Vanderbilt Journal of Transnational Law

Volume 14
Issue 4 *Fall 1981*

Article 4

1981

Recent Decisions

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RECENT DECISIONS

ANTITRUST — ACT OF STATE DOCTRINE PRECLUDES JUDICIAL REVIEW OF CASES IN WHICH PRIVATE DEFENDANT INDUCES FOREIGN SOVEREIGN TO BOYCOTT PLAINTIFF'S SERVICES AND PRODUCTS

I. FACTS AND HOLDING

Plaintiff,[1] a designer and manufacturer of short takeoff and landing (STOL) aircraft,[2] sought damages[3] from defendants[4] for violation of sections 1 and 2 of the Sherman Act.[5] Specifically,

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1. General Aircraft Corporation (GAC).

2. Plaintiff's aircraft sold under the trade names "Helio Courier" and "Helio Stallion."

3. Clayton Act, ch. 1, § 15, 15 U.S.C. § 15 (1976) states that:

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

See also 15 U.S.C. § 26 (1976).

4. Named as defendants are Air America, Inc., its wholly owned subsidiary, Air Asia Co., Ltd., and George A. Doole, Jr., Chief Executive Officer of Air America and Air Asia during the 1950's and 1960's until his retirement in 1971. These defendants are alleged to be a part of the "CIA Air Proprietary Complex."

5. 15 U.S.C. §§ 1, 2 (1976). Sections 1 and 2 of the Sherman Act state:

> 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
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> 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment

plaintiff alleged that defendant's employees falsely disparaged General Aircraft Corporation's (GAC) STOL aircraft products and services by circulating false and misleading performance reports and engaged in a "vendetta"[6] designed to drive GAC out of business because of GAC's refusal to conduct Southeast Asian Helio sales under the auspices of defendant Doole and Air American. Plaintiff asserted that in furtherance of this vendetta, Air Asia obtained GAC proprietary data and trade secrets that enabled the defendant to fabricate Helio planes and parts without license at its repair facilities in Taiwan from 1962 to January 31, 1975. Finally, plaintiff alleged that defendant orchestrated a boycott of GAC's STOL aircraft, thereby completing the conspiracy to destroy GAC's competitive position in the marketplace.[7] Responding with various motions to dismiss or in the alternative for summary judgment, defendants argued the following: (1) the act of state doctrine precludes adjudication of GAC's claim for lost sales to foreign governments; (2) the *Noerr-Pennington* doctrine bars plaintiff's claim for lost sales to domestic corporations and the United States Government; and (3) the statute of limitations bars all plaintiff's foreign and domestic claims for damages resulting from defendant's alleged uncompetitive activities since most of the actions in question occurred prior to the running of the statute of limitations period which began to run four years prior to the November 8, 1977 commencement of the suit. The United States District Court for the District of Columbia *held*: (1) The act of state doctrine precludes United States courts from reaching the merits of a case in which (a) the alleged antitrust injury re-

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not exceeding three years, or by both said punishments, in the discretion of the court.

6. General Aircraft Corp. v. Air America, Inc., 482 F. Supp. 3, 5 (D.D.C. 1979).

7. The plaintiff asked the court to review both the conspiratorial actions allegedly taken by the CIA Air Proprietary Complex and certain domestic and foreign corporations as well as to assess their impact on procurement decisions reached by foreign governments. In addition for damages for the destruction of its business, plaintiff alleged that defendants' anticompetitive activities influenced procurement decisions made by United States government agencies in at least three instances: (1) a 1965 test competition conducted by the Air Force Tactical Air Command; (2) a 1968 sale-source procurement of STOL aircraft by the Navy known as the "Riverine" program; and (3) a 1971 Air Force procurement of STOL aircraft for use in Cambodia and Thailand. Plaintiff also alleged that defendants influenced STOL aircraft procurement decisions made by the CIA. *Id.* at 6.

sults directly from acts or decisions of foreign governments and only indirectly from defendant's allegedly unlawful anticompetitive activities and in which (b) the motivation of a foreign government's purchasing decision is brought into issue by the pleadings; (2) an antitrust plaintiff may recover damages for injuries resulting from defendant's alleged false disparagement of plaintiff's products where such misrepresentation is designed to influence the commercial marketplace decisions of government agencies; (3) although most claims are barred by the four-year statute of limitations, "justice" requires that plaintiff be allowed to specify how and why it could not prove its cause of action for the alleged destruction of its business before the four-year period prior to the initiation of the antitrust action. *General Aircraft Corp. v. Air America, Inc.*, 482 F. Supp. 3 (D.D.C. 1979).

II. LEGAL BACKGROUND

A. *Judicial Application of the Act of State Doctrine to International Antitrust Cases*

The classic United States statement of the act of state doctrine, which precludes United States courts from adjudicating acts of foreign sovereigns committed within their own borders, is found in *Underhill v. Hernandez.*[8] The then-current notions of sovereignty and independence among nations were the basis of the *Underhill* analysis.[9] These concepts, though not specifically identified, first influenced an antitrust action involving a foreign government in *American Banana Co. v. United Fruit Co.*[10] The

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8. 168 U.S. 250 (1897). The Court stated:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Id. at 252, *cited in* Banco National de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964).

9. Note, *Sherman Act Jurisdiction and the Acts of Foreign Sovereigns*, 77 COLUM. L. REV. 1247, 1256 (1977).

10. 213 U.S. 347 (1909). In that case plaintiff, an Alabama corporation, sued defendant, a New Jersey corporation, for monopolizing the banana trade in Panama. Plaintiff alleged that the defendant not only restrained trade in that country, but also induced the government of Costa Rica to interfere with plaintiff's farm operations by seizing part of plaintiff's plantation and various cargo supplies.

Supreme Court in *American Banana Co.* held that international comity prohibited the extension of the jurisdiction of the Sherman Act to reach the acts committed abroad by, or under the direction of, a foreign sovereign. As a corollary, the Court ruled that the existence of foreign executive or legislative action permitting actions that would be illegal under the Sherman Act[11] would not impact on Sherman Act decisions. The Supreme Court further defined the reach of the Sherman Act and its interrelation with the act of state doctrine in *United States v. Sisal Sales Corp.*[12] In that case, plaintiff alleged that defendants[13] had created a monopoly in Mexico's sisal (rope) trade, which included exports to the United States, by obtaining discriminatory legislation in that country. Although defendant cited *American Banana Co.* for the proposition that acts are adjudged legal or illegal according to the law of the place where they are committed,[14] the Court distinguished the facts of *Sisal Sales Corp.* from *American Banana Co.*[15] and held that where conspirators bring about "forbidden results" within the United States, "they are within the jurisdiction of our courts and may be punished for offenses against our will."[16] Subsequent cases developed the rule that the reach of

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11. *Id.* at 358. The Court stated: "A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by local law." *Id.* at 359.

12. 274 U.S. 268 (1927).

13. Three American banks, United States nationals, and a Mexican corporation.

14. 274 U.S. at 270.

15. *Id.* at 275-76. The Court noted that the plaintiff's plantation in *American Banana Co.* was within the de facto jurisdiction of Costa Rica, and that that nation took it and kept possession of it by virtue of its sovereign power. In *Sisal Sales Corp.* the Court emphasized that defendant's actions were comprised of a contract, combination and conspiracy entered into by the parties within the United States and made effective by acts done therein. "The fundamental object was control of both importation and sale of sisal and complete monopoly of both internal and external trade and commerce therein." *Id.* at 276.

16. *Id.* at 276. The Court explained further:

> The United States complains of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties. True, 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.

Id.

A corollary to the act of state doctrine in the foreign antitrust field is the

the Sherman Act will extend well beyond United States borders in cases in which adverse effects upon United States commerce are shown, even when the actions of foreign sovereigns are involved.[17]

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principle that corporate conduct compelled by a foreign sovereign is protected from antitrust liability, as if it were an act of the state itself. On the other hand, mere governmental approval or foreign governmental involvement which the defendants had arranged does not necessarily provide a defense. For a discussion of the distinction, see United States v. The Watchmakers of Switzerland Information Center, Inc., 168 F. Supp. 904 (S.D.N.Y. 1962).

17. In United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945), Judge Learned Hand wrote for the Second Circuit that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends." *Id.* at 443. The court there stressed that a prerequisite to the application of the Sherman Act to an agreement (contract, combination or conspiracy) made outside American borders to affect United States trade was that it must be "intended to affect imports and [did] affect them." *Id.* at 444. While that case did not involve the actions of any foreign power, the broad "intended effects" test has been cited with approval in cases involving antitrust and the defense of the act of state doctrine. In Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979), plaintiff sued defendant for damages in antitrust alleging that the latter had secured foreign patents by fraud which, if perpetrated in securing domestic patents, would lead to antitrust liability. In rejecting defendant's assertion that the issuance of a patent by a foreign government constituted an act of state, the court went on to list the factors to be considered in determining whether the Sherman Act should be applied extraterritorially where a foreign sovereign is somehow involved. *See* 595 F.2d at 1297-98. Essentially, the *Mannington* court approved the analysis found in Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976). In that international antitrust case, defendants asserted that the Honduran Government's enforcement of a security interest in a lumber plant (which plaintiff alleged constituted one part of a larger antitrust conspiracy aimed at affecting lumber exports to the United States) was an act of state not justiciable by United States courts. The court rejected the act of state defense, noting that the "sovereign acts" of Honduras consisted of judicial proceedings instituted by one of the defendants. *Id.* at 608. Nevertheless, the court undertook to set out the balancing test to use when applying the Sherman Act abroad including, apparently, situations involving foreign governmental action. *Id.* at 613-15. Using "jurisdictional rule of reason" as a guideline, the court set forth the following elements to be weighed:

> [T]he degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or effect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of

While the judiciary expanded the jurisdiction of the Sherman Act, courts also altered the underpinnings of the act of state doctrine. Judge Learned Hand hinted at a new act of state rationale in a Second Circuit opinion[18] in which he suggested that courts must consider State Department suggestions before deciding whether foreign sovereign acts are justiciable.[19] Although the Supreme Court has not endorsed such an idea, the concept of State Department suggestions injects a "political" aspect into act of state doctrine analysis. As a result, the opinions have "fluctuated between according State Department advice conclusive effect and retaining a more flexible case-by-case approach with ultimate power of decision in the judiciary."[20] In *Banco Nacional de Cuba v. Sabbatino*,[21] the Court noted that the act of state doctrine is not compelled either by the "inherent nature of sovereign authority . . . or by some principle of international law,"[22] but rather that the doctrine has "constitutional" underpinnings.[23] Later, however, the Supreme Court decision in *Alfred Dunhill of London, Inc. v. Republic of Cuba*[24] emphasized a new aspect of the doctrine: "The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive branch of our government in the conduct of our foreign relations."[25] Whatever the theoretical foundation, the *Dunhill* Court reemphasized the *Sabbatino* analysis that the doctrine "precludes the courts of this country from inquiring into the validity of the *public* acts a recognized foreign sovereign power

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conduct within the United States as compared with conduct abroad. *Id.* at 614. *See also* note 98 *infra*.

18. Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir.), *cert. denied*, 332 U.S. 772 (1947).

19. 163 F.2d at 249. *See also* Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvart-Maatschappij, 210 F.2d 375 (2d Cir. 1954) (per curiam).

20. Note, *supra* note 9, at 1256.

21. 376 U.S. 398 (1964).

22. *Id.* at 421.

23. *Id.* at 423. In describing the act of state doctrine, the Court noted: "It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations." *Id.*

24. 425 U.S. 682 (1976).

25. *Id.* at 697.

committed within its own territory."[26]

While a political "separation of powers" rationale now underlies the act of state doctrine, an exception to the application of the doctrine has been recognized in instances of foreign sovereign commercial activity. In *Dunhill*,[27] the Supreme Court stated that the act of state defense did not extend to acts of foreign sovereigns in the course of their "purely commercial operations."[28] In that case, Cuban intervenors[29] had refused to repay to importers funds the latter had mistakenly paid to Cuba but actually owed to pre-intervention cigar factory owners. The plurality opinion[30] noted that the act of state doctrine did not shield Cuban intervenors in matters such as repudiation of a foreign debt[31] that the Court regarded as "purely commercial." The Foreign Sovereign Immunities Act of 1976[32] codified the commercial exception, and the Second Circuit in *Hunt v. Mobil Oil Corp.*[33] has treated it as firmly established in the context of antitrust cases. In that case, plaintiff, an oil producer, sued other oil producers for conspiring to prevent him from reaching a settlement with Libya before the government nationalized his oil fields. While noting that the Supreme Court declined to apply the act of state doctrine to situations in which the sovereign had descended to the level of entrepreneur, the court ruled that expropriation of the property of an alien within the boundaries of the sovereign state is cited in *Dunhill* as an example of noncommercial sovereign activity within the

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26. *Id.* at 706 (quoting Underhill v. Hernandez, 168 U.S. 250, 252 (1897) (emphasis added by *Dunhill* Court)).

27. *Id.* at 682.

28. *Id.* at 708.

29. Those persons named to possess and occupy nationalized Cuban businesses.

30. Because Justice Stevens excluded the commercial activity discussion from his concurring opinion, the commercial exception cannot be deemed Supreme Court precedent. *See* Marks v. United States, 430 U.S. 188, 193 (1977), in which the Court stated that absent a majority its holding "may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds," and therefore should not be viewed as Supreme Court precedent.

31. 425 U.S. at 705-06.

32. 28 U.S.C. §§ 1602-1611 (1976). The statute distinguishes public acts from commercial dealings of foreign nations and excludes the latter from the scope of sovereign immunity in United States courts.

33. 550 F.2d 68 (1977).

ambit of the doctrine.[34] Even though the Second Circuit recognized an exception to the act of state doctrine, that court has also broadened the application of the doctrine by precluding judicial inquiry not only when the validity of a foreign public act is involved,[35] but also when the parties raise the issue of the motivation behind an "anticompetitive" act of a foreign government to determine whether a private antitrust defendant instigated the sovereign action. In *Hunt*, the court found that plaintiff could prevail only if he could prove that "*but for* their [defendants'] combination or conspiracy Libya would not have moved against it [Hunt]."[36] The court thus ruled that it could not "logically separate Libya's motivation from the validity of its seizure"[37] unless the judicial branch examined the motivation of the Libyan action. The court in *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*,[38] a case involving parallel facts (though distinguished in *Hunt*), refused to adjudicate an antitrust claim comprised of plaintiff's allegations that defendant induced the ruler of Sharjah to award to defendant certain territory which plaintiff already held through a concession from a neighboring Sheikdom, Umm al Qaywayn. Through the use of "internal documents,"[39] the plaintiffs proposed to show that the ruler of Sharjah, named as a co-conspirator along with Iran, issued a fraudlent territorial waters decree. The court noted that "plaintiffs necessarily ask this court to 'sit in judgment' upon the sovereign acts pleaded, whether or not the countries involved are considered co-conspirators."[40] While the plaintiffs attempted to argue during trial they did not complain of the acts of foreign sovereign states but rather "only of defendant's conduct in 'catalyzing' those acts,"[41] the court ultimately ruled that "such inquiries by the court into the authenticity and motivation of the acts of foreign sovereigns would be the very sources of diplomatic friction and complication that the act of state doctrine aims to avert."[42] Unfortunately, the Supreme

34. *Id.* at 73.
35. *See* note 26 *supra* and accompanying text.
36. 550 F.2d at 76.
37. *Id.* at 77.
38. 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).
39. *Id.* at 110.
40. *Id.*
41. *Id.*
42. *Id.*

Court has not found it necessary to concern itself with the "motivation" issue when deciding whether or not to invoke the act of state doctrine in cases in which defendants allegedly induce foreign governments to engage in anticompetitive schemes.[43]

B. *Judicial Application of the* Noerr-Pennington *Doctrine to Antitrust Cases*

A defense based on the *Noerr-Pennington* doctrine may be available in antitrust cases in which plaintiffs base liability on market conduct in the context of governmental permission.[44] The doctrine puts outside the reach of the Sherman Act activities involving group solicitation aimed at the passage and enforcement of law and group influence of public officials and administrative agencies[45] even though such conduct is part of a larger scheme which violates the antitrust laws. The *Noerr-Pennington* doctrine is grounded both in constitutional and public policy arguments. First, the *Noerr* Court recognized that the Sherman Act could not be construed so as to "trespass" upon the first amendment right of petition.[46] Second, the Court emphasized that the Sherman Act could not be interpreted so as to hamper access of the United States citizens to democratic political institutions.[47] As a result,

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43. In United States v. Sisal Sales Corp., 274 U.S. 268 (1927), the Supreme Court disallowed an act of state defense where defendants allegedly caused forbidden antitrust results in the United States by inducing the Mexican government to pass legislation favorable to their goals of monopolizing sisal trade in Mexico. *See* text accompanying note 12 *supra*. Citing *Sisal Sales Corp.*, the Court in Continental Ore Co. v. Union Carbide & Carbon Co., 370 U.S. 690, 704-05 (1962), reaffirmed this rationale for the inapplicability of the act of state doctrine. In that case, plaintiff alleged that defendant, a United States corporation, through its Canadian subsidiary appointed as exclusive wartime agent to purchase and allocate vanadium for Canadian industries by the Canadian Government, eliminated plaintiff entirely from the Canadian market and divided plaintiff's business between other defendant companies. The Court was careful to find that the Canadian Government had neither approved nor compelled any of the challenged anticompetitive actions taken by a co-conspirator while exercising discretionary powers granted by that Government: "[R]espondents are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government." *Id.* at 706.

44. *See* U.M.W. v. Pennington, 381 U.S. 657 (1965); Eastern R.R. President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

45. *See* Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

46. 365 U.S. at 138.

47. *Id.* at 137.

judges are reluctant to utilize the doctrine in cases involving foreign governments.[48] In addition, courts hesitate to apply the doctrine to cases in which the defendant attempts to influence government bodies in purely commercial matters such as procurement.[49] Finally, as the Court in *Noerr-Pennington* stated, the doctrine does not immunize any governmental petition that is "a sham to cover up what is actually nothing more than an attempt to interfere directly with the business relationship of a competitor."[50]

C. *Judicial Application of the Statute of Limitations to Antitrust Cases*

In all foreign and domestic antitrust cases a cause of action "accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business."[51] If a plaintiff can plead and prove that a claim accrued within the limitations period (four years immediately preceding commencement of the case),[52] he is entitled to damages for that entire period.[53] In order for an antitrust plaintiff to recover damages for injurious acts occurring prior to the commencement of the running of the statute of limitations, there must be a showing that the claims arising from the injurious acts did not "accrue" because the damages were too speculative and not capable of reasonable calculation.[54] On the other hand, in order to maintain an antitrust action after the expiration of the limitations period, the plaintiff must show that the statute was tolled.[55] Courts have thus articulated exceptions to the general rule that an antitrust claim is barred unless the plaintiff can plead and prove that a claim accrued within the limita-

48. *See generally* Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. at 107-08, and the cases cited therein. The court wrote: "The constitutional freedom to petiton the Government carries limited if indeed any applicability to the petitioning of foreign governments."

49. *See generally* Gen. Aircraft Corp. v. Air Am., Inc., 482 F. Supp. at 6, and the cases cited therein. The instant court notes that under such circumstances, the governmental entity is acting not as a political body, but rather as a participant in the marketplace. *Id.* at 7.

50. 365 U.S. at 144.

51. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338 (1971).

52. 15 U.S.C. § 15b (1976).

53. *See* Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481 (1968).

54. *See* notes 56-58 *infra* and accompanying text.

55. *See* notes 59-64 *infra* and accompanying text.

tions period. In *Zenith Radio Corp. v. Hazeltine Research, Inc.*[56] the Supreme Court held that "even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable."[57] In such a situation, the Court ruled, refusal to award future profits because they were too speculative was equivalent to holding that no cause of action had accrued for any damages other than those already suffered. The cause of action for future damages, if they ever occur, "will accrue only on the date they are suffered; thereafter, the plaintiff may sue to recover them at any time within the four years from the date they were inflicted."[58] In addition, the court in *Winkler-Koch Engineering Co. v. Universal Oil Products Co.*[59] held that cases involving a continuing conspiracy may be essentially immune from the timing requirements of the statute of limitations. The *Winkler* court ruled that a continuing conspiracy which caused the destruction of plaintiff's business constituted "a single wrong and a single cause of action, and . . . the damages, if any, resulting from the accumulative effect of the alleged acts of the defendants did not accrue until the common purpose of the alleged conspiracy had been achieved."[60] Courts have narrowed that opinion, however, and most jurisdictions apply the rule set out in *Delta Theaters, Inc. v. Paramount Pictures,*[61] in which the defendant's alleged continuing conspiracy to destroy plaintiff's business created a single cause of action that accrued on the date the business was destroyed. The *Delta* court ruled that in the case of successive damages suffered because of a continuing conspiracy, the statute begins to run on each day the damage occurs.[62] Finally, in order to sustain an action brought after the running of the limitation period, an antitrust litigant may assert that the fraudulent concealment of the claim by de-

56. 401 U.S. 321 (1971).

57. *Id.* at 339.

58. *Id.*

59. 96 F. Supp. 1014 (1950), *aff'd on rehearing*, 100 F. Supp. 15 (S.D.N.Y. 1951).

60. *Id.* at 1018.

61. 158 F. Supp. 644 (E.D. La. 1958).

62. *Id.* at 649. The court stated: "When suit is brought, the plaintiff may recover only for damages inflicted during the period of limitation immediately preceding the filing of the complaint." *Id. See also* S.S. Co. v. United Fruit Co., 243 F. 1, 20 (3d Cir. 1917).

fendant tolled the statute of limitations. The general elements of this counterpose are laid out in *Weinberger v. Retail Credit Co.*;[63] "(1) [f]raudulent concealment by the party raising the statute together with (2) the other party's failure to discover the facts which are the basis of his cause of action despite (3) the exercise of due diligence on his part."[64]

III. The Instant Decision

The instant court rejected plaintiff's legal arguments on all claims although it concluded that "justice" required allowing plaintiff to amend its complaint.[65] The theory of plaintiff's foreign claim, the court stressed, was not that the alleged combination or conspiracy itself damaged plaintiff but rather that the adverse purchasing determinations made by foreign governments were influenced by certain actions taken in furtherance of the alleged conspiracy and that this situation resulted in the elimination of a market for GAC's STOL aircraft and other services.[66] In support of its rejection of plaintiff's foreign claims, the court cited *American Banana Co.* and *Occidental* for the proposition that the act of state doctrine precludes judicial inquiry where the alleged injury was the direct result of the acts or decision of a foreign sovereign and only indirectly from defendant's allegedly unlawful anticompetitive activities.[67] Moreover, the court followed the Second Circuit's opinion in *Hunt*[68] and refused to reach the merits of plaintiff's foreign claim because plaintiff cited the foreign government's motives behind the purchasing decisions as an essential element in its pleadings. On the issue of plaintiff's domestic claims, the court rejected defendant's argument that the *Noerr-Pennington* doctrine protected defendant's alleged anticompetitive activities in "influencing" United States agencies to refuse to buy plaintiff's STOL aircraft. The court noted that there is a general reluctance to apply the doctrine to attempts to influence government bodies acting in purely commercial matters such as procurement. Relying on recent case law, the instant court ruled that the agencies to which defendants falsely dispar-

63. 498 F.2d 552 (4th Cir. 1974).
64. *Id.* at 555.
65. Gen. Aircraft Corp. v. Air Am., Inc., 482 F. Supp. 3, 11 (D.D.C. 1979).
66. *Id.* at 6.
67. *Id.*
68. *See* 550 F.2d 68 (2d Cir. 1977); *see* note 36 *supra* and accompanying text.

aged plaintiff's products and services acted not as political entities but rather as participants in the commerical arena;[69] consequently, the court held the *Noerr-Pennington* doctrine inapplicable as a defense.[70] This determination, however, did not end plaintiff's domestic claims since most of the injurious acts alleged by plaintiff took place prior to the commencement of the limitations period, or more than four years preceding the Novmber 7, 1977 commencement of this action.[71] The court thus rejected plaintiff's contention that defendant's fraudulent concealment of the facts prevented GAC from filing a timely action.[72] In addition, the court disposed of plaintiff's argument that it had only one cause of action which did not accrue until the destruction of plaintiff's business in 1976. Because its complaint stemmed from continuing antitrust behavior, the purpose of the alleged conspiracy had been achieved.[73] Finally, in response to plaintiff's alternative contention that pre-1973 damages to its company were too speculative and not provable until the company's sale in 1976, the court observed that plaintiff knew the seriousness of its business situation as early as 1973 and that the circumstances in that year were "strikingly similar"[74] to those in 1976.[75] Thus, plaintiff's unsuccessful sales efforts resulted in prov-

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69. 482 F. Supp. at 8.

70. *Id.* The court stated: "Even if this were not true, the allegedly misleading performance reports and false disparagement engaged in by the defendants would be of no assistance to a decision maker acting in the marketplace and such conduct would not be immune from antitrust activities." *Id.*

71. *See* note 7 *supra.*

72. 482 F. Supp. at 8.

73. *Id.* at 10. Plaintiff relied on footnote 15 in Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481, 502 (1968), in which the Court wrote of a continuing conspiracy (occurring between the years 1912 and 1955):

> We are not dealing with a violation which if it occurs at all must occur within some specific time span . . . . Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act which inflicted continuing and accumulating harm to Hanover. Although Hanover could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955.

The instant court apparently ignored this language and further rejected plaintiff's reliance on *Winkler-Koch.* 482 F. Supp. at 10..

74. 482 F. Supp. at 9. The court noted that "a plaintiff cannot await the availability of the best evidence if damage is otherwise provable." *Id., citing* Hanson v. Shell Oil Co., 541 F.2d 1352 (9th Cir. 1976), *cert. denied,* 429 U.S. 1074 (1977).

75. *Id.*

able damages once contracts were awarded to GAC's competitors.[76] The court granted defendant's motion to dismiss[77] plaintiff's claim that defendant engaged in predatory practices because there was no indication when these actions occurred. The court ruled, however, that justice required that plaintiff be allowed an opportunity to amend its complaint so that plaintiff might prove the accrual of a cause of action during the limitations period or demonstrate that its claims were "Zenith" exception claims,[78] provable only after 1973.

IV. COMMENT

The instant court defined the act of state doctrine in unnecessarily broad terms and inconsistently applied its conclusions of law to the facts. On appeal, the instant opinion should be reversed. The District of Columbia Circuit Court's interpretation of the instant facts and its analysis of case precedent construe the act of state doctrine in an overly broad fashion. The court used various act of state decisions from other circuits to dismiss as nonjusticiable plaintiff's foreign claims. Borrowing conclusions from the Supreme Court and the Ninth Circuit, the court decided not to reach the merits of this antitrust case involving a claim that is partially based upon the sovereign act of a foreign government, even though the sovereign act was induced by nongovernmental defendants.[79] The instant court failed, however, to consider other Supreme Court and Ninth Circuit rulings in which those courts found act of state antitrust cases involving economic effects within the United States[80] occurring as the result of the alleged anticompetitive activity, to be justiciable. The court also borrowed from Second Circuit analysis in reaching its decision to refuse to consider the merits of cases involving questions of the motivation of foreign sovereigns;[81] however, the instant court ignored the Second Circuit's enunciation of a commercial exception

76. *Id.* at 10.

77. *Id.* at 10-11.

78. *Id.* at 11; *see* note 56 *supra* and accompanying text.

79. *See* Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972).

80. *See* note 17 *supra*.

81. *See* notes 36-43 *supra* and accompanying text.

to the act of state doctrine.[82] This is surprising, because the court's extinguishment of defendant's *Noerr-Pennington* defense depended on the court's ruling that the governmental entities to which defendants directed their alleged anticompetitive activities acted as "participants in the marketplace" in "purely commercial matters."[83] Although plaintiff alleged both foreign and domestic antitrust activities, the court ignored the possibility that plaintiff's foreign claim might fall within the commercial exception to the act of state doctrine.

While the instant court engaged in a broad interpretation of the act of state doctrine, it also applied its "justice" standard inconsistently. Even though the court could not draw any "firm conclusions concerning the timeliness" of GAC's claims, "justice require[d] that plaintiff be given leave to amend its complaint."[84] The court, however, was not as lenient with plaintiff's foreign antitrust allegations. The court dismissed GAC's overseas claims because it found that the "motivation underlying purchasing decisions made by foreign governments [was] an essential issue raised by the pleadings."[85] The foreign governments were at most peripheral participants in the alleged anticompetitive scheme. The court should have allowed plaintiff time to amend its complaint to base its case on the theory that the conspiracy or combination itself directly damaged plaintiff.[86] Alternatively, to construe plaintiff's pleadings so as to do substantial justice,[87] the court should have ignored the question of motivation since it was "essential" only on the face of the complaint.

The instant court's analysis of case precedent was also inconsistent. The court quickly rejected defendant's *Noerr-Pennington* defense on the grounds that earlier holdings classified false disparagement of aircraft within the commercial activity exception of the *Noerr-Pennington* doctrine.[88] The court derived this ruling from cases holding that "governmental decisions concerning specifications for swimming pools, the leasing of a football stadium

82. *See* notes 27-34 *supra* and accompanying text.
83. 482 F. Supp. at 7.
84. *Id.* at 11.
85. *Id.* at 7.
86. The court implied that the merits could have been reviewed if plaintiff had argued that the conspiracy or combination directly damaged the plaintiff. *Id.* at 6.
87. FED. R. CIV. P. 8(f).
88. 482 F. Supp. at 8.

and the award of a soft drink concession have been held to be outside the scope of the [*Noerr-Pennington*] doctrine."[89] The court found, however, that plaintiff's citation of *Sisal* and *Continental* in support of the argument that its foreign claims were justiciable was not on point.[90] The court wrote that in neither case "did the plaintiff's claims require analysis of the reason underlying sovereign acts. In both cases, the direct cause of the injuries alleged was the actions of private corporations and not the act of the sovereign."[91] While the court may be correct, the facts as alleged reveal that foreign government participation in the instant case amounted to less than the participation found in either *Sisal* or *Continental.*[92] In dealing with plaintiff's foreign claim, the instant court should have continued the process of culling important legal principles from case precedent. The *Sisal* and *Continental* decisions, for example, provide case precedent from which conclusions regarding plaintiff's foreign claim might be drawn.[93]

In sum, fairness required the court to (1) construe plaintiff's complaint to achieve substantial justice by ignoring the issue of motivation or, alternatively, by giving plaintiff leave to amend the pleadings so as to eliminate any discussion of motivation; or (2) if the motivation issue could not be ignored or precluded by amending the complaint the court should have followed the Second Circuit's case law and classified the foreign sovereign's overseas conduct as "commercial activity" under the act of state doctrine. This second option would be consistent with the court's classification of the activities of the domestic governmental agencies under the *Noerr-Pennington* doctrine. Certainly the court must always be cognizant of the need to apply case precedent in a fair and equitable fashion.

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89. *Id.* at 7.

90. *Id.* at 6-7.

91. *Id.* at 7.

92. In *Sisal Sales Corp.*, the Supreme Court repeatedly emphasized that defendants had induced the Mexican government to pass favorable legislation and the importance that such legislation was crucial to the success of the alleged anticompetitive scheme. *See* 274 U.S. at 273. In *Continental Ore Co.*, although the Court emphasized that Canada did not approve of the actions taken by defendant, *see* 370 U.S. at 706, Canada did in fact act in its official sovereign capacity to appoint defendant as its trade agent.

93. United States v. Sisal Sales Corp., 274 U.S. at 276; Continental Ore Co. v. Union Carbide & Carbon Co., 370 U.S. at 706.

In its earliest form the act of state doctrine rested on the foundation of sovereignty and independence among nations.[94] As currently defined, the act of state doctrine is based on the separation of powers rationale—it accords primary authority in the conduct of foreign relations to the executive department. The presumption is that judicial interference in the conduct of foreign relations might embarrass or frustrate the executive department.[95] The instant court seems more than willing to deny a United States corporation its day in court even though there is no indication that the Executive will be embarrassed. The court noted only that "[t]he serious concerns recognized in prior decisions involving the act of state doctrine are clearly present here."[96] This ambiguous use of "here" portends future broad interpretations of the act of state doctrine with a concomitant decrease in careful consideration of relevant case law and the peculiar facts of each case. The United States may yet become an international "thieves' market"[97] for antitrust culprits similar to the environment described by Senator Hickenlooper during the congressional debates[98] to reverse portions of the *Sabbatino* decision.[99] Courts should consider immunizing antitrust defendants with the act of state doctrine only when their actions are so inextricably intertwined with the acts of foreign governments that review of the alleged anticompetitive scheme would entail adjudication of the validity of foreign sovereign public actions which could in turn interfere with executive branch direction of foreign policy. Even in these cases, the separation of powers and international comity, considerations should be weighed carefully against the need to protect, through the extra-territorial jurisdiction of the Sherman Act, legitimate United States interests overseas.[100] The act of

94. *See* note 8 *supra* and accompanying text.

95. *See* text accompanying note 25 *supra.*

96. 482 F. Supp. at 7.

97. *See* French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 60; 242 N.E.2d 704, 713; 295 N.Y.S.2d 433, 446 (1968).

98. 110 CONG. REC. 19,548 (1964).

99. *See* 376 U.S. at 427-39.

100. *See generally* Timberland Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976). The court stated:

> We concluded, then, that the problem should be approached in three parts: Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States? Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act? As a matter of

state doctrine should not preclude judicial review in cases such as the instant case in which the application of the doctrine serves to further neither the policies underlying the doctrine nor substantial justice.

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international comity and fairness, should the extraterritorial jurisdiction of the U.S. be asserted to cover it?

Id. at 615.

SOVEREIGN IMMUNITY—ACT OF STATE DOCTRINE—CLAIM LIES FOR IRAN'S FAILURE TO COMPENSATE FOLLOWING NATIONALIZATION

I. FACTS AND HOLDING

Plaintiffs, three corporations collectively representing American insurance interests in Iran in 1979,[1] filed a motion for partial summary judgment on the issue of liability in an action for damages brought in response to the nationalization without compensation[2] of plaintiffs' Iranian insurance interests[3] by defendants Islamic Republic of Iran[4] and Central Insurance of Iran (CII).[5] This

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1. American International Group Corporation owned 35% of the equity of Iran America International Insurance Company; INA Corporation owned 20% of the equity of Bimch Shargh, an Iranian corporation involved in the insurance business; Continental Corporation owned 10% of the equity of Hafez Insurance Company, Ltd., an Iranian corporation which, prior to mid-1979, was involved in buying and selling property and insurance. Am. Int'l Group, Inc. v. Islamic Republic of Iran, 493 F. Supp. 522, 523 (D.D.C. 1980), *remanded,* No. 80-1779 (D.C. Cir. June 5, 1981).

2. The defendants nationalized the insurance industry in Iran on June 25, 1979, by passing "The Law of Nationalization of Insurance Companies," which provided in part:

> To protect the rights of insurers, to expand the insurance industry over the entire State, and to instruct it in the service of people, from the date of ratification of this law, all insurance companies of the State are proclaimed nationalized with acceptance of the conditioned legitimate principle of possession.

Am. Int'l Group, Inc. v. Islamic Republic of Iran, 493 F. Supp. at 524.

3. Iranian law, including "The Law of Nationalization of Insurance Companies," failed to provide any mechanism for determining the payment of compensation. *Id.*

Relations between Iran and the United States were unsettled at the time of the nationalization because of the deterioration of political and governmental stability in Iran. In response to the November 2, 1979, seizure of sixty-two hostages at the United States Embassy in Teheran by a group of Iranian students, President Carter instituted on November 14, 1979, a "freeze" on all property located in the United States belonging to Iran or its nationals. Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979). Iran immediately countered by repudiating its debts to United States banks. Am. Int'l Group, Inc. v. Islamic Republic of Iran, 493 F. Supp. at 524. President Carter ceased United States diplomatic relations with Iran on April 7, 1980, and banned travel to and from Iran on April 17, 1980. Exec. Order No. 12,211, 45 Fed. Reg. 26,685 (1980).

4. The Islamic Republic of Iran (Iran) is a sovereign state and is a party to

nationalization severed all business relations between plaintiffs, defendants, and those Iranian insurance companies in which plaintiffs had invested.[6] Plaintiffs claimed this nationalization provided no mechanism for adequate compensation in violation of the Treaty of Amity and, independently, international law. Defendants argued that either the act of state doctrine or sovereign immunity precluded the court from awarding partial summary judgment. On plaintiffs' motion for partial summary judgment on liability under the Treaty of Amity and international law, *granted.*[7] *Held:* Iran's liability for nationalizing American monetary interests without adequate compensation is precluded neither by sovereign immunity, because Iran waived its sovereign immunity in the Treaty of Amity, nor by the act of state doctrine, because (1) the failure to provide a mechanism for adequate compensation is not an act of state; (2) the Treaty of Amity provides applicable established principles of international law; and (3) the commercial activity of the defendants is outside the protection afforded by sovereign immunity. *American International Group, Inc. v. Islamic Republic of Iran,* 493 F. Supp. 522 (D.D.C. 1980), *remanded,* No. 80-1779 (D.C. Cir. June 5, 1981).[8]

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the Treaty of Amity, Economic Relations, and Consular Rights, June 16, 1957, United States-Iran, 8 U.S.T. 899, T.I.A.S. No. 3853 (hereinafter cited as Treaty of Amity). Am. Int'l Group, Inc. v. Islamic Republic of Iran, 493 F. Supp. at 523.

5. Central Insurance of Iran (CII) is an Iranian governmental agency responsible for overseeing the insurance industry in Iran and participating in the business of reinsurance and underwriting. 493 F. Supp. at 523. CII gained control of plaintiffs' business and assets in Iran after the nationalization. *Id.* at 524. Plaintiffs' employees, unable to carry out most of their duties after the nationalization, eventually had to leave Iran. *Id.* at 525.

6. *Id.* at 524.

7. The court found defendants liable under Cause of Action One (Treaty of Amity violation) and under Cause of Action Two (international law violation). *Id.* at 526. The court ruled that genuine issues of material fact existed in Causes of Action Three (third party beneficiary), Four (conspiracy), and Five (conversion). *Id.* at 526 & n.2. A determination on the issue of damages was postponed. *Id.* at 526. The court ordered a preliminary injunction, preventing defendants from "transferring title to or possession of, withdrawing, or removing from the territory or the jurisdiction of the United States . . ., to the extent and in the amount necessary to satisfy plaintiffs' liquidated and unliquidated claims, attorneys' fees, costs and interest, which are estimated to total approximately $35,000,000 . . . ." *Id.* at 526-27. The court ordered plaintiffs to post a $35,000,000 security bond. *Id.* at 527.

8. On January 19, 1981, while this case was before the District of Columbia Circuit Court of Appeals on interlocutory appeal, Iran and the United States

II. LEGAL BACKGROUND

A. *The Doctrine of Sovereign Immunity*

The doctrine of sovereign immunity is a jurisdictional tenet under which domestic courts refrain from exercising jurisdiction over a foreign state in deference to its sovereignty. The United States Supreme Court first fashioned the American doctrine of sovereign immunity by denying jurisdiction over an armed French national ship in *The Schooner Exchange v. McFaddon,*[9] noting that

> [t]he jurisdiction of a nation, within its own territory, is necessarily exclusive and absolute . . . . This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns, nor their sovereign rights, as its objects.[10]

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settled the hostage crisis by executive agreement. N.Y. Times, Jan. 19, 1981, at 1, col. 1. To fulfill its obligations under the two agreements with Iran, the United States filed a Statement of Interest with the District of Columbia Circuit on February 26, 1981, requesting that the attachments and other restraints upon Iranian assets be vacated, and that the underlying private actions for judicial relief be stayed. Am. Int'l Group, Inc. v. Islamic Republic of Iran, No. 80-1779, slip op. at 4 (D.C. Cir. June 5, 1981). The circuit court granted the request of the United States to remand these cases with instructions to vacate the attachments and all other provisional and preliminary remedies and to stay further progress in the litigation, but it denied the United States request to vacate the orders of partial summary judgment. *Id.* at 39.

9. 11 U.S. (7 Cranch) 116 (1812). Two United States citizens, claiming title, libeled the Schooner Exchange when it was in the Port of Philadelphia.

10. *Id.* at 135-36. The Court stated that only the consent of the nation itself could create exceptions to this absolute territorial jurisdiction. This consent, however, could be express or implied. *Id.* at 315.

While immunity for private merchants and vessels "would subject the laws to continual infraction, and the host government to degradation," the Court argued that amenability of a public armed ship clearly would damage the sovereign's power and dignity. *Id.* at 143. The Court decided that

> the Exchange, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port, opened for her reception, on terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.

Id. at 146.

Although other nations were shifting from an absolute doctrine of sovereign immunity, like that evinced in *Schooner Exchange,* to a restrictive doctrine, which recognized sovereign immunity only for public governmental acts *(jure imperii)* and not those of a private nature *(jure gestionis)*,[11] the Supreme Court in *Berizzi Bros. Co. v. S.S. Pesaro*[12] reaffirmed the United States adherence to the absolute doctrine. Emphasizing the governmental purpose but not the commercial nature of the ship's mission, the *Pesaro* Court granted immunity to a merchant ship that was owned, possessed, and controlled by the Italian government.[13] In recognition of the potential impact of sovereign immunity issues upon foreign relations, Supreme Court decisions after *Pesaro* deferred to executive branch opinions on whether acts were public-governmental or private-commercial in nature.[14] The Supreme Court in *Republic of*

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11. *See* H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 645 (2d ed. 1976). *See also* 13 VAND. J. TRANSNAT'L L. 835, 836 (1980).

12. 271 U.S. 562 (1926).

13. *Id.* at 574. The Court granted this ship essentially the same immunity awarded to warships.

14. *See* Republic of Mexico v. Hoffman, 324 U.S. 30 (1945); *Ex parte* Republic of Peru, 318 U.S. 578 (1943). *Republic of Peru* concerned a motion for leave to file a petition for a writ of prohibition or mandamus to prohibit the district court from the further exercise of jurisdiction over petitioner Republic of Peru's seized vessel, the *Urayali.* Petitioner also sought an order declaring the ship immune. A Cuban corporation had libeled petitioner's ship, claiming that it had failed to carry a cargo of sugar from Peru to New York. The State Department informed the district court that it recognized petitioner's claim of sovereign immunity. The Supreme Court granted sovereign immunity to petitioner, stating:

> When the Secretary [of State] elects, as he may and as he appears to have done in this case, to settle claims against the vessel by diplomatic negotiations between the two countries rather than by continued litigation in the courts, it is of public importance that the action of the political arm of the Government taken within its appropriate sphere be promptly recognized. . . .

Id. at 587. The Court declared that it was "required to accept and follow the executive determination that the vessel is immune." *Id.* at 588.

Republic of Mexico v. Hoffman involved a libel against a merchant ship owned by the Mexican government but possessed and operated by a private party under a lease from the government. The State Department took no stance on the sovereign immunity issue but cited two cases, Ervin v. Quintanilla, 99 F.2d 935 (5th Cir. 1938), and Compania Espanola de Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68 (1937). H. STEINER & D. VAGTS, *supra* note 11, at 646. The *Ervin* court granted sovereign immunity because the ship involved was in the possession and service of the Mexican government. 99 F.2d at 939-41. The *Espanola* Court denied sovereign immunity because the ship involved was not in

Mexico v. Hoffman[15] initiated a shift towards, but not a firm adoption of, the restrictive doctrine of sovereign immunity. The *Hoffman* Court impliedly distinguished between a government-owned merchant ship not possessed by the government (non-immune) and a government-owned merchant ship possessed by the government (immune).[16] The State Department publicly adopted the restrictive doctrine in the May 19, 1952 "Tate Letter,"[17] after which the courts consistently deferred to the State Department's suggested rulings on sovereign immunity claims.[18] The State De-

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the possession and service of the Spanish government. 303 U.S. at 75. The State Department's noncommittal position prompted the *Hoffman* Court to state that "[i]n the absence of recognition of the claimed immunity by the political branch of the government, the courts may decide for themselves whether all the requisites of [sovereign] immunity exist." Republic of Mexico v. Hoffman, 324 U.S. 30, 34-35 (1945). The test for exercising sovereign immunity when the political branch failed to provide clear guidance was whether adjudication would embarrass the executive in the conduct of foreign relations. *Id.* at 39. The Court pointed out that "the recognition by the courts of an immunity upon principles which the political department of the government has not sanctioned may be [as] equally embarrassing" as ignoring a recommendation to surrender jurisdiction. *Id.* at 36. Interpreting the State Department's noncommittal position as an implicit rejection of the ship's sovereign immunity claim, *id.* at 36-37, the Court denied the claim and exercised jurisdiction. *Id.* at 38.

15. 324 U.S. 30 (1945).

16. The Court implied that the commercial nature of a government-owned ship possessed by a private party, rather than the public purpose of such a ship, would be determinative on sovereign immunity issues. *Id.* at 38. Thus, the Court favored a "nature" test (examining the nature of an activity — whether the government or a private entity is in control of the ship) over a "purpose" test (examining the purpose of an activity — whether the ship is carrying government or private goods). See note 34 *infra* for a discussion of the "nature" test as it has evolved under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (1976). The *Hoffman* approach is the opposite of that taken in early United States decisions in which the courts looked to the purpose of the ship to determine sovereign immunity questions. *See* text accompanying note 12 *supra*. The *Hoffman* decision did not mark the formal adoption of the restrictive doctrine, however, because the Court emphasized the potential for embarrassment in the conduct of foreign relations and its own acquiescence to the State Department's stated preference for the use of the restrictive doctrine in *Hoffman*. *See* note 14 *supra*.

17. 26 DEP'T STATE BULL. 984 (1952). This letter was written by Jack B. Tate, Acting State Department Legal Advisor, to Acting Attorney General Phillip B. Perlman.

18. *See* Spacil v. Crowe, 489 F.2d 614 (5th Cir. 1974); Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971); Petrol Shipping Corp. v. Kingdom of Greece, 360 F.2d 103 (2d Cir.), *cert.*

partment, however, did not offer an opinion on the validity of sovereign immunity claims in all cases. In *Victory Transport, Inc. v. Comisaria General de Abastecimientos Transportes*[19] the Fifth Circuit responded to the State Department's failure to render an opinion regarding defendant's sovereign immunity by fashioning five "categories of strictly political or public acts about which sovereigns have traditionally been quite sensitive."[20] The court ruled that, absent a State Department suggestion of sovereign immunity, it should be granted only if the defendant's activity fits within one of the following categories: "(1) internal administrative acts, such as the expulsion of an alien, (2) legislative acts, such as nationalization, (3) acts concerning the armed forces, (4) acts concerning diplomatic activity, (5) public loans."[21] Despite the State Department's avowed adherence to the restrictive doctrine, several of its decisions recognizing sovereign immunity claims are more easily explained on political grounds than on the basis of a public-private distinction.[22] Congress recognized the re-

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denied, 385 U.S. 931 (1966); Rich v. Naviera Vacuba, S.A., 295 F.2d 24 (4th Cir. 1961); N.Y. & Cuba Mail Steamship Co. v. Republic of Korea, 132 F. Supp. 684 (S.D.N.Y. 1955); Chemical Natural Resources, Inc. v. Republic of Venezuela, 420 Pa. 134, 215 A.2d 864, *cert. denied*, 385 U.S. 822 (1966).

19. 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

20. *Id.* at 360.

21. *Id.* Comisaria General, a Greek government agency, chartered a ship from Victory Transport, Inc. to transport wheat from Alabama to Spain. Victory Transport brought an action for damages after the ship sustained damage to its hull. The court abandoned both the "nature" and "purpose" tests and devised these five categories to determine whether the sovereign activity was public or private, and thus whether it was immune. The court found that Comisaria General's chartering of a private ship "[partook] far more of a private commercial act than a public or political act." *Id.*

22. *See* Spacil v. Crowe, 489 F.2d 614 (5th Cir. 1974) (a suit against a Cuban ship that sailed from a Chilean port during the overthrow of the Allende government before the ship had fully unloaded its freight); Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971) (in an action brought by a shipowner for damages to a shipment of grain ordered by the Indian government, despite the obvious commercial nature of India's activity, the State Department recommended immunity for the Indian government, possibly to maintain or improve trade relations with India); Rich v. Naviera Vacuba, S.A., 295 F.2d 24 (4th Cir. 1961) (to maintain good relations between the United States and Cuba after the two governments had made an effort to improve their mutual relations by exchanging hijacked vessels and planes, immunity was granted to a stolen Cuban ship carrying stolen freight). *See also* Goodman, *Immunity of Foreign Sovereigns: A Political or Legal Question—Victory Transport Revisited*, 38 BROOKLYN L. REV. 885, 889 (1972); Note,

strictive doctrine of sovereign immunity and achieved three major goals[23] with the passage of the Foreign Sovereign Immunities Act of 1976 (FSIA):[24] (1) the codification of the restrictive doctrine of sovereign immunity;[25] (2) the transfer of the official, final authority to determine the validity of sovereign immunity claims from the State Department to the courts;[26] and (3) the limitation of the types of jurisdiction that can be asserted over foreign sovereigns.[27] The FSIA provides in personam jurisdiction over foreign states[28] unless they are "entitled to immunity . . . under sections

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Sovereign Immunity—Limits of Judicial Control, 18 HARV. INT'L L.J. 429, 436 & n.37 (1977); 5 VAND. J. TRANSNAT'L L. 264, 266-67 (1971).

23. These goals are underscored by the official declaration of purpose contained in the Foreign Sovereign Immunities Act of 1976 (FSIA):

> §1602. Findings and declaration of purpose.
>
> The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. § 1602 (1976).

24. 28 U.S.C. §§ 1330, 1602-1611 (1976).

25. H.R. REP. No. 1487, 94th Cong., 2d Sess. 5 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6604, 6605 [hereinafter cited as U.S. CODE CONG. & AD. NEWS].

26. *Id.* at 6610.

27. 28 U.S.C. § 1330 (1976). Congress had additional goals in passing the FSIA. *See* von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 45 & n.53 (1978); 13 VAND. J. TRANSNAT'L L. 835, 837-38 (1980).

28. Terms like "foreign state" are defined in § 1603 of the FSIA:

> §1603. Definitions.
>
> For purposes of this chapter—
>
> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity—
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a

1605-1607 of this title [28] . . . ."[29] Section 1330(b) embodies the minimal jurisdictional contacts and adequate notice require-

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foreign state or political subdivision thereof, and

(3) which is neither a citizen or a state of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

28 U.S.C. § 1603 (1976).

29. 28 U.S.C. § 1330(a) (1976). Section 1330(b) satisfies due process by requiring service of process upon the foreign sovereign. This section constitutes a long-arm statute patterned after the Washington, D.C. long-arm statute embodied in the Act of July 29, 1970, Pub. L. No. 91-358, § 132(a), 84 Stat. 473, 549 (1970) (*codified in* D.C. CODE ANN. § 13-421 (1973 & Supp. VII 1980)). U.S. CODE CONG. & AD. NEWS, *supra* note 25, at 6612.

Section 1605, typical of the provisions limiting immunity, reads:

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

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

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

28 U.S.C. § 1605(a)(1)-(2) (1976). Additional exceptions to the immunity provisions are beyond the scope of this Comment but they are listed in the United States Code:

§ 1330. Actions against foreign states.

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

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607.

28 U.S.C. § 1330 (1976).

ments[30] of *International Shoe Co. v. Washington.*[31] Thus, if a case fits within one of the exceptions to the rule of immunity, minimum contacts inherently exist.[32] Although some courts correctly examine personal jurisdiction under the FSIA by analyzing the actual immunity exceptions,[33] others determine personal jurisdiction strictly on the basis of traditional minimum contacts or stricter standards.[34] All the immunity exception provisions codified in sections 1605-1607 require "commercial activity," which is defined in section 1603(d) as "either a regular course of commercial conduct or a particular commercial transaction or act."[35] If

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30. U.S. CODE CONG. & AD. NEWS, *supra* note 25, at 6612. There can be no personal jurisdiction under § 1330(b) unless the district court has original jurisdiction under section 1330(a). *Id.* at 6612.

31. 326 U.S. 310 (1945). The defendant must "have certain minimum contacts with . . . [the forum] such that the maintenance of suit does not offend 'traditional notions of fair play and substantial justice.' " *Id.* at 316.

32. U.S. CODE CONG. & AD. NEWS, *supra* note 25, at 6612; Chicago Bridge & Iron Co. v. Islamic Republic of Iran, 506 F. Supp. 981, 985 (N.D. Ill. 1980); E. Europe Domestic Int'l Sales Corp. v. Terra, 467 F. Supp. 383, 387 (S.D.N.Y.), *aff'd,* 610 F.2d 806 (2d Cir. 1979).

33. *See* Chicago Bridge & Iron Co. v. Islamic Republic of Iran, 506 F. Supp. 981 (N.D. Ill. 1980); Int'l Ass'n of Machinists & Aerospace Workers v. OPEC, 477 F. Supp. 533 (C.D. Cal. 1979).

34. One court's standard was whether the defendant had "purposely avail[ed] itself of the privilege of conducting business in the United States." Carey v. Nat'l Oil Corp., 592 F.2d 673, 676 (2d Cir. 1979) (per curiam). To satisfy this standard, the court sought evidence of continuous and systematic activities of the defendants in the United States or of corporate agents regularly doing business in the United States. *Id.* at 676 n.7. Another court determined that neither the *International Shoe* minimum contacts test nor the "continuously doing business" test sufficed. This court required that the defendant must either have been organized under the laws of, or had its principal place of business in, the forum state. Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056, 1059-60 (E.D.N.Y. 1979).

35. Title 28 U.S.C. § 1603(d)-(e) (1976) provides:

> (d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.
>
> (e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

The commercial "nature" of an activity is the proper test under the FSIA; the "purpose" of the activity is irrelevant. U.S. CODE CONG. & AD. NEWS, *supra* note 25, at 6615. *See generally* note 16 *supra;* text accompanying note 12 *supra.*

defendant's activity is not commercial activity, the foreign state is immune[36] unless an existing treaty provides otherwise.[37] The third exception under section 1605(a)(2) precludes immunity in any case "in which the action is based . . . 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."[38] The "direct effect" language[39] in section 1605(a)(2) requires that the detrimental impact be a substantial, direct, and foreseeable result of an act outside the United States.[40] "Commercial activity" is that activity in which private parties normally engage; immune, "noncommercial activity" is that activity in which only sovereigns engage.[41] Because nationalization is the quintessential act of a sovereign, it is not a commercial activity.[42]

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36. Title 28 U.S.C. § 1604 (1976) provides: "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."

37. A foreign sovereign also can lose its immunity by waiving its sovereign immunity in an international agreement to which the United States is a party. *Id; see* note 43 *infra* and accompanying text.

38. 28 U.S.C. § 1605(a)(2) (1976) (text reprinted in note 29 *supra*). This Comment will deal only with this exception under the FSIA.

39. Int'l Ass'n of Machinists & Aerospace Workers v. OPEC, 477 F. Supp. at 566-67; *see* Harris v. VAO Intourist, Moscow, 481 F. Supp. at 1064.

40. United Mexican States v. Ashley, 556 S.W.2d 784, 786 (Tex. 1977). No private party can nationalize property. Note that *Victory Transport* listed nationalization as one of its five categories of strictly political or public acts. 336 F.2d at 360. *See* text accompanying note 20 *supra. Contra,* New England Merchants Nat'l Bank v. Iran Power Co., 502 F. Supp. 120, 123 (S.D.N.Y. 1980). Mr. von Mehren argues that nationalization of rights or property given by contract constitutes commercial activity under the FSIA because the sovereign breaches its contract. He still considers nationalization of property or interests not involving contractual rights to be noncommercial. von Mehren, *supra* note 27, at 57-58.

41. U.S. CODE CONG. & AD. NEWS, *supra* note 25, at 6618. The legislative history refers to RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965).

42. Verlinden B.V. v. Cent. Bank of Nigeria, 488 F. Supp. 1284, 1298 (S.D.N.Y. 1980); Harris v. VAO Intourist, Moscow, 481 F. Supp. at 1062-63. Courts have construed strictly the direct effect language, requiring effects that flow in a straight uninterrupted line from the initial event. Upton v. Empire of Iran, 459 F. Supp. 264, 266 (D.D.C. 1978). The *Upton* court ruled that the death of a United States tourist in Teheran caused by the collapse of an airport termi-

In addition to the immunity exceptions under sections 1605-1607, district courts can gain original jurisdiction under "any applicable international agreements."[43] Unlike the language of sections 1605-1607, the language of the Treaty of Amity and the history of United States treaties of amity, friendship, and commerce indicate that the waiver of immunity in the Treaty of Amity applies only to each state's commercial activities in the other state's territory.[44] The instant case poses the question whether a nation-

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nal roof had no direct effect in the United States. The injuries, though endured in the United States, had been caused in Teheran. *Id; see* Harris v. VAO Intourist, Moscow, 481 F. Supp. at 1062.

Although the direct effect language is vague, one commentator believes that a nationalization by a foreign government of a United States-owned company directly affects the company's stockholders. von Mehren, *supra* note 27, at 58; *cf.* Carey v. National Oil Corp., 592 F.2d at 676 (Libya had nationalized concessions owned by Bahamian corporations; a United States corporation, New England Petroleum Corporation, was a beneficiary. The court found a direct effect in the Bahamas but none in the United States.). *Contra,* Verlindin B.V. v. Cent. Bank of Nigeria, 488 F. Supp. at 1298 ("In applying . . . [the direct effect language] courts have uniformly held that the locus of the injury is dispositive of jurisdiction, indeed that factor takes precedent over the citizenship of the victim.").

43. 28 U.S.C. § 1330(a) (1976) (text reprinted in note 29 *supra*); *see* 28 U.S.C. § 1604 (1976). As noted in the legislative history, "[a]ll immunity provisions in sections 1604 through 1607 are made subject to 'existing' treaties and other international agreements to which the United States is a party. In the event an international agreement expressly conflicts with this bill, the international agreement would control." U.S. CODE CONG. & AD. NEWS, *supra* note 25, at 6616. If the existing international agreement addresses sovereign immunity, the parties must consult the agreement first. *Id.*

Treaties that establish affirmative and judicially enforceable obligations without the need for implementing legislation are called self-executing treaties. Saipan v. United States Dep't of Interior, 502 F.2d 90, 97 (9th Cir. 1974). The *Saipan* court named several elements to be considered in determining whether a treaty is self-executing: "the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasability of alternative enforcement methods, and the immediate and long-range social consequences of self- or non-self-execution." *Id.*

44. Article XI, paragraph 4 of the Treaty of Amity provides the following:

> No enterprise of either High Contracting Party, including corporations, associations, and governmental agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in *commercial, industrial, shipping or other business activities* within the territories of the other High Contracting Party, claim or enjoy, either for itself or its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject

alization of foreign interests without compensation destroys a sovereign's immunity under the FSIA or a treaty waiving immunity for commercial or business activities.

B. *The Act of State Doctrine*

The act of state doctrine operates to preclude judicial review of a foreign government's activities within its territory when the sensitive nature of these matters render them nonjusticiable.[45] The Supreme Court first articulated the act of state doctrine in *Underhill v. Hernandes:*[46]

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through means open to be availed of by sovereign powers as between themselves.[47]

Subsequent cases invoking the doctrine usually involved nationalization of United States property by foreign governments.[48] Recognizing the political nature of these nationalizations, the courts refrained from review. The Second Circuit ignored the act of state doctrine in *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*[49] at the request of the State Department.[50] The Supreme Court reestablished judicial control over

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therein.

Treaty of Amity, *supra* note 4; *see* Behring Int'l, Inc. v. Imperial Iranian Air Force, 475 F. Supp. 383, 390 (D.N.J. 1979). *See generally* Chicago Bridge & Iron Co. v. Islamic Republic of Iran, 506 F. Supp. at 984.

45. Sovereign immunity, on the other hand, is a jurisdictional doctrine. *See* text accompanying notes 9-10 *supra.*

46. 168 U.S. 250 (1897). Plaintiff Underhill sued the revolutionary government of Venezuela for injuries including false imprisonment for forcing him to operate his own Venezuelan waterworks for two months. Defendant won a directed verdict on act of state grounds.

47. *Id.* at 252.

48. *See* Ricaud v. Am. Metal Co., 246 U.S. 304 (1918); Oetjen v. Cent. Leather Co., 246 U.S. 297 (1918); Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

49. 210 F.2d 375 (2d Cir. 1954) (per curiam).

50. Jack B. Tate, Acting Legal Advisor for the Department of State, wrote a letter to the *Bernstein* court expressing the executive branch's opposition to the use of the act of state doctrine. *Id.* at 375-76. This "Tate Letter" must be distinguished from the letter discussed in the text accompanying note 17 *supra.* Tate's letter to the Second Circuit in *Bernstein* marked the State Department's

the act of state doctrine, however, in *Banco Nacional de Cuba v. Sabbatino*[51] when, despite two letters indicating State Department support for adjudication,[52] it refused to review a Cuban expropriation of United States-owned sugar. The Court explained:

> The Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, *in the absence of a treaty* or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.[53]

Initially, the *Sabbatino* district court ruled that Cuba's expropriation violated international law for three reasons: (1) it was motivated by a retaliatory and not a public purpose; (2) it discriminated against United States nationals; and (3) it did not provide

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first attempt to suggest a position on an act of state question. In *Bernstein,* plaintiff's stock in a shipping line had been converted by Nazi Germany officials. On the initial appeal, the absence of any advice from the executive branch prompted the Second Circuit to order the parties to avoid allegations that would force the court to pass on the validity of the German government officials' actions. Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 173 F.2d 71 (2d Cir. 1949). The court received the Tate Letter during the second appeal, and responded by retracting its order and remanding the case to the district court, "[i]n view of this supervening expression of Executive Policy." Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d at 376. The Second Circuit's decision to follow the suggestion of the State Department initiated a new policy of judicial deference to the executive branch in act of state matters. This policy became known as the *Bernstein* exception.

51. 376 U.S. 398 (1964).

52. The *Sabbatino* Court declared that it did not need to rule on the *Bernstein* exception, because the State Department had revealed that it intended to avoid making any statements in the letters which could affect the litigation. *Id.* at 420.

The Supreme Court finally addressed the *Bernstein* exception in First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972). Six Justices rejected the *Bernstein* exception on separation of power grounds. *Id.* at 776-77 (Brennan, J., dissenting). "The task of defining the contours of a political question such as the act of state doctrine is exclusively the function of this Court." *Id.* at 790 (Brennan, J., dissenting).

53. 376 U.S. at 428 (emphasis added). *Sabbatino* did not entail a nationalization involving two nations that had signed a treaty providing standards and remedies for nationalization. The Court specifically excluded that situation from the scope of its ruling. *Id.* For the purposes of this Comment, this implied exclusion will be called the *Sabbatino* treaty exception.

adequate compensation for the owner of the expropriated sugar.[54] Fearful of embarrassing the executive branch,[55] the Supreme Court refused to rule[56] whether Cuba's expropriation had violated international law.[57] Congress passed the Hickenlooper Amend-

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54. *Id.* at 406-07.

55. *Id.* at 428. The *Sabbatino* Court did point out, however, that the justification for nonadjudication diminished as the risk of hindering the conduct of foreign relations declined. *Id.*

56. The Court explained that the appropriateness of adjudication increases as the degree of certification or consensus on an issue in international law increases, because consensus allows a court to apply an agreed-upon principle to a set of facts rather than forcing the court to fashion a principle not inconsistent with national interests and international justice. *Id.*

57. *Id.* The Court noted the disparate opinions regarding international law and the "limitations on a state's power to expropriate the property of aliens." *Id.* In discussing expropriation, the Court stated that "[i]t is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations." *Id.* at 430. The Court declined to review this international law issue despite the United Nations stance on expropriations:

> Nationalization, expropriation, or requisitioning, shall be based on grounds or reasons of public utility, security or national interest which are recognized as overriding purely individual or private interests, both domestic or foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law.

G.A. Res. 1803, 17 U.N. GAOR, Supp. (No. 17) 39, U.N. Doc. A/5217 (1962).

The status of nationalization and the standards of compensation have become less certain under international law because many nations, especially third world countries, have supported an expanded authority to expropriate and a contracted responsibility to compensate. *See* de Arechaga, *State Responsibility for the Nationalization of Foreign Owned Property,* 11 N.Y.U. J. INT'L & POL. 179 (1978); Garcia-Amador, *The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation,* 12 LAW. AMERICAS 1 (1980); Neville, *The Present Status of Compensation by Foreign States for the Taking of Alien-Owned Property,* 13 VAND. J. TRANSNAT'L L. 51 (1980). Although the third world nations recognize a duty to compensate, they believe that the host nation (the expropriating nation) should determine compensation according to its own standards. These standards flow from an analysis of the activities of the visiting, expropriated entity during its stay in the host nation: whether the visiting nation's entity recovered its initial investment; whether the visiting entity was unduly enriched through colonial domination; whether the visiting entity recovered excessive profits; whether the visiting entity contributed to the social development of the host nation. de Arechaga, *supra,* at 184-85. Resolution 3281 of the United Nations General Assembly, the Charter of Economic Rights and Duties of States, reflects the third world stance

ment[58] in 1964, hoping to overrule *Sabbatino* and thus *require*

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on nationalization:

> 2. Each State has the right:
>
> . . . .
>
> (c) To nationalize, expropriate or transfer ownership of foreign property, in which case *appropriate* compensation should be paid by the State adopting such measures, *taking into account* its relevant laws and regulations and *all circumstances that the State considers pertinent.* In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

G.A. Res. 3281, 29 U.N. GAOR, Supp. (No. 31) 50, U.N. Doc. A/9631 (1974) (emphasis added).

The industrialized nations originally preferred a standard requiring "prompt, adequate, and effective" compensation, but the vast majority of states have rejected this in favor of a more relaxed standard requiring "appropriate" compensation. de Arechaga, *supra,* at 184-85.

Article IV, paragraph 2 of the Treaty of Amity also addresses nationalization:

> Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken . . . without the prompt payment of *just compensation.* Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

Treaty of Amity, *supra* note 4 (emphasis added). The compensation standard in the Treaty of Amity provides more rights to the visiting entity whose property has been nationalized than do the two United Nations Resolutions. The Treaty of Amity requires compensation equal to the property taken, while the United Nations Resolutions require only appropriate compensation as determined by the nationalizing country.

58. Foreign Assistance Act of 1964, Pub. L. No. 88-633, § 301 (d)(4), 78 Stat. 1009, 1013 (1964), *as amended by* Foreign Assistance Act of 1965, Pub. L. No. 89-171, § 301(d)(2), 79 Stat. 653, 659 (1965). The amended version of the Hickenlooper Amendment states as follows:

> [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 in a case in which a claim of title or other rights to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Pro-*

judicial review of acts of state in expropriation situations similar to *Sabbatino*. The courts have responded to this congressional mandate by finding the Hickenlooper Amendment inapplicable in virtually every case with the exception of the *Sabbatino* decision on remand.[59] The Supreme Court in *Alfred Dunhill of London, Inc. v. Republic of Cuba*[60] attempted to fashion a "commercial exception" to the act of state doctrine, parallel to the restrictive doctrine of sovereign immunity,[61] under which a sovereign's private, commercial acts would not be considered acts of state. Justice White argued that holding foreign sovereigns to their commercial obligations would not risk embarrassing the executive branch in the conduct of foreign relations.[62] Although this commercial exception received only plurality support,[63] courts have cited it with approval.[64] Two courts have ruled expressly, how-

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vided, That this subparagraph shall not be applicable . . . (2) in any case with respect to which 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 and a suggestion to this effect is filed on his behalf in that case with the court.

22 U.S.C. § 2370(e)(2) (1976).

59. Conant, *The Act of State Doctrine and Its Exceptions: An Introduction,* 12 VAND. J. TRANSNAT'L L. 259, 267 (1979); *see* Occidental of Umm al Quywayn, Inc. v. A Certain Cargo, 577 F.2d 1196 (5th Cir.), *cert. denied,* 442 U.S. 928 (1978); Menendez v. Saks & Co., 485 F.2d 1355 (2d Cir. 1973), *rev'd on other grounds, sub nom.* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976); Occidential 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); Hunt v. Coastal States Gas Producing Co., 583 S.W.2d 322 (Tex.), *cert. denied,* 444 U.S. 992 (1979); United Mexican States v. Ashley, 556 S.W.2d 784 (Tex. 1977); French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 242 N.E.2d 704, 295 N.Y.S.2d 433 (1968).

60. 425 U.S. 682 (1976). This case involved the 1960 Cuban expropriation of the business of five manufacturers and exporters of Cuban cigars. "Intervenors" appointed by the Cuban government took over these companies and continued to produce and export cigars. One United States importer of the cigars was Alfred Dunhill of London, Inc., the appellant. The former owners of the cigar business brought suit against Dunhill and other United States importers to recover the purchase price of the pre-expropriation and post-expropriation shipments of cigars that had been paid to the intervenors by the importers.

61. *Id.* at 695.

62. *Id.* at 704.

63. Justice Marshall dissented and was joined by Justices Brennan, Stewart, and Blackmun. *Id.* at 715-37. Justice Powell concurred in the result but did not support the commercial exception. *Id.* at 715.

64. *See* Bokkelen v. Grumman Aerospace Corp., 432 F. Supp. 329, 333

ever, that an expropriation is not a private act fitting within the *Dunhill* commercial exception.[65] The *Dunhill* Court further defined[66] the act of state doctrine when it found that the absence of any formal Cuban decree, order, or statute[67] regarding the decision not to repay[68] indicated that no act of state was involved.[69] Justice Marshall's separate dissent indicated that he did not interpret the majority's definition of an act of state to require an act as formal as a decree, order, or statute.[70] The Delaware District Court in *D'Angelo v. Petroleos Mexicanos*[71] seconded Justice Marshall's interpretation of *Dunhill:* "Nonaction as well as affirmative conduct of a government agency, if based upon sovereign governmental authority, can have the status of an act of state."[72] The instant case presents the question whether a failure to provide compensation for a nationalization constitutes an act of state. More importantly, this case is the first test of the *Sabbatino* treaty exception: the validity, according to the Treaty of Amity, of an expropriation and a decision not to compensate.

(E.D.N.Y. 1977); D'Angelo v. Petroleos Mexicanos, 422 F. Supp. 1280, 1286 (D. Del. 1976), *aff'd mem.* 564 F.2d 89 (3d Cir. 1977); United Mexican States v. Ashley, 556 S.W.2d 784, 786-87 (Tex. 1977).

65. *See* D'Angelo v. Petroleos Mexicanos, 422 F. Supp. 1280, 1286 (D. Del. 1976), *aff'd mem.*, 564 F.2d 89 (3d Cir. 1977); United Mexican States v. Ashley, 556 S.W.2d 784, 786 (Tex. 1977).

66. The same four justices dissented, but Justice Powell concurred with this portion of Justice White's opinion. 425 U.S. at 695-706.

67. "[T]he only evidence of an act of state other than the act of non-payment by intervenors was 'a statement by counsel for the intervenors, during trial, that the Cuban government and the intervenors denied liability and had refused to make repayment.' " 425 U.S. at 694 (quoting Menendez v. Faber, Coe & Gregg, Inc., 345 F. Supp. 527, 545 (S.D.N.Y. 1972)).

68. The importers mistakenly paid the intervenors for shipment of cigars shipped before the expropriation. The money should have been paid to the former owners.

69. 425 U.S. at 695.

70. *Id.* at 718. (Marshall, J., dissenting).

71. 422 F. Supp. 1280 (D. Del. 1976).

72. *Id.* at 1290. Plaintiff, a receiver for the Papantla Royalties Corporation, claimed that a March 18, 1978, Mexican Presidential decree expropriating oil owned by foreign nationals did not extinguish Papantla's royalty and participating interests. A commission created to indemnify persons whose royalty and participating interests in the Mexican oil had been extinguished did not recognize Papantla's claim. The Mexican attorney general advised the district court that the actions of the commission in determining the legitimacy of the various claims was an act of state. The court agreed, ruling that the commission's decisions had the qualities of an act of state even absent any formal decree. *Id.*

III. INSTANT OPINION

The instant court declared[73] that nationalization without a mechanism for adequate compensation violated the Treaty of Amity and, independently, international law, because defendants failed to satisfy even the minimum requirements of either the Treaty of Amity or international law.[74] The court maintained that international law requires "prompt, adequate, and effective" compensation.[75] Because the Treaty of Amity is self-executing,[76] and because individuals and companies have the right to enforce private rights of action in United States courts under the property protection provisions of treaties of friendship, commerce, and navigation, plaintiffs could sue for damages in federal court for violations of the Treaty of Amity and international law.[77] Defendants were not allowed to claim immunity under the act of state doctrine or the concept of sovereign immunity. The court refused to apply the act of state doctrine for several reasons. First, plaintiffs challenged not only defendants' act of expropriation, but also their failure to provide a mechanism for compensation.[78] Second, the court invoked the *Dunhill* exception: because "defendants' failure to compensate plaintiffs occurred in connection with a commercial activity of defendants,"[79] the act of state doctrine could not apply. Last, under the *Sabbatino* treaty exception, the act of state doctrine did not preclude adjudication because the

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73. The court determined that it had venue and jurisdiction even though plaintiffs had not sought judicial or administrative redress in Iran, because legal recourse in Iran was futile. Am. Int'l Group, Inc. v. Islamic Republic of Iran, 493 F. Supp. at 525. The court noted that international law also would allow a plaintiff, for the same reason, to bring an action in United States courts without first seeking legal recourse in Iran. *Id.*

74. *Id.* at 524.

75. *Id.* Despite the enunciation of this particular standard, the court cited United Nations General Assembly Resolution 1803 as the prevailing international standard on compensation. *Id.* at 524 n.1. This resolution, however, requires "appropriate" compensation, which is a different standard. *See* note 57 *supra.*

76. The court ruled that article IV, paragrah 2 of the Treaty of Amity was self-executing because the treaty satisfied the requirements of a self-executing treaty as described in Saipan v. United States Dep't of Interior, 502 F.2d 90, 97 (9th Cir. 1974). *See* note 43 *supra.*

77. 493 F. Supp. at 525.

78. *Id.* Thus, the court implies that the failure to provide a mechanism for compensation is not an act of state.

79. *Id.*

Treaty of Amity set forth applicable, agreed upon principles of international law.[80] Independently, the court decided that the doctrine of sovereign immunity did not bar jurisdiction because defendants had waived any sovereign immunity in article XI, paragraph 4 of the Treaty of Amity.[81] Using a narrow interpretation of the Treaty of Amity urged by the State Department, the court also found a waiver of sovereign immunity.[82] Because CII clearly was subject to jurisdiction as a commercial entity and was inseparable from and the alter ego of Iran in insurance matters, the court reasoned that Iran and CII were "one juridical person." Thus, Iran was a commercial entity.[83] The court adjudged that the FSIA did not provide sovereign immunity to defendants because the failure to provide a compensation mechanism is an act in connection with a commercial activity within the meaning of section 1605(a)(2) of the FSIA, and because it had a direct effect within the meaning of section 1605(a)(2) of the FSIA.[84] Because no genuine issue existed as to any material fact, and because neither the act of state doctrine nor the concept of sovereign immunity prevented adjudication, the court awarded partial summary judgment to plaintiffs on the issue of defendants' liability.[85]

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80. *Id.; see* note 53 *supra.*

81. In response to plaintiffs' motion for a writ of attachment, the court originally decided that the Treaty of Amity waived all of defendants' sovereign immunity. 493 F. Supp. at 525-26.

82. The court did not indicate the exact nature of the State Department's narrow interpretation of the Treaty.

83. 493 F. Supp. at 526. The court cited to Elec. Data Sys. Corp. Iran v. Social Sec. Organ. of Iran, No. 79 Civ. 1711 (S.D.N.Y. May 23, 1979), *remanded per curiam,* 610 F.2d 94 (2d Cir. 1979), as support for this theory. 493 F. Supp. at 526. The district court's decision in *Electronic Data* is unreported. The Second Circuit remanded the case for reconsideration of the order of attachment because of the tense political situation caused by the seizure of the United States Embassy and hostages in Teheran. Elec. Data Sys. Corp. Iran v. Social Sec. Organ. of Iran, 610 F.2d at 95.

84. 493 F. Supp. at 526. The court did not identify the commercial activity, although it implied that the activity was the involvement of CII in the insurance industry. The only direct effect that the court mentioned was an increase of the Iranian government's monopoly in the insurance industry from 25% or 50% to 100%. *Id.*

85. *Id.* at 524-26.

IV. COMMENT

The instant decision breaks a longstanding tradition[86] of declining review in deference to the executive branch in cases affecting the conduct of foreign relations. The significance of this case is minimized, however, by the many avenues of analysis eschewed by the court in reaching its decision to assert jurisdiction. The court could have declined jurisdiction by using any one of three different modes of analysis. The court's first option was to apply the act of state doctrine and decline review. Instead, without explanation, the court decided that a failure to provide a compensation mechanism was not an act of state.[87] Perhaps the court interpreted Iran's failure to make public any decision regarding compensation as an absence of a specific "act" or decision. The court also may have reasoned that Iran's failure to provide a compensation mechanism was a private, commercial act. The Iranian government, however, must have made some active, intentional decision not to compensate plaintiffs; thus, there was an "act." Private individuals do not nationalize interests; only sovereigns face such questions of a public, governmental nature. Another explanation for the court's decision is that it confused the language of the FSIA commercial exception[88] with that of the *Dunhill* commercial exception.[89] This interpretation would clarify the court's lack of explanation for its holding. The court incorrectly[90] presented the *Dunhill* exception as binding precedent, ruling that acts of a commercial or private nature are not immune.[91] The decision not to compensate, however, is a public or governmental act, not a commercial act.

The court's second option was to deny jurisdiction under the Treaty of Amity. The court misinterpreted the extent of the sovereign immunity waiver clause in the Treaty of Amity by insisting that the Treaty waived *all* of Iran's sovereign immunity.[92] Paragraph 4 of article XI clearly waives immunity only for activities of

86. *See* text accompanying notes 45-48 & 51-54 *supra.*

87. *See* text accompanying note 78 *supra.*

88. *See* text accompanying note 38 *supra.*

89. Although the court cited to *Dunhill,* the language it used is that of § 1605(a)(2) of the FSIA. 493 F. Supp. at 525-26; *see* note 29 *supra.*

90. *See* note 61 *supra* and accompanying text.

91. *See* text accompanying note 63 *supra.*

92. 493 F. Supp. at 526.

a commercial or business nature;[93] these activities do not inherently include a nationalization and an ensuing decision not to compensate. The court simply stated that a sovereign closely related to a commercial instrumentality was not immune,[94] but other than indicating that CII's participation in the insurance industry qualified it as a commercial entity, the court gave no indication of what constituted a commercial instrumentality. The idea that a sovereign and a commercial instrumentality are "one juridical person" implies that all sovereigns potentially are linked to their commercial entities. The ramifications of this concept ably demonstrate its absurdity: this could absolutely preclude sovereign immunity for nationalization and all other public acts. The Treaty of Amity should not have provided jurisdiction over defendants because there was no actual waiver. If the court had correctly found no waiver under the Treaty, it would not have had to consider the FSIA because the Treaty controls in the event of conflict with the FSIA.[95]

Even if the court mistakenly had reached the FSIA level of analysis, the court could have exercised its third option: to deny jurisdicton under the FSIA. Instead, the court found a waiver of sovereign immunity under the FSIA for several reasons. First, the court inexplicably ignored the minimum contacts aspects of the FSIA.[96] The court stretched the commercial activities analysis in section 1605(a)(2) of the FSIA to include defendants' nationalization and subsequent failure to compensate plaintiffs.[97] Although the language in section 1605(a)(2) may be broad enough to include nationalization because governmental acts can be connected to commercial entities under 1605(a)(2), Congress intended to codify the restrictive doctrine of sovereign immunity in the FSIA to recognize immunity for public acts[98] including nationalization and a failure to provide a compensation mechanism.[99] The court further stretched section 1605(a)(2) by finding a direct effect from defendants' acts,[100] although the only "direct" effect mentioned was an increase in the Iranian government's monopoly over the

93. *See* note 44 *supra.*
94. *See* text accompanying note 83 *supra.*
95. *See* note 43 *supra.*
96. *See* text accompanying notes 30-32 *supra.*
97. *See* text accompanying note 84 *supra.*
98. *See* text accompanying notes 25-26 *supra.*
99. *See* note 40 *supra* and accompanying text.
100. *See* text accompanying note 84 *supra.*

insurance industry.[101] On appeal, this case may be remanded for a finding on whether a direct effect existed, but it would be preferable to dismiss the case for lack of personal jurisdiction over defendants. There was no waiver of sovereign immunity under the FSIA, because the commercial activity requirement of section 1605(a)(2) was not satisfied, or under the Treaty of Amity.

The court's failure to analyze the potential for embarrassment[102] of the executive branch and its concomitant finding of an international law violation[103] by defendants is particularly curious because the international law regarding nationalization and compensation is much more unsettled now than it was in 1964, the year of the *Sabbatino* decision.[104] Ignoring the most recent United Nations position on post-nationalization compensation,[105] the court proffered a retaliatory interpretation of international law that may hinder the executive branch's conduct of foreign relations, especially in light of the virginal nature of the *Sabbatino* treaty exception.[106] Despite the manifest applicability of that exception, the court should have considered the primary justification for, and applied, the act of state doctrine.[107] It thus would have beneficially narrowed the *Sabbatino* treaty exception to deny jurisdiction in cases such as the instant involving devastating foreign relations implications. The instant decision, instead, severely constricts both the act of state doctrine and the concept of foreign sovereign immunity. The exercise of discretionary powers by the executive branch increases its ability to protect and represent United States interests abroad. The risks of adjudication in the instant case were overwhelming because the lives of the United States hostages in Iran were endangered. Future courts should refrain from adjudication in cases such as the instant in which adjudication may hinder the executive branch by jeopardizing the conduct of foreign relations.

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101. *See* note 84 *supra.*
102. *See* notes 56-57 *supra* and accompanying text.
103. *See* text accompanying note 74 *supra.*
104. *See* note 57 *supra.*
105. *Id.*
106. *See* note 52 *supra.*
107. *See* note 56 *supra.*