given situation.[71] The defense became more politically than legally based.[72] The political influence often led to inconsistent decisions regarding the granting or withholding of immunity.[73] As one commentator suggested, "[the courts] saw themselves bound by the policy enunciated in the [Tate Letter], but were unable to extract therefrom any specific principles to guide their decisions."[74] While the courts were aware of the reasons for the policy shift, the lack of direction from the Legislative Branch, and Executive interference in the application of the defense, created more problems than the Tate Letter solved.

Congress resolved these problems by enacting the Foreign Sovereign Immunities Act of 1976 (FSIA)[75] which codifies the "restrictive" theory and ensures that all decisions involving the granting or withholding of immunity will be made on a legal rather than a political basis.[76] The FSIA explicitly established the "restrictive" theory of sovereign immunity as United States law,[77] terminated the State Department's role in the application of the defense,[78] established jurisdictional rules for its application,[79] and provided

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(4) the need of individuals who enter commercial undertakings with a government for a forum for resolution of disputes; (5) "[t]he reasons which obviously motivate state trading countries in adhering to the [absolute] theory with perhaps increasing rigidity are most persuasive that the United States should [adopt the restrictive theory] . . . ."

Id. (footnote omitted).

70. Hill, *supra* note 63, at 176. *See* Tate Letter, *supra* note 68.

71. Hill, *supra* note 63, at 176; Timberg, *supra* note 65, at 8-13; Editorial Comments, *Sovereign Immunity - The Case of the "Imias,"* 68 AM. J. INT'L L. 280, 281 (1974).

72. Letter to the Speaker, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6634-35 [hereinafter cited as Letter to the Speaker]. *See also* Tate Letter, *supra* note 68.

73. The political influence of the State Department led to situations in which immunity was granted in clearly commercial cases. *See, e.g.*, Rich v. Naviera Vacuba, S.A., 295 F.2d 24 (4th Cir. 1961) (per curiam); Aerotrade, Inc. v. Republic of Haiti, 376 F. Supp. 1281 (S.D.N.Y. 1974). In addition, immunity was granted in some cases *after* the foreign government had waived it. *See, e.g.*, 295 F.2d 24 (4th Cir. 1961).

74. Hill, *supra* note 63, at 176.

75. 28 U.S.C. §§ 1330, 1332(a), 1391(f) & 1601-11(1976).

76. Letter to the Speaker, *supra* note 72, at 6634.

77. *See* 28 U.S.C. §§ 1602, 1603, 1605-07 (1976); *see* H.R. REP. No. 1487, 94th Cong., 2d Sess. 12-14, 16-22, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604, 6611-13, 6614-21 [hereinafter cited as House Report].

78. *See* 28 U.S.C. § 1602 (1976).

79. *See* House Report, *supra* note 77, at 8, 12-14, 23-26, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6606, 6610-12, 6621-25.

for execution of judgments on foreign property.[80] The FSIA does not extend immunity to any situation

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.[81]

The question which most frequently arises in the assertion of foreign sovereign immunity is whether a given action is public or private in nature. The FSIA provided the "nature of the course of conduct"[82] standard which has subsequently been interpreted by the courts. Private actions are those which both the government and the private sector can perform. Public actions, on the other hand, can only be performed by the government.[83] Thus, levying taxes to raise capital would be a public function while the securing and repaying of a loan for a similar purpose would be a private action.[84] While this distinction seems straightforward, it appears that courts can manipulate the facts of a case in order to achieve the desired result. A comparison of *International Association of Machinists & Aerospace Workers v. OPEC*[85] with *Outboard Marine Corp. v. Pezetel*[86] illustrates this point.

In *OPEC*, IAM sued OPEC for price fixing in violation of the Sherman Act.[87] OPEC maintained the price of oil by regulating

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80. 28 U.S.C. § 1610(a); House Report, *supra* note 77, at 7-8, 26-31, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6605-06, 6624-30.

81. 28 U.S.C. § 1605(a)(2) (1976).

82. 28 U.S.C. § 1603(d) (1976).

83. For cases endorsing this approach, see Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 704 (1976); International Ass'n of Machinists & Aerospace Workers v. OPEC, 477 F. Supp. 553, (C.D. Cal. 1979), *aff'd*, 649 F.2d 1354 (9th Cir.), *appeal docketed*, No. 81-645 (U.S. Nov. 9, 1981).

84. *Compare* National Am. Corp. v. Federal Republic of Nig. 448 F. Supp. 622, 641 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979) (foreign government's breach of a letter of credit agreement is a commercial act) *with* Carey v. National Oil Corp., 453 F. Supp. 1097, 1102 (S.D.N.Y. 1978), *aff'd*, 592 F.2d 673 (2d Cir. 1979) (nationalization of oil is a non-commercial act).

85. 477 F. Supp. 553 (C.D. Cal 1979), *aff'd*, 649 F.2d 1354 (9th Cir.), *appeal docketed*, No. 81-645 (U.S. Nov. 9, 1981).

86. 461 F. Supp. 384 (D. Del. 1978).

87. 477 F. Supp. at 558-59. OPEC consisted of thirteen member nations which either owned or actively participated in the management of firms which produced and exported oil. 649 F.2d at 1355.

the amount of crude oil leaving the respective member countries and by engaging in its own production and export operations.[88] The district court ruled that OPEC's activities were essentially public in nature and therefore immune from suit under the FSIA. "[T]he nature of the activity engaged in by each of these OPEC member countries is the establishment by a sovereign state of the terms and conditions for the removal of a prime natural resource-to wit, crude oil-from its territory."[89] The court reasoned that "[t]he 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."[90] The court explained its view of OPEC's operation, stating that the "governmental nature [of the regulatory activity] does not change merely because the medium through which the activity is accomplished has changed."[91] Thus, the public nature of the regulatory activity was extended to the essentially private production activities and bootstrapped the production activities into the protection of foreign sovereign immunity.

Several commentators have taken issue with the district court's finding of immunity.[92] They argue that the cartel's acts were obviously commercial and therefore a proper subject of suit.[93] To support this criticism, they rely on a House Report which explicitly states: "'a regular course of commercial conduct' includes the carrying on of a commercial enterprise *such as a mineral extraction company*, an airline, or a state trading corporation."[94] How then, did the *OPEC* court come to the opposite conclusion?

The volatile Middle East situation in which the *OPEC* decision was made seems to have been a major factor in the district court's decision.[95] While the FSIA shields the courts from the direct influ-

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88. In addition, OPEC accomplished this without the aid of an enforcement arm. 649 F.2d at 1355.

89. 477 F. Supp. at 567.

90. *Id.* at 568.

91. *Id.* at 568 n.14.

92. *See, e.g.*, Crocker, *Sovereign Immunity and the Suit Against OPEC*, 12 CASE W. RES. J. INT'L L. 215 (1980).

93. *Id.* at 226-27.

94. House Report, *supra* note 77, at 16, *reprinted in*, 1976 U.S. CODE CONG. & AD. NEWS at 6614-15 (emphasis added).

95. The court also relied heavily on general principles of international law which establish the right of foreign sovereigns over their own natural resources. 477 F. Supp. at 567-68. However, because the legislative history of the defense explicitly excludes natural resources from immunity, it is possible that the court merely couched its decision in interna-

ence of the State Department, it cannot prevent, nor does it attempt to prevent, the court from including all relevant factors in its decision. *OPEC* demonstrates how the political environment in which a case is heard can affect the outcome. Although the FSIA attempts to separate the legal and political spheres, *OPEC* seems to have been decided more on a political basis than a legal basis. The district court relied on the underlying policy considerations rather than on a strict application of the defense.

The court regarded the regulation and production of crude oil as an essential function of the OPEC governments.[96] The court protected the OPEC governments from harassing and interfering litigation by immunizing the cartel from IAM's claim. It is questionable, however, whether IAM's suit was brought merely to harass OPEC. In this light, perhaps the *OPEC* decision is better seen as protecting FSIA's implicit policy of insuring the smooth operation of United States foreign policy.[97] The district court, faced with a political decision far beyond its ability and resources to adjudicate, declined to do so. This preserved the State Department's role as sole arbiter of foreign policy and left an extremely complex political situation to the Executive.[98] While this decision denied judicial relief, it did not foreclose the possibility of political or diplomatic relief. Thus, from an FSIA policy viewpoint, *OPEC* was correctly decided.

In *Outboard Marine Corp. v. Pezetel*,[99] a United States golf cart manufacturer sued a Polish golf cart manufacturer, "created by and responsible to the Peoples Republic of Poland,"[100] for restraining trade, conspiring to monopolize and importing at substantially below market price.[101] The court ruled that the defendant was engaged in a commercial activity and, therefore, was not

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tional law terms while actually deciding the case on the basis of the prevailing political environment.

96. 477 F. Supp. at 568.

97. *OPEC* essentially presents a separation of powers problem. This explains why the circuit court decided the case on act of state grounds. The protection of the smooth operation of United States foreign policy is a corollary to the separation of powers consideration and is concerned primarily with the protection of long-term foreign relations. The FSIA was enacted to protect the long term foreign policy considerations involved in the disposition of an international case and, therefore, implicitly protects the smooth operation of foreign policy.

98. The circuit court was also concerned with this aspect of the litigation. 649 F.2d at 1360-61.

99. 461 F. Supp. 384 (D. Del. 1978).

100. *Id.* at 388-89.

101. *Id.* at 390.

immune from suit under the FSIA.[102] The facts of *Pezetel* are similar to those of *OPEC*. Both the Polish and OPEC governments were engaged in commercial activities. The differences in the commodities and the political situations involved, however, may be the key to understanding why the decisions came out differently. The *Pezetel* court, unlike the *OPEC* court, was not faced with a highly volatile political situation. Rather, *Pezetel* involved a relatively unimportant commodity and a relatively stable political environment. The two cases may be reconciled by emphasizing the policies underlying the FSIA and the prevailing political climates. OMC's suit, like IAM's, was not brought merely to harass the defendant. Yet, OMC succeeds where IAM failed because the court was not faced with a difficult political decision. The court did not feel a need to defer to the State Department or forego adjudication in favor of a political or diplomatic remedy. Thus, the policy considerations behind the *OPEC* decision also function in *Pezetel* and explain the varied results.

C. *Foreign Sovereign Compulsion*

The defense of foreign sovereign compulsion has been successfully asserted in only one antitrust case, *Interamerican Refining Corp. v. Texaco Maracaibo*.[103] In *Texaco*, the plaintiff alleged that the defendant oil companies had engaged in a group boycott to prevent the plaintiff from obtaining the oil crucial to its operation.[104] The defendants asserted that the Venezuelan government forced them to cease dealing with the plaintiff.[105] The defendants argued that because the Venezuelan government compelled their actions, they were protected under the defense of foreign sovereign compulsion.[106] The court held that the defendant proved compulsion by the Venezuelan government and had a complete defense to the plaintiff's claim.[107] The court reasoned that "[w]ere compulsion not a defense, American firms abroad faced with a government order would have to choose one country or the other in which to do business. The Sherman Act does not go so far."[108] The court

102. *Id.* at 396.

103. 307 F. Supp. 1291 (D. Del. 1970).

104. *Id.* at 1292.

105. *Id.* at 1293.

106. *Id.* at 1294.

107. *Id.* at 1296. The court found that the defendants had held their concessions subject to the Venezuelan Ministry of Mines and Hydrocarbons which had threatened to suspend the defendants' right to export oil if the defendants dealt with the plaintiff. *Id.* at 1294.

108. *Id.* at 1298.

supported the application of the defense, stating that "[o]nce governmental action is shown, *further examination is neither necessary nor proper.*"[109] As noted above, the act of state doctrine bars any inquiry into the validity of an act by a foreign sovereign.[110] The applicability of the defense turns on the defendant's showing of actual compulsion. Mere acquiescence, approval or delegation of power by a government does not usually constitute compulsion.[111] Some commentators suggest that the form of the compulsion is irrelevant and that it can range from formal legislative decrees to informal verbal communications.[112]

The policy considerations behind foreign sovereign compulsion are straightforward and overlap those of the act of state doctrine.[113] The major policy consideration at work in foreign sovereign compulsion is fairness to the defendant.[114] A defendant should not be liable for violations of the antitrust laws that were compelled by a foreign government. The second policy underlying the defense is that by controlling commerce within their territories, foreign governments may require compliance with an anticompetitive regulation. In such a situation, enforcement of United States antitrust laws would force the defendant to abandon trade within one of the countries involved. The third policy underlying foreign sovereign compulsion also supports the act of state defense, namely, that a United States court will not sit in judgment on an act of foreign sovereign. "If, of course, the defendants' activities had been required by [foreign] law, [the] court could indeed do nothing. A United States court would have under such circumstances no right to condemn the governmental activity of another sovereign nation."[115]

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109. *Id.* at 1301 (emphasis added).

110. *See supra* note 10 and accompanying text.

111. 307 F. Supp. at 1298.

112. *See* B. HAWK, *supra* note 1, at 154.

113. *See id.* at 151-52.

114. *See id.* at 155.

115. United States v. Watchmakers of Switz. Information Center, Inc., 1963 Trade Cas. (CCH) ¶ 70,600, 77,456 (S.D.N.Y. 1962).

In addition, the defense of foreign sovereign compulsion is not effective if the defendants induced the compelling conduct.

A fourth policy consideration is analogous to the "state action" exemption of Parker v. Brown, 317 U.S. 341 (1943). This case does not support the act of state doctrine or the defense of foreign sovereign compulsion. Professor Hawk suggests that one of the *Parker* progeny, Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), does support the fairness consideration underlying the sovereign compulsion defense. *See* HAWK, *supra* note 1, at 154.

These underlying policies can be seen at work in *Texaco*. Once the *Texaco* court found actual compulsion, the act of state policy barred inquiry into the validity of the foreign act. The lack of wrongful inducement of the action by the defendants[116] and the possibility of a detrimental effect on the defendants for non-compliance[117] led to the finding that fairness dictated that the defendants be relieved of all liability.

II. *IN RE URANIUM ANTITRUST LITIGATION*

In re Uranium Antitrust Litigation[118] provides an excellent factual background for comparing the traditional separatist approach with an aggregate approach which emphasizes policy considerations and de-emphasizes the rigid application of rules.[119] In *Uranium* Westinghouse brought an antitrust suit against twelve foreign and seventeen domestic producers of uranium[120] for violation of section 1 of the Sherman Act[121] and section 73 of the Wilson Tariff Act.[122] The plaintiff alleged that the defendants had engaged in a conspiracy to restrain both foreign and domestic commerce in the United States.[123] Westinghouse also alleged the defendants' activities led to artificially high uranium prices forcing Westinghouse to breach some of its contracts with third parties because of the lack of uranium supply.[124] The defendants argued that they had cartelized at the suggestion of their respective governments.[125] The foreign governments, as *amicus curiae* claimed that

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116. 307 F. Supp. at 1297.

117. *See supra* note 107.

118. 480 F. Supp. 1138 (N.D. Ill. 1979).

119. *See infra* notes 136-167 and accompanying text.

120. *In re* Uranium Antitrust Litig., 473 F. Supp. 382, 382 (N.D. Ill. 1979).

121. Westinghouse Complaint at 1, 44, *In re* Uranium Antitrust Litig., 480 F. Supp. 1138 (N.D. Ill. 1979) [hereinafter cited as Westinghouse Complaint].

122. *Id.* at 44.

123. *Id.* at 19-40.

124. *Id.* at 41-44.

125. The defendants argued that foreign sovereign compulsion barred the plaintff's claim. *See, e.g.*, Answer of Gulf Oil Corp. at 26 *In re* Uranium Antitrust Litig., 480 F. Supp. 1138 (N.D. Ill. 1979); Answer of Gulf Minerals Can., Ltd. at 24 Answer of Denison Mines, Inc. at 9.

The Canadian government admittedly coordinated the cartel activities:

> The Canadian Government first sought unsuccessfully to promote a joint producer/consumer arrangement and subsequently initiated the discussions which led to an informal marketing arrangement among non-U.S. producers. The Canadian Government took this initiative and secured compliance of Canadian producers with the

they had encouraged the cartel in reaction to a United States uranium embargo.[126]

The case before Judge Marshall was concerned with discovery issues.[127] However, his attitude toward discovery indicates that he would have taken a strict approach to the application of the defenses had the litgation reached the merits of the case.[128]

The defense of foreign sovereign immunity was mechanically unavailable to the *Uranium* defendants because none of them was a

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terms of the arrangement because it was convinced that preservation of a viable uranium producing industry was essential to the Canadian national interest in the light of projections of future uranium requirements. The long history of close Canadian Government involvement in and regulation of the uranium resource industry through stockpiling, export licences and other measures clearly establishes the degree to which the Government regards the industry as vital to Canadian interests and the importance it consequently attaches to industry compliance with Government policy respecting uranium marketing.

Diplomatic Note (No. ECP-25) from Hon. Donald Jamieson, Secretary of State for External Affairs of Canada to Hon. Thomas Enders, U.S. Ambassador to Canada, November 8, 1978, *reprinted in* Memorandum of Government of Canada as Amicus Curiae, Att. D. p.2., *In re* Uranium Antitrust Litig., 480 F. Supp. 1138 (N.D. Ill. 1979) (filed May 21, 1979).

126. The Canadian government also explained that its actions were in response to the United States embargo on foreign uranium:

> The problems of the Canadian uranium industry were accentuated in August 1964 when President Johnson signed into law the Private Ownership of Special Nuclear Materials Act. One of the provisions of this Act permitted domestic and foreign uranium customers to use the government (USAEC) owned enrichment facilities. However, as a means of protecting the domestic US uranium industry, the Act made provision to exclude foreign uranium enriched in the facilities from US markets. When the USAEC formally established in 1966 its criteria for enrichment services, foreign producers had been effectively barred from competing in the US market (which represented at that time 70% of the "free world" market).

Press Release from Alastair Gillespie, Minister of Energy, Mines and Resources, Sept. 22, 1976, *reprinted in* Westinghouse Elec. Corp. v. Dusquesne Light Co., 78 D.L.R.3d 3, 11 (1978).

127. Westinghouse had requested the production of various documents located in foreign countries. The district court ordered the production of the documents and required all parties to comply or file restated objections specifying and particularizing the objection to compliance based on foreign blocking statutes. Ten defendants raised foreign law objections. Westinghouse moved for production orders pursuant to FED. R. CIV. P. 37(a) against the ten non-producers.

Of the five blocking statutes involved, only the Canadian, Australian and South African laws were of any consequence. Generally, these laws prohibited the production of any documents relating to uranium activities. Each statute was enacted or modified just prior to the litigation for the express purpose of frustrating the United States' jurisdiction over the foreign defendants. Finally, each statute imposed criminal liability for non-compliance. 480 F. Supp. 1143.

128. The plaintiff argued that the court should follow a two-step procedure for compelling production and imposing saction. *Id.* at 1144. The defendants argued that the court

government entity or instrumentality. When the court rejected the defense, it did not discuss the smooth operation of United States foreign policy or the need to protect foreign governments from harassing and interfering litigation.

The court's decision at the discovery stage regarding the act of state doctrine leaves no doubt as to how it would have ruled if the defense were raised with regard to the substantive issues. Several defendants urged that the issuance of the requested production orders was barred by the act of state because such orders would "interfere with the conduct of our foreign relations by the Executive Branch."[129] The court ruled that the doctrine was inapplicable because the plaintiff had not challenged the validity of the foreign sovereign acts blocking discovery but rather, conceding their validity, had questioned whether they excused the defendants from complying with a production order.[130] Once the court decided that the act of state doctrine was inapplicable, the policies underlying the defense were never explored. Judge Marshall's refusal to engage in

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should examine all relevant factors in determining whether the orders should issue. *Id.* Judge Marshall ruled that

> [o]nce personal jurisdiction over the person and control over the documents by the person are present, a United States court has power to order production of the documents. The existence of a conflicting foreign law which prohibits the disclosure of the requested documents does not prevent the exercise of this power.

Id. at 1145.

> Judge Marshall explicitly rejected any balancing test, stating:
> Aside from the fact that the judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country, *such a balancing test is inherently unworkable* . . . . The competing interests here display an irreconcilable conflict on precisely the same plane of national policy. Westinghouse seeks to enforce this nation's antitrust laws against an alleged international marketing arrangement among uranium producers, and to that end has sought documents located in foreign countries where those producers conduct their business. In specific response to this and other related litigation in the American courts, three foreign governments have enacted non-disclosure legislation which is aimed at nullifying the impact of American antitrust legislation by prohibiting access to those same documents. *It is simply impossible to judicially "balance" these totally contradictory and mutually negating actions.*

Id. at 1148 (emphasis added).

129. *Id.* at 1149.

130. *Id.* Judge Marshall's order actually does challenge the validity of the foreign blocking statutes. By postponing the discussion of the foreign law until the sanction stage of the litigation, and ordering production, the court implicitly states that the blocking statutes could be circumvented, while the Sherman Act could not. This seems to indicate that Judge Marshall considers the Sherman Act to be somehow "more valid" than the foreign laws.

any policy analysis ignores the separation of powers consideration involved in the act of state defense.[131]

The defense of foreign sovereign compulsion was also asserted[132] but was not addressed by the court. By postponing its consideration of the defense until the sanction stage of the litigation Judge Marshall implicitly rejected the defense.[133] Arguably, the defendants could have met the requirements of the defense in the discovery stage because they were actually compelled by the foreign governments not to disclose the requested information.[134] Substantively, however, the defendants were not compelled to cartelize and therefore, would not have been protected by the defense.[135] Nevertheless, Judge Marshall's failure to consider the defense of foreign sovereign compulsion resulted in the loss of the defense's major policy consideration, fairness.

In conclusion, the difficulty with a mechanistic application of the antitrust defenses in *Uranium* would be the loss of interests which would result if the court was permitted to exercise its power without considering all of the implications of its decision. In the *Uranium* situation, the separatist approach does not protect all of the policies underlying the defenses and therefore, does not adequately protect the defendants.

III. *THE AGGREGATE APPROACH*

It has recently been suggested that, because there is no significant policy overlap among the three defenses, "there is good reason to resist collapsing the doctrines into one another or discarding some of them entirely."[136] Actually, this lack of policy overlap among the defenses is the reason they *should* be aggregated. By so doing the courts can insure that the defenses will function *more* efficiently and fairly. The separatist approach functions in the majority of situations. There are unusual cases such as *Uranium*, however, in which the approach fails. In these cases, the aggregate approach would function to protect the policies whose benefits would otherwise be lost. The remainder of this Comment will

131. *See supra* note 19 and accompanying text.
132. *See supra* note 125.
133. *See* 480 F. Supp. at 1149.
134. *See supra* notes 103-17 and accompanying text.
135. *Id. See supra* note 125.
136. Comment, *supra* note 4, at 656.

elaborate on the policy problems in *Uranium*, posit an aggregate approach to remedy those problems, and demonstrate how such an approach might function.

Judge Marshall's failure to explore the policies underlying the defense of foreign sovereign immunity resulted in an absence of important considerations from the decision, namely the smooth operation of United States foreign policy and protection of foreign governments from harassing and interfering litigation.[137] While the latter policy was not a factor in *Uranium*,[138] the former should have been because as that case demonstrated, the smooth operation of United States foreign policy can be endangered even though a foreign government is not directly involved in the suit. The smooth operation of foreign policy is closely related to the separation of powers consideration.[139] While a separation of powers analysis is primarily concerned with immediate foreign policy considerations, the smooth operation of foreign policy consideration is concerned with the effect that the court's decision might have on future foreign relations.[140] In determining whether it is appropriate for the

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137. *See supra* notes 63-103 and accompanying text.

138. Since none of the parties involved in *Uranium* was a foreign state or instrumentality of a foreign state, the court did not have to concern itself with whether the litigation was harassing or interfering. If, however, a foreign sovereign were a party to the litigation, it would be interesting to hypothesize how the *Uranium* court would have handled the analysis.

Since the *Uranium* court took a strict formulistic approach to the act of state doctrine, it is safe to assume that its approach to the foreign sovereign immunity defense would also be formulistic. The court would have closely adhered to FSIA and held that since the foreign government was engaged in a commercial activity (i.e., operating a mineral extraction company) it was not immune from suit under the FSIA of 1976. It is highly doubtful that the *Uranium* court would take the *OPEC* district court approach and rule that since the regulation of the industry was essentially a public governmental function, the nature of the action does not change because the medium through which it is accomplished changes. Thus, the sovereign defendant would not be liable for the creation or operation of the cartel because it was merely a vehicle by which the defendant accomplished an essentially public goal. The *Uranium* court would probably have denied immunity on the ground tht the foreign defendant's act was specifically excluded from immunity by the legislative history of FSIA. See supra note 106 and accompanying text. Under the current individualistic approach and the circumstances of the case as posited by the hypothetical, the decision to deny immunity would probably have been correct.

While the issue of whether the plaintiff's suit is harassing was not present in *Uranium*, it is nevertheless an important consideration. The plaintiff's intentions in bringing the suit could bear heavily upon the court's decision to grant or deny immunity. Thus, a court could, under the finding that the suit was merely to harass the defendant, grant immunity in a clearly commercial case and deny imunity in a non-commercial case.

139. *See supra* note 99 and accompanying text.

140. *Id.*

court to decide the case, these long-term considerations are as significant as the immediate policy impact of the decision.[141]

The *Uranium* court's approach to the act of state doctrine significantly jeopardized the position of the defendants and failed to consider the separation of powers policy underlying the defense. As illustrated by the circuit court decision in *OPEC*, separation of powers serves to protect the Executive from political embarrassment and, more importantly, safeguards the Executive's bargaining position and credibility in delicate foreign policy matters.[142] In *OPEC*, separation of powers restrained the court from adjudicating a claim in which any remedy granted to the plaintiff could have, and in all probability would have, led to significant economic harm.[143] In addition, the risk of retaliation from the OPEC countries was substantial.[144] The risk of retaliation outweighed the need to provide the plaintiff with a remedy.[145] "The basic premise of the analysis, that it is not good policy to exercise judicial authority where adjudication would do more general harm than good, seems unassailable."[146] This policy, while clearly at work in *OPEC*, is absent from *Uranium*.

While the foreign policy problems presented in *Uranium* were not of the same magnitude as those in *OPEC* the separation of powers analysis should not have been ignored.[147] The court should have inquired into the issue of whether an adjudication could have led to more general harm than good. Fortunately, in this instance, the potential political ramifications of the decision were minimal. Canada, France, Australia and South Africa would not take severe retaliatory measures against the United States merely because of an adverse decision.[148]

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141. *See infra* note 148.

142. *See supra* note 99.

143. This premise is based upon the impact of the 1973 embargo. For a further discussion of the use of oil as a weapon by the OPEC nations, see generally Paust & Blavstein, *The Arab Oil Weapon—A Threat to International Peace*, 68 AM. J. INT'L L. 410 (1974).

144. Since oil is the sole weapon of OPEC, it is not difficult to imagine that it would be used in this situation.

145. *See infra* note 145.

146. Comment, *supra* note 4, at 652.

147. The reason for this is explained, *infra* note 148.

148. While it may be true that Canada, France, Australia or South Africa would not take severe retaliatory action against the United States, it is not true, as the *Uranium* court implied, that close allies will not take some measure to protect themselves against United States antitrust laws. The *Uranium* decision to order the production of the documents despite the foreign blocking statutes implicitly suggests that the smooth operation of foreign policy

The *Uranium* decision disregards the role of the executive branch in foreign policy matters by failing to recognize that it may

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will not be affected when the parties before the court are allies. In light of the events which followed the *Uranium* decision, this belief was categorically incorrect.

One of the most decisive responses to the *Uranium* decision was Britain's passing of the Protection of Trading Interests Act, 1980, ch. 11 (UK), *reprinted in* Antitrust & Trade Reg. Rep. (BNA) No. 959, F-1 to F-2 (April 10, 1980). PTIA provides for the "clawing" back of the punitive portion of a foreign judgement. *Id.* § 6(1).

> [T]he qualifying defendant shall be entitled to recover from the party in whose favour the judgment was given so much of the amount referred to in subsection (1) above as exceeds the part attributable to compensation; and that part shall be taken to be such part of the amount as bears to the whole of it the same proportion as the sum assessed by the court that gave the judgment as compensation for the loss or damage sustained by that party bears to the whole of the damages awarded to that party.

Id. § 6(2). In other words, a British defendant can, under the PTIA, recover the amount equal to two thirds of the entire award against him. Clearly, this action amounts to a type of retaliation against the United States' extraterritorial application of the Sherman Act. The British have armed themselves against United States antitrust liability. The passage of PTIA suggests that even close American allies will confront the United States on antitrust issues. Such a confrontation cannot lead to improved relations but may only serve to create a strain on the intergovernmental relationship. For an excellent analysis of PTIA see Note, *The Protection of Trading Interests Act of* 1980 - *Britain's Latest Weapon in the Fight Against United States Antitrust Laws*, 4 FORDHAM INT'L L.J. 341 (1981).

In addition to Great Britain's latest action, Canada has also taken steps to enact a similar statute. "The Foreign Proceedings and Judgments Bill" would prevent enforcement of foreign antitrust judgments in Canada when the Canadian Attorney General considers the enforcement of such judgment to be harmful to Canadian international trade and commerce. Antitrust & Trade Reg. Rep. (BNA) No. 979, at A-5 to A-6 (Aug. 28, 1980). The Canadian sentiment towards the extraterritorial application of foreign laws is best summed up by Justice Mininster Jean Chrétien.

> With the proliferation of multinational corporations, many countries have legitimate claims to jurisdiction over the activities of these multinational entities. However, we feel that it is improper for a country to attempt to extend its jurisdiction to lawful activities which occur outside its territory.

Antitrust & Trade Reg. Rep. (BNA) No. 973, at A-20 (July 17, 1980).Chrétien singled out the United States' enforcement activities in the *Uranium* situation. "In our view, it is objectionable that actions of the Canadian uranium industry, taken outside the United States in accordance with Canadian law in response to a declared national policy, should be the subject of legal proceedings in the United States."*Id.*

Finally, the international reaction to the United States' intrusion upon foreign sovereignty has not been isolated in the antitrust area. In 1973, Canada passed the Foreign Investment Review Act (FIRA), ch. 46, 1973-74 Can. Stat., *as amended by* ch. 52, 1976-77 Can. Stat. 82. FIRA limits the availability of foreign investment opportunities in Canada. Since the United States is Canada's number one trading partner, this placed a severe limitation upon American investors' ability to directly invest in Canadian businesses.

The foregoing discussion suggests that the smooth operation of foreign policy is a key factor in any international litigation analysis, and especially in the antitrust context since there is always the possibility of a large treble damage award. The *Uranium* court's approach to this factor is clearly erroneous. While close allies will not retaliate on a grand scale, the statutes briefly discussed illustrate that difficulties in long term international relations can

have been better equipped to supply a remedy than the court.[149] A more comprehensive approach, such as that posited in *Timberlane*,[150] would have expressly addressed this problem. It is quite possible that under the *Timberlane* analysis, the *Uranium* court would have reached the identical result as it did through its formulistic approach. Nevertheless, the court's failure to engage in such an analysis clearly resulted in the loss of defendants' interest.

Finally, by refusing to consider the defense of foreign sovereign compulsion, the underlying policy consideration of fairness escaped the court's analysis. Under the circumstances, fairness would seem to indicate that the defendants should prevail. The defendants cartelized at the behest of the foreign governments who sought to protect the uranium producers from the adverse affects of the United States embargo.[151] The cartel was formed pursuant to the important energy policies of the involved governments.[152] Fairness also indicates that cartelization in self-defense should not be actionable. This analysis would change if the cartel had not been formed in response to a United States embargo. The *Uranium* court did not engage in this type of analysis and thus, the policy was unexamined and unprotected.

A possible solution to avoiding the interest loss occasioned by the separatist approach would be to aggregate the individual policies underlying each defense into a single analysis. Such an analysis would only be employed after the separate application of each defense failed to protect the defendant. The aggregate approach would ensure that all of the policies underlying the defenses were carefully analyzed before the defendant was subjected to antitrust liability. Individually, each defense acts as a complete defense to liability.[153] The aggregrate approach, however, could either act as a complete defense or present mitigating circumstances which would reduce liability.[154] This dual nature is the result of the ad hoc application of the approach. A court following the aggregate

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arise because a court imprudently disregarded an analysis of the impact that its decision would have on United States international relations.

149. *See* 376 U.S. at 423; 649 F.2d at 1358.

150. 549 F.2d at 613. *See supra* notes 41-53 and accompanying text.

151. *See supra* note 125.

152. *Id.*

153. *See supra* notes 10, 81 & 107 and accompanying text.

154. The reduction in liability would decrease the initial amount of the award. It would definitely not prevent a court from trebling that amount because judicial discretion with

approach would apply the following factors to the specific facts before it in determining whether the defendant has a complete defense or has presented mitigating circumstances:

1. Whether a foreign government is involved and to what extent. (i.e. whether the government is a party or has passed legislation significantly affecting the case).[155]
2. If a foreign government is involved, the extent to which its actions affected those of the defendant.[156]
3. The extent to which the alleged conduct interferes with the domestic and foreign commerce of the United States.[157]
4. Whether the separation of powers consideration suggests that an adjudication would do more general harm than good in the context of the case.[158]
5. Whether it is feasible for the plaintiff to obtain diplomatic relief if the court denies judicial relief.[159]
6. Whether the adjudication of the case will have a severe effect on the smooth operation of United States foreign policy.[160]
7. A general notion of fairness under the circumstances.[161]

International comity would also be considered.[162]

In applying these criteria to the facts of *Uranium*, the court would have to engage in the following analysis. Although the foreign governments were not named as parties, their conduct significantly affected the defendants' actions. The uranium cartel was a self-defense measure rather than merely an attempt to control the market. These factors coupled with the insubstantial effect of United States commerce, weigh against adjudicating the case. On

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regard to whether or not to treble the damage award could lead to discriminatory and inconsistent practices.

155. This factor is related to foreign sovereign compulsion. *See supra* notes 103-17 and accompanying text.

156. *See supra* notes 103-17 and accompanying text.

157. The effect upon economics and competition within the United States is the basis of the antitrust laws. In support of this proposition see, *supra* note 2.

158. This factor is related to the act of state doctrine. *See supra* notes 20-28 and accompanying text.

159. *See supra* notes 20-22 and accompanying text.

160. This factor is a product of the foreign sovereign immunity defense. *See supra* notes 103-17 and accompanying text.

161. This factor finds its basis in the foreign sovereign compulsion defense. *See supra* notes 103-17 and accompanying text.

162. Although international comity has been de-emphasized by the courts, its recognition is still important. *See supra* note 147.

the other hand, the separation of powers consideration is not a major factor in *Uranium* because the countries involved are close allies. Therefore, there is little risk of severe economic retaliation. The smooth operation of United States foreign policy consideration would seem to indicate that an adjudication would not severely hamper United States foreign relations with the countries involved.[163] These factors tend to weigh in favor of adjudication. Under these circumstances, fairness to the plaintiff would dictate that the defendants be denied a complete defense. Westinghouse was injured, albeit by a defensive rather than offensive measure. Nevertheless, fairness would indicate that Westinghouse should recover while the defendants should be permitted to use the mitigating circumstances to reduce their liability.[164]

In practice, the major difficulty with the aggregate approach is that it requires the defendants to argue policy rather than law. This, however, is not unusual in antitrust litigation.[165] Areeda and Turner have suggested, "[p]erhaps the one point that deserves to be stressed for the future is that the substantive antitrust analysis must not be applied mechanically where foreign contacts are involved—not even in the so called per se area. More subtlety is required . . . ."[166] Practically, under the aggregate approach, the defendant would plead the policies underlying each defense after pleading each defense separately.

CONCLUSION

The strict separatist approach which has thus far dominated the field of international antitrust is incomplete. It leads to the loss of vital interest and permits liability where none should issue. To permit this to continue would be an egregious loss to both the defendants and the system in general.[167] If the United States is going to continue to apply its antitrust laws extraterritorially, it

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163. *But see supra* note 148.

164. *See supra* note 153.

165. Excellent examples of this blurred distinction occur in cases employing the rule of reason. *See, e.g.*, National Soc'y of Professional Eng'rs. v. United States, 435 U.S. 679 (1978); Board of Trade of Chicago v. United States, 246 U.S. 231 (1918); CBS v. ASCAP, 620 F.2d. 930, 934 (2d Cir. 1980); United States v. Realty Multilist, Inc., 1981 Trade Cas. (CCH) ¶ 63, 624 (5th Cir. 1980).

166. P. AREEDA & D. TURNER, ANTITRUST LAW § 240 at 278 (1978).

167. If the policies are not upheld, the system suffers as much as the defendant.

must continue to develop rules which encompass a myriad of policy considerations. The aggregate approach to the defenses of act of state, foreign sovereign immunity and foreign sovereign compulsion frees the courts from the strict adherence to the separatist approach and protects all of the policies underlying each defense.

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