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MULTINATIONAL BUSINESSES BEWARE: THE LONG ARM OF THE UNITED STATES ANTITRUST LAWS MAY REACH YOU†

by Julian O. von Kalinowski*

The title of my speech today was suggested by the famous line from Shakespeare's *Julius Caesar*, "BEWARE THE IDES OF MARCH." This morbid foreboding, with some poetic license, can be related to recent developments in the enforcement of United States antitrust laws in the international area and the resulting impact on multinational businesses.

Within the last year, the Supreme Court held in *Pfizer, Inc. v. India*,¹ that a foreign nation could sue for treble damages for injuries suffered by reason of a violation of the antitrust laws to the same extent as any other person. This is a unique holding since previously it had been held in *United States v. Cooper Corp.*² that the United States government was not a person within the meaning of the special treble damage remedy embodied in section 4 of the Clayton Act.³ It was not until 1955, when Congress enacted section 4(a) of the Clayton Act,⁴ that the United States was finally given a claim for damages for injuries arising from antitrust violations, and Congress specifically limited the United States to *single* damages "in view of the disastrous impact of treble damages upon concerns doing a large proportion of their business with the government."⁵ One does not need to be skilled in the art of forecasting to predict what the impact of treble damage suits from some 162 foreign nations would be on companies doing business with those nations. The exposure is mind-boggling! If the United States government thought it had a balance of payment problem pre-*Pfizer*, it hasn't seen anything yet; the potential outflow of dollars either by way of set-

† This article is a slightly revised version of a speech given to the Los Angeles County Bar Association on June 7, 1978. Robert H. Fairbank assisted in the editorial work.

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1. 434 U.S. 308 (1978)

2. 312 U.S. 600 (1941).

3. Clayton Act § 4, 15 U.S.C. § 15 (1976).

4. Clayton Act § 4A, 15 U.S.C. § 15a (1976).

5. H.R. REP. NO. 422, 84th Cong., 1st Sess. 4 (1955).

tlement or treble damage judgments will certainly accentuate this balance of payments imbalance.

In another area, the Justice Department has served notice⁶ that it intends to vigorously prosecute hard-core violations of the antitrust laws in the international area where American companies or individuals may be involved, or, for that matter, where foreign persons are involved if personal jurisdiction can be obtained over the foreign defendants and if the subject matter jurisdictional requirements of the Sherman Act have been met. This in itself is a foreboding development for companies doing business in foreign countries or with foreign government-sponsored commercial activities. Many of the foreign government enterprises involved may engage in price fixing activities or other anticompetitive cartel-type activities which may be perfectly legal in the particular country. Yet if these activities have an impact on United States foreign commerce, United States firms participating in such activities might well find themselves involved in a criminal case under the Sherman Act. The penalties can be heavy.

I am sure you are aware that the 1974 Antitrust Procedures and Penalties Act⁷ amended the Sherman Act to increase the maximum penalties under that Act to (a) a one hundred thousand dollar fine and/or a three-year jail term for individuals (making it a felony), and (b) a \$1 million fine for corporations.⁸ The Antitrust Division is seeking and obtaining substantially increased penalties as a result of this amendment.⁹ The Division was recently successful in obtaining jail sentences of twenty-four to thirty months for the individual defendants and fines of \$2.5 million for the corporate defendants.¹⁰ The seven corporate co-defendants and two individuals were convicted by a jury of price fixing. I must emphasize that this result is not unique. In another recent case one individual was given an eighteen-month jail sentence.¹¹

6. Speech by Joe Sims, Practising Law Institute Seventeenth Annual Advanced Antitrust Seminar on International Trade and the Antitrust Laws (Jan. 20, 1978).

7. Antitrust Procedures & Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706 (codified in scattered sections of 15, 47, and 49 U.S.C.).

8. 15 U.S.C. § 1 (1976).

9. See Justice Department Memorandum from Assistant Attorney General Donald I. Baker to all Antitrust Division attorneys and economists entitled "*Guidelines for Sentencing Recommendations in Felony Cases under the Sherman Act*" (Feb. 24, 1977), reprinted in [1977] 803 ANTITRUST & TRADE REG. REP. (BNA) F-1. For a more detailed discussion of the criminal prosecution and sentencing of antitrust violators, see Note, *Sentencing Antitrust Felons*, 34 WASH. & LEE L. REV. 1097 (1977); Hermann, *Criminal Prosecution of United States Multinational Corporations*, 8 LOY. CHI. L.J. 465 (1977).

10. *United States v. Arcole Midwest Corp.*, 4 TRADE REG. REP. (CCH) ¶ 45,077, case no. 2570 (N.D. Ill. 1977).

11. *Id.* 4 TRADE REG. REP. (CCH) ¶ 45,077, case no. 2568 (N.D. Ill. 1977). For other

Although these cases involved domestic activity, there is no reason why similar penalties could not be imposed for violations in the international area. The standards are identical. Indeed, the criteria used by the government in initiating such a prosecution are identical to those used in a domestic case—willfulness and clarity.¹²

One can well imagine the consternation this policy has caused in foreign government circles. Indeed, some foreign government-owned “commercial enterprises” and their officers can directly be involved in hard-core antitrust violations. There is no immunity under United States law for such commercial activities.¹³ For example, within the past year, the Department of Justice indicted the German state-owned airline, Lufthansa, for participating with United States carriers in a conspiracy to fix fares on United States-Germany military traffic outside of the International Air Transport Association.¹⁴ As an aside, I might mention that the Supreme Court recently held in *City of Lafayette v. Louisiana Power & Light Co.*¹⁵ that domestic state-owned “commercial enterprises” are subject to the antitrust laws.

Yet another recent event in the international area is the enactment of the Hart-Scott-Rodino Antitrust Improvements Act of 1976,¹⁶ which added pre-merger notification requirements (section 7(a)) to the Clayton Act.¹⁷ Under section 7(a), one or both parties of an acquisition or a merger of a designated size (including tender offers) must notify the government during the pre-merger period and then endure a thirty-day

recent cases imposing stiff fines and criminal sentences on antitrust offenders, see *United States v. Leviton Mfg. Co.*, 4 TRADE REG. REP. (CCH) ¶ 45,077, case nos. 2613-15 (D. Conn. 1978) (pleas of nolo contendere in a price fixing case resulted in fines totaling \$885,000 and jail sentences for ten corporate officials from eighteen to thirty months, with all but three months suspended for five defendants, all but thirty days suspended for four defendants and the entire sentence for one defendant); *United States v. Borden, Inc.*, 4 TRADE REG. REP. (CCH) ¶ 45,077, case no. 2579 (D. Ark. 1977) (pleas of nolo contendere in a price fixing case resulted in corporate fines of \$575,000 and jail sentences for two corporate officials of one year, with all but sixty days suspended).

12. Speech by Joe Sims, *supra* note 4, at 19. Not all recent developments are gloomy for the antitrust criminal defendant. For example, the United States Supreme Court, in *United States v. U.S. Gypsum Co.*, 98 S. Ct. 2864, 2872 (1978), recently held that criminal liability under the Sherman Act requires proof of criminal intent. This greatly increased the government's burden of proof in criminal antitrust cases somewhat counterbalancing the increased severity of criminal penalties and fines for conviction.

13. 28 U.S.C. §§ 1603(d), 1605(a) (1976).

14. *United States v. Pan Am. World Airways, Inc.*, 4 TRADE REG. REP. (CCH) ¶ 45,077, case no. 2560 (D.D.C. 1977).

15. 435 U.S. 389 (1978).

16. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified in scattered sections of titles 15, 18, and 28 U.S.C.).

17. 15 U.S.C. § 18a (1976).

waiting period before consummation. Pre-merger notification is designed to give the government notice of large mergers so that the Federal Trade Commission ("FTC") and the Antitrust Division may evaluate their consequences prior to their completion.

Persons subject to the pre-merger notification and waiting period requirement must file with the Department of Justice and the FTC such documentary material and information as is "necessary and appropriate" to enable the government to determine whether consummation of the acquisition or merger may violate the antitrust laws. The FTC was directed, with the concurrence of the Department of Justice, to promulgate rules specifying what documentary material and information is "necessary and appropriate."¹⁸

In substance, the notification requirements of the Act are triggered when (a) the acquiring person, or the person whose voting securities or assets are being acquired, is engaged in commerce or in any activity affecting commerce¹⁹ and (b) the acquiring or acquired person has annual net sales or total assets of \$100 million or more and the other party has annual net sales or total assets of \$10 million or more.²⁰ As an additional precondition to notification, the acquiring person must hold, as a result of the acquisition, either (1) fifteen percent or more of the voting securities or assets of the acquired person, or (2) an aggregate total amount of the voting securities and assets of the acquired person in excess of \$15 million.²¹ Anyone failing to comply with any of the provisions of the Act is liable for civil penalties up to \$10,000 for each day during which the violation occurs.²²

The jurisdictional standards of the Act are quite broad. The terms "engaged in commerce" or "affecting commerce" conceivably could

18. *Id.* § 18a(d)(1). The final version of these rules was promulgated on July 31, 1978. 43 Fed. Reg. 33,450 (1978). See notes 23 through 26 *infra* and accompanying text.

19. 15 U.S.C. § 18a(a)(1) (1976).

20. The dollar criteria are met if the acquisition or merger involves:

(1) the voting securities or assets of a person engaged in manufacturing with annual net sales or total assets of \$10 million or more and any acquiring person with total assets or annual net sales of \$100 million or more;

(2) the voting securities or assets of a person not engaged in manufacturing with total assets of \$10 million or more and any acquiring person with total assets or annual net sales of \$100 million or more; or

(3) the voting securities or assets of a person with annual net sales or total assets of \$100 million or more and any acquiring person with total assets or annual net sales of \$10 million or more.

15 U.S.C. § 18a(a)(2)(A)-(C) (1976).

21. *Id.* § 18a(a)(3).

22. *Id.* § 18a(g)(1).

encompass almost every activity. Thus, many primarily or even wholly foreign acquisitions are potentially subject to the Act.

The final FTC version of the rules required to implement the pre-merger notification program was issued in July of this year.²³ It included some helpful examples of when notification may or may not be required when foreign acquisitions are involved. The FTC rules deal with three types of foreign acquisitions: (1) acquisitions of foreign assets or of voting securities of a foreign issuer by United States companies;²⁴ (2) acquisitions of assets or voting securities by foreign

23. 43 Fed. Reg. 33,450 (1978).

24. *United States "persons" (individuals or corporations) acquiring foreign assets or voting stock of a foreign company* (43 Fed. Reg. 33,450, 33,497-98 (1978) (to be codified in 16 C.F.R. § 802.50)):

- (a) Exemption unless *assets* of acquired foreign company generated greater than \$10,000,000 sales in the United States last year.

EXAMPLES:

(1) Assume that "A" and "B" are both United States persons. "A" proposes selling to "B" a manufacturing plant located abroad. Sales in or into the United States attributable to the plant totaled \$8 million in the most recent fiscal year. The transaction is exempt under this paragraph.

(2) Sixty days after the transaction in example 1, "A" proposes to sell to "B" a second manufacturing plant located abroad; sales in or into the United States attributable to this plant totaled \$5 million in the most recent fiscal year. Since "B" would be acquiring the second plant within 180 days of the first plant, both plants would be considered assets of "A" now held by "B." See § 801.13(b)(2), 43 Fed. Reg. 33,450, 33,478 (1978) (to be codified in 16 C.F.R. § 801.13(b)(2)). Since the total annual sales in or into the United States exceed \$10 million, the acquisition of the second plant would not be exempt under this paragraph.

- (b) Exemption unless foreign company (whose *voting securities* a United States person is acquiring) holds assets in the United States of \$10,000,000 or generated sales of \$10,000,000 in the United States last year.

EXAMPLE:

"A," a United States person, is to acquire the voting securities of "C," a foreign issuer. "C" has no assets in the United States, but made aggregate sales into the United States of \$12 million in the most recent fiscal year. The transaction is not exempt under this section.

25. *Acquisitions by foreign "persons"* (43 Fed. Reg. 33,450, 33,498-99 (1978) (to be codified in 16 C.F.R. § 802.51)):

- (a) exempt if assets located outside the United States;
- (b) exempt if acquisition of voting securities of foreign person will not result in control over company with either (1) greater than or equal to \$10,000,000 assets located in the United States or (2) greater than or equal to \$10,000,000 sales yearly in the United States;
- (c) exempt if acquisition of less than \$10,000,000 assets located in the United States; or
- (d) exempt if aggregate total assets located in the United States of both foreign "persons" involved in acquisition is less than \$110,000,000.

EXAMPLES:

1. Assume that "A" and "B" are foreign persons with aggregate annual sales in or into the United States of \$200 million. If "A" acquires the assets of "B," and if no assets in the United States or voting securities of United States issuers will be acquired, the transaction is exempt under paragraphs (a) and (c).

2. In example 1, assume that "A" is acquiring "B's" stock and that included within

persons;²⁵ and (3) acquisitions of assets or voting securities by or from foreign governmental corporations.²⁶

One might ask what foreign acquisitions could be subject to section 7 of the Clayton Act. The short answer is that section 7 has been stretched to reach a variety of multinational mergers. The most common multinational merger that is challenged involves a United States company acquiring a foreign firm. For example, in *United States v. Joseph Schlitz Brewing Co.*,²⁷ Schlitz acquired voting control over a Canadian corporation which sold its beer in the East and Midwest and was on the verge of expanding into California and the West. The United States Supreme Court affirmed a trial court decision that ordered divestiture of the Schlitz holdings in the Canadian corporations. The trial court emphasized that Schlitz had violated section 7 by eliminating a potential competitor in the California market.²⁸

Similarly, a foreign corporation's acquisition of a United States firm also poses danger of a challenge of illegality under section 7. For example, in *United States V. Imperial Chemical Industries, Ltd.*,²⁹ the FTC challenged an acquisition by a British company of a United States explosives market. The British company made explosives in Canada but had not done business in the United States. Nonetheless, the FTC stressed that the British explosives manufacturer was the *most likely entrant* into a concentrated American market. The case resulted in a consent decree ordering divestiture.

Section 7 has also occasionally extended its tentacles to reach merg-

"B" is issuer "C," a United States issuer whose total assets are valued at \$12 million. Since "C's" voting securities will be acquired indirectly, and since "A" thus will be acquiring control of a United States issuer with total assets of more than \$10 million, the acquisition cannot be exempt under this section.

3. In the previous examples, assume that "A" is a United States person. This section does not apply, since the acquiring person must be a foreign person.

26. *Acquisition by or from foreign governmental corporation* (43 Fed. Reg. 33,450, 33,499-500 (1978) (to be codified in 16 C.F.R. § 802.52)):

(a) Exempt if foreign government controls either acquiring or acquired corporation AND the acquisition involves assets located entirely within that foreign state or voting securities of foreign corporation.

EXAMPLE:

The government of foreign country X has decided to sell assets of its wholly-owned corporation, "B," all of which are located in foreign country. The buyer is "A," a United States person. Regardless of the aggregate annual sales in or into the United States attributable to the assets of "B," the transaction is exempt under this section. (If such aggregate annual sales were less than \$10 million, the transaction would also be exempt under § 802.50, 43 Fed. Reg. 33,450, 33,497-98 (1978) (to be codified in 16 C.F.R. § 802.50).)

27. 253 F. Supp. 129 (N.D. Cal.), *aff'd per curiam*, 385 U.S. 37 (1966).

28. *Id.* at 144-45.

29. [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,914 (F.T.C. 1972) (consent order).

ers that do not directly involve United States companies. Thus, in *United States v. CIBA Corp.*,³⁰ a Swiss corporation was on the verge of merging with another Swiss corporation. Both had United States subsidiaries that were engaged in overlapping sales of dyes, drugs, and chemicals. The FTC challenged the impending merger, claiming that the acquisition would lessen actual competition in the United States. The resulting consent decree ordered the foreign companies to form a *new* company to carry on the overlapping United States activity and then to divest their holdings in that new company.

I want to emphasize that to date section 7 of the Clayton Act has only been an occasional irritant for multinational mergers. Nevertheless, corporate lawyers should be aware of possible section 7 liability in any merger involving a foreign company, especially if: (1) the foreign company is a *direct competitor* of a United States firm involved in the merger, (2) the foreign company is a *likely entrant* into the same United States market in which its American merging partner is already competing, or (3) the foreign company is an *important source of supply* to the United States market in which its American merging partner is already competitive.

A further area of interest to the multinational corporation is the developing cooperation between nations on restrictive trade practices. The United Nations has been the primary forum for this movement. For example, at a 1976 United Nations Conference on Trade and Development, an ad hoc group of experts set out to:

- (a) identify those practices which are likely to result in the acquisition and abuse of market power at the national and international levels;
- (b) examine ways of improving the exchange of information on restrictive business practices between governments of developed and of developing countries;
- (c) examine the elements of the formulation of a model law or laws for developing countries on restrictive business practices; and
- (d) examine the possibility of formulating multilaterally acceptable principles on restrictive business practices which aim at remedying those practices which adversely affect the trade and development of developing countries.³¹

The objective was to secure voluntary adherence to mutually acceptable principles which would "help to harmonize international opinion about restrictive practices, shape the general behavior of most enter-

30. 50 F.R.D. 507 (S.D.N.Y. 1970).

31. United Nations Conference on Trade and Development, Report of the Second Ad Hoc Group of Experts on Restrictive Business Practices 37, U.N. Doc. TD/B C.2/AC.5/6 at ¶ 1(3) (1976).

prises, and facilitate international cooperation."³²

Although only the most rudimentary steps have been taken, there is general recognition, even among United States antitrust authorities, that there is need for international cooperation. This attitude is refreshing. There is a need for harmonization in the international arena and in the long run multinational businesses should benefit by it.

Perhaps I have gotten a bit ahead of myself. Let me revert back to some of the basic principles involved in the application of the United States antitrust laws in the international context. More particularly I want to dwell on the Sherman Act's requirements, although section 7 of the Clayton Act might also apply to multinational activities. I intend to cover two particular areas: (1) who is subject to the antitrust laws and (2) what justiciable defenses are available.

First, who is subject to the United States antitrust laws? I am sure you are aware that the subject matter jurisdiction of the antitrust laws is based upon the commerce clause of the United States Constitution,³³ and the specific antitrust statutes applying the commerce power.³⁴ The Sherman Act is particularly pertinent since its jurisdictional reach is as broad as the commerce clause. It reaches activities "in restraint of trade or commerce among the several States, or with foreign nations"³⁵ The courts have interpreted Sherman Act commerce requirements to apply an "effects" test. Under this test courts have subject matter jurisdiction over activity in or affecting (1) trade or commerce among states or (2) foreign commerce (United States imports or exports) either in the United States or in a foreign country.

In determining whether a potential defendant is engaged in activity in or affecting interstate commerce, the courts have applied two alternative tests. One test focuses on whether the restraint occurred within the flow of interstate commerce.³⁶ The other test asks whether the restraint substantially affected the flow of foreign commerce.³⁷ Substantiality is an elusive term. Some courts require proof of quantitative substantiality: What percentage of the total volume of commerce in a line of goods or services is affected by the restraint?³⁸ Other courts

32. *Id.* at ¶ 73.

33. U.S. Const., Art. 1, § 8, cls. 1, 3.

34. *See, e.g.*, Sherman Act, 15 U.S.C. §§ 1-7 (1976); Clayton Act, 15 U.S.C. §§ 12, 13, 14-21, 22-27 (1976); Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1976).

35. 15 U.S.C. § 1 (1976).

36. *See, e.g.*, *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 234 (1948).

37. *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

38. *See Burke v. Ford*, 389 U.S. 320, 321 (1967).

apply a qualitative substantiality test: Is the restraint essentially local in nature and thus not within federal jurisdiction?³⁹

If interstate commerce is not affected, the court must determine whether a potential defendant is engaged in activity that restrains the flow of goods or services imported into or exported from the United States. The courts have applied a variety of tests. I might add that this area of the law is a literal jungle. By way of illustration, the courts have expressed the "effects" tests in such illuminating language as: "direct and material adverse effect,"⁴⁰ "substantial effect" (only relevant when the effect is indirect),⁴¹ "direct and substantial effect,"⁴² intended to and did in fact have "some effect,"⁴³ "substantial and foreseeable effect on U.S. Commerce,"⁴⁴ anticompetitive effect resulting from conduct "aimed at obstructing the foreign commerce of the United States,"⁴⁵ and finally in terms of the conflicts of law approach, *i.e.*, balancing the comparative effects of the challenged conduct on the United States and foreign country or countries.⁴⁶ In sum, it seems any activity where foreign commerce is involved is likely to be subject to the Sherman Act.

As to the persons within the scope of subject matter jurisdiction, it has been determined that if a defendant's conduct restrains or affects the flow of goods and services imported into or exported from the United States, defendant violates section 1 of the Sherman Act whether the acts were committed either in the United States⁴⁷ or abroad,⁴⁸ by a United States citizen⁴⁹ or by a foreign national.⁵⁰

I might mention the Ninth Circuit's approach to subject matter jurisdiction which shows promise of being increasingly adopted in future antitrust cases. This is the so-called conflicts of law approach. The Ninth Circuit combines the questions of whether subject matter juris-

39. *United States v. Shubert*, 348 U.S. 222, 225, 227 (1955).

40. *Fleischmann Distilling Corp. v. Distillers Co., Ltd.*, 395 F. Supp. 221, 226 (S.D.N.Y. 1975).

41. *United States v. Watchmakers of Switz. Information Center, Inc.*, 1963 Trade Cas. ¶ 70,600 at 77,457 (S.D.N.Y. 1962).

42. *United States v. General Elec. Co.*, 82 F. Supp. 753, 891 (D.N.J. 1949).

43. *United States v. Aluminum Co. of America*, 148 F.2d 416, 444 (2d Cir. 1945).

44. U.S. Dep't of Justice Dep't, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 6 (March, 1977).

45. *United States v. United States Alkali Export Ass'n*, 86 F. Supp. 59, 66 (S.D.N.Y. 1949); Address of Michael J. Egan, Associate Atty. General, Justice Dept. (Nov. 3, 1977).

46. *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 614 (9th Cir. 1976).

47. *United States v. Sisal Sales Corp.*, 274 U.S. 268, 272 (1927).

48. *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 599 (1951).

49. *United States v. Sisal Sales Corp.*, 274 U.S. 268, 271, 273 (1927).

50. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 692 (1962).

diction exists and whether it should be exercised into a single balancing test based on a conflict of law or "jurisdictional rule of reason" analysis.⁵¹ At least five factors are balanced:⁵² (1) nature and amount of effect that the challenged conduct has on United States commerce; (2) relative importance of the interests of the nations in or affected by the controversy; (3) nationality of the parties, their locations, and other contacts with the nations involved; (4) degree of international conflict that might result if jurisdiction is asserted; and (5) extent to which an exercise in jurisdiction is likely to result in successful enforcement and compliance.

Turning to the *second* area of discussion, what are the "justiciable" defenses that a multinational corporation might invoke when charged with an antitrust violation involving foreign commerce? There are two such defenses which might be applicable—the defenses of (1) act of state, and (2) sovereign compulsion.

I might add that there exists a third defense which has only limited relevance to our discussion of today, that of sovereign immunity. This defense potentially applies when a plaintiff seeks redress directly against a sovereign state, its political subdivisions, agents, or instrumentalities, or conversely when a defendant contends that a foreign government was involved in the alleged restraint.

Even that defense has been substantially limited. Congress, in the Foreign Sovereign Immunities Act of 1976,⁵³ adopted the "restrictive principle of sovereign immunity," that is, a foreign state, its political subdivisions, agents or instrumentalities could not be immune from suit in any action based upon a "commercial activity," whether occurring inside or outside of the United States, if such activity has a direct effect in the United States.⁵⁴ Thus, foreign government ownership of stocks in a "commercial" enterprise does *not* create antitrust immunity. The enterprise, as well as other corporations, such as a domestic corporation participating in the alleged restrictive practices which violate the Sherman Act, can be prosecuted. Indeed, as I mentioned earlier, such a case charging Pan-Am Airlines and Lufthansa with price fixing is presently pending.⁵⁵

Coming back to the two defenses previously mentioned, let me deal *first* with the act of state doctrine. This doctrine provides that when-

51. *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 613-14 (9th Cir. 1976).

52. *Id.* at 614.

53. 28 U.S.C. §§ 1602-1611 (1976).

54. *Id.* §§ 1603(d), (e), 1605(a) (1976).

55. See text accompanying note 14 *supra*.

ever a controversy involves acts of a foreign government performed within its own territory and the case cannot be adjudicated without inquiry into the validity of those acts, the court will decline to exercise jurisdiction.⁵⁶ The underlying rationale of the doctrine is that the court of one nation should not sit in judgment of the acts of another nation on its own soil; such adjudication might embarrass the executive branch of the United States government and its conduct of foreign affairs.⁵⁷

The act of state defense is potentially available to foreign states, private domestic corporations, and foreign corporations. To illustrate that principle, let me outline a few situations in which the act of state defense was held available.

In *American Banana Co. v. United Fruit Co.*,⁵⁸ one plantation owner alleged that a competitor had violated the Sherman Act by persuading the Costa Rican government to seize the American's land. The United States Supreme Court refused to adjudicate the controversy, concluding that an act of state was involved: settling the controversy would require an adjudication of the Costa Rican seizure. Likewise, in *Hunt v. Mobil Oil Corp.*⁵⁹ a group of independent oil producers charged that seven major oil companies conspired to advance their Persian Gulf oil interests by successfully promoting the nationalization of the Hunt's Libyan oil operations. The Second Circuit held that the act of state defense was available: otherwise, the court would have to inquire into "acts and conduct of Libyan officials, Libyan policies with respect to plaintiff's as well as other oil producers' properties and the underlying reasons for the Libyan government's actions."⁶⁰

Sometimes the act of state defense takes on a slightly different guise. In *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*,⁶¹ for example, American Oil Company was charged with conspiring with Iran, Great Britain and Sarjah (a shiekhdom in the Trucial States), to deprive Occidental of a valuable oil concession in the Persian Gulf. The plaintiff argued that it was not challenging the acts of a foreign state, but rather only defendant's role in instigating an international boundary dispute which led to the disruption of plaintiff's concession rights. The court concluded that it could not separate an analysis of defendant's alleged

56. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

57. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 697 (1976).

58. 213 U.S. 347 (1909).

59. 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

60. *Id.* at 72 (quoting *Hunt v. Mobil Oil Corp.*, 410 F. Supp. 10, 24 (1976)).

61. 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).

role as a "catalyst" from inquiry into the sovereign's political acts; the act of state doctrine thus applied.⁶²

I do not mean to imply, however, that the act of state doctrine precludes all adjudication of possible antitrust violations merely because the defendant links its behavior to a foreign government. In *United States v. Sisal Sales Corp.*,⁶³ for example, defendants who induced Mexican governmental officials to recognize the defendants as the exclusive traders in sisal hemp and to impose discriminatory taxes on rival sellers could not utilize the act of state defense. The Supreme Court stressed that "[t]rue, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States."⁶⁴

Another classic example of a rejected act of state defense is *Continental Ore Co. v. Union Carbide & Carbon Corp.*⁶⁵ In *Continental Ore* the defendant, a Canadian corporation, allegedly conspired with an affiliated American corporation to exclude a competitor. The defendant argued that the Canadian government had made it an exclusive agent of that government. Nonetheless, the United States Supreme Court held that the act of state defense was not available: there was no evidence that any Canadian official approved or would have approved of the joint effort.

One final example of the act of state defense and its outer limits is *Alfred Dunhill of London, Inc. v. Republic of Cuba*.⁶⁶ In *Dunhill* a four-judge plurality of the Supreme Court held that the act of state doctrine, like the related sovereign immunity doctrine,⁶⁷ should not be extended to include "acts committed by foreign sovereigns in the course of their purely commercial operations."⁶⁸ It must be noted that this question is still unresolved since no majority of the Supreme Court has yet accepted the commercial act/public act distinction.

There is another interesting unresolved issue which I might mention. That is, does the *Noerr-Pennington* doctrine⁶⁹ apply to foreign as well

62. *Id.* at 110.

63. 274 U.S. 268 (1927).

64. *Id.* at 276.

65. 370 U.S. 690 (1962).

66. 425 U.S. 682 (1976).

67. See text accompanying notes 54 & 55 *supra*.

68. 425 U.S. at 706. Accord, 1975 State Department "Leigh" letter which stated that "we do not believe that the *Dunhill* case raises an act of state question because the case involves an act which is commercial, and not public, in nature." Letter from Monroe Leigh of State Department to the Solicitor General (Nov. 26, 1975), reprinted in 425 U.S. at 707 app.

69. *UMW v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

as domestic contexts? It will be recalled that *Noerr* and its progeny established the principle, subject to a "sham" exception,⁷⁰ that the first amendment protects efforts to induce a governmental body to take anticompetitive actions. The governmental body involved can either be the legislature, the executive, or an administrative or judicial body.

The courts have not squarely addressed this issue. One could argue that the Supreme Court, in the *Continental Ore*⁷¹ case, implied that the *Noerr-Pennington* rule protects collective efforts to lobby foreign governments. The Department of Justice has taken the same position in its Guidelines.⁷² However, it is not all that clear whether the doctrine has application to non-democratic foreign governments. There is some case authority to the effect that its protection is limited to democratic governments.⁷³

The *second* defense mentioned is that of sovereign compulsion. The underlying premise of this doctrine is that when a foreign government commands a private party or group to undertake anticompetitive activity, there can be no antitrust liability.⁷⁴

This doctrine clearly applies to actions compelled within a foreign state's territory. It is not so clear whether the doctrine applies to restraints within the United States. At least one District Court has taken the position that it does.⁷⁵ On the other hand, the Justice Department contends that the sovereign compulsion doctrine is not available in such circumstances.⁷⁶

Moreover, there are other situations in which the sovereign compulsion doctrine has been held to be inapplicable. The following cases are illustrative. In *Continental Ore Co. v. Union Carbide & Carbon Co.*,⁷⁷ the United States Supreme Court held that the mere acquiescence in or approval of a defendant's discriminatory behavior by a foreign sover-

70. "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." 365 U.S. at 144.

71. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).

72. U.S. DEPT OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 63 (Jan. 26, 1977).

73. *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.2d 92, 107-08 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 905 (1972). See also P. AREEDA, ANTITRUST ANALYSIS 130 (2d ed. 1974).

74. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 702-08 (1962).

75. *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298 (D. Del. 1970).

76. Speech by D. Farmer before the annual meeting of the National Security Industrial Association (May 23, 1977), reprinted in [current] TRADE REG. REP. (CCH) ¶ 50,323.

77. 370 U.S. 690, 702-08 (1962).

eign does not trigger the sovereign compulsion defense. Similarly, a defendant's encouragement and solicitation of foreign legislation for purposes of monopolizing the sisal hemp market has been held to be insufficient.⁷⁸

This concludes our review of the basic principles involved. Due to time limitations, I have laid aside such fascinating subjects as jurisdiction over the person, service of process, venue matters, and compulsory process.

I might dwell just a minute on discovery abroad since that seems to be a particular irritant to foreign governments.⁷⁹ As one might say, it has gotten most of the press coverage.

United States courts have taken the position that documents located abroad, even in the possession of foreign subsidiaries, are subject to production under rule 34.⁸⁰ The rationale of such a rule is that the antitrust laws are a "cornerstone of this nation's economic policies" and that in a suit involving such policies, the securing of information should not be frustrated by any means.⁸¹

This assertion of extra-territorial jurisdiction by United States courts, particularly in the area of document production, has resulted in the enactment by a number of countries of laws forbidding the production of documents located within that country.⁸² The question then arises as to whether a party may avoid the sanctions of rule 37⁸³ (including a default judgment) by pleading the prohibition under foreign law. The rule, as expressed by the Supreme Court in *Societe Internationale v. Rogers*,⁸⁴ is that prohibition under foreign law is not an excuse for failure to obey a discovery order, but that the harsh sanctions of rule 37

78. *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927).

79. Fed. R. Civ. P. 34.

80. For a more detailed analysis of the rapidly expanding area of international discovery, see Note, *Taking Evidence Outside of the United States*, 55 B.U.L. REV. 368 (1975); Note, *Ordering the Production of Documents Located Abroad—the Tenth Circuit's Approach*: In re Westinghouse Electric Corp. Uranium Contracts Litigation, 1978 UTAH L. REV. 361; Note, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation*, 14 VA. J. INT'L L. 747 (1974).

81. *American Industrial Contracting, Inc. v. Johns-Manville Corp.*, 326 F. Supp. 879, 880 (W.D. Pa. 1971).

82. See The Business Records Protection Act, 1947, as amended by 1 ONT. REV. STAT. ch. 54 (1970) (passed in response to *In re Grand Jury Subpoenas Duces Tecum Addressed to Canadian International Paper Co.*, 72 F. Supp. 1013 (S.D.N.Y. 1974)). See also Business Concerns Records Act, QUE. REV. STAT. ch. 278 (1964); Shipping Contracts and Commercial Documents Act, 1964, ch. 87 (United Kingdom); Economic Competition Act of June 28, 1956 (Netherlands), Act of July 16, 1958, art. 39.

83. Fed. R. Civ. P. 37.

84. 357 U.S. 197 (1958).

are not justified when the failure is due to good faith inability to produce the documents.

Just what the parameters of good faith are is not too clear. What is clear, however, is that the least a party must do is to attempt to negotiate an exemption from foreign jurisdiction. If such a showing can be made, a United States court usually will not impose the sanctions of rule 37, particularly if the foreign statute imposes criminal sanctions for disobedience.⁸⁵ On the other hand, if there is evidence of collusion between the party and the foreign government representatives, rule 37 sanctions will be imposed.⁸⁶

This is an area where some accommodation should be found between the interests of the United States and those of a foreign government. Defendants in antitrust suits should not be subject to harsh sanctions because of the dictates of foreign law. The courts should be sensitive to the principles of comity.

Section 40 of the Restatement of Foreign Relations attempts to solve this conflict by requiring a court to consider a variety of factors, such as (a) the vital national interests of each of the states, and (b) the extent and nature of the hardships that inconsistent enforcement actions would impose on such a person.⁸⁷ Although this is certainly a step in the right direction, the United States courts have tended to consider United States antitrust interests as paramount and to consider hardships on the parties as secondary.

Let me sum up where we now are in the enforcement of the United States antitrust laws in the international area. The goal of United States antitrust laws in an international context is to maintain an open, competitive system in both the import and export trade of the United States and to insure that business diversity and opportunity will flourish and that the most efficient technologies will be available to consumers at the lowest prices. The United States government has recently adopted a threefold approach to regulation of international trade. First, the government endorses the vigorous enforcement of the anti-trust laws with respect to the conduct of United States businesses abroad. The Justice Department rejects the traditional argument by United States corporations that this places them at a competitive disadvantage in the international marketplace. Second, United States courts have demonstrated an increased willingness to impose United States

85. E. KINTNER & M. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER 48-58 (1974).

86. Note, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation*, 14 VA. J. INT'L L. 747, 750-51 (1974).

87. RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 40 (1965).

laws on foreign states and their nationals if their commercial activity has a significant anticompetitive impact on United States commerce. Third, the executive and legislative branches have emphasized increased cooperative efforts between United States and foreign governments, including rudimentary steps toward an international antitrust code or set of principles.⁸⁸

With these thoughts in mind, it is all too clear that multinational corporations should "BEWARE" of the international reach of the United States antitrust laws.

88. *See, e.g.*, text accompanying note 31 *supra*.