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James F. Rill

Richard L. Frank

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Antitrust Consequences of United States Corporate Payments to Foreign Officials: Applicability of Section 2(c) of the Robinson-Patman Act and Sections 1 and 2 of the Sherman Act

James F. Rill and Richard L. Frank***

* Member, District of Columbia Bar. A.B., Dartmouth College, 1954; LL.B., Harvard University, 1959.

** Member, District of Columbia Bar. A.B., 1972; J.D., 1976, University of Michigan.

I. INTRODUCTION

For more than a year, the executive and legislative branches of government and the media have trembled with indignation in reaction to repeated disclosures of payments by United States corporations to foreign nationals. These payments, often allegedly made for the purpose of securing foreign business for the companies involved, have attracted the attention of congressional committees[1] and executive agencies[2] and have resulted in litigation and consent settlements approved by the district courts.[3] The reverberations of these disclosures have produced turbulence overseas, most notably in Japan.[4]

Notwithstanding the uproar, relatively little has been accomplished in the way of preventing a resumption or continuation of the practice. Indeed, some uncertainty exists whether outright bribery of a foreign agent by a domestic firm seeking to secure sales is prohibited by the laws of the United States. While the Securities and Exchange Commission claims the power to require disclosure in some instances, it seeks legislation to fortify its authority,[5] and it is entirely unclear whether the payments themselves can be challenged if disclosure is properly made. When bribery is used to further conspiracies that restrain domestic or foreign trade of the United States or conduct that monopolizes or attempts to monopolize such trade, it should become a matter of concern to those empowered to enforce federal antitrust laws.[6]

One of the more intriguing and imaginative approaches to these payment practices is contained in a report to the Senate Banking Committee by the Secretary of Commerce on behalf of the Ford Administration Task Force on Questionable Corporate Payments

1. *Hearings on the Activities of American Multinational Corporations Abroad before the Subcomm. on International Economic Policy of the House Comm. on International Relations,* 94th Cong., 1st Sess. (1975) [hereinafter cited as *1975 Hearings]; Hearings on Multinational Corporations and U.S. Foreign Policy before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations,* 94th Cong., 1st Sess., pt. 12 (1975).

2. SEC REPORT ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES, submitted to the Senate Banking, Housing and Urban Affairs Committee (May 12, 1976) [hereinafter cited as SEC REPORT].

3. *See, e.g.,* SEC v. Kalvex, Inc., FED. SEC. L. REP. (CCH) ¶ 95,226 (S.D.N.Y., filed July 7, 1975); SEC v. Lockheed Aircraft Corp., Civ. No. 76-0611 (D.D.C., filed April 13, 1976); SEC v. Northrop Corp., Civ. No. 75-563 (D.D.C., filed April 18, 1976).

4. *See* N.Y. Times, July 24, 1976, § 3, at 31, col. 5; N.Y. Times, July 28, 1976, § 1, at 1, col. 2; K. Willenson, *Japan: Sordid Maneuvers,* NEWSWEEK, May 31, 1976.

5. SEC REPORT, *supra* note 2, at 57. *See also* Stevenson, *The SEC and Foreign Bribery,* 32 BUS. LAW. 53 (1976).

6. *1975 Hearings, supra* note 1, at 86.

Abroad. Evaluating the potential reach of American antitrust laws, the task force observed:

> Section 2(c) of the Clayton Act prohibits the payment of commissions or other allowances, except for services actually rendered, in connection with the sale of goods in which either the buyer or seller is engaged in commerce (including commerce with foreign nations). Section 2(c) encompasses commercial bribery and bribes of state government officials to secure business at the expense of U.S. competitors. Although there do not appear to be any Section 2(c) cases involving dealings with foreign governments, the statute might be applicable to the payment of a bribe by a U.S. corporation to a foreign official to assist its business at the expense of its U.S. competitors.[7]

A second interesting, yet untested, approach is contained in the statement of Donald I. Baker, former Deputy Assistant Attorney General, Antitrust Division, Department of Justice, before the Subcommittee on International Economic Policy investigating the activities of American multinational corporations abroad. Elaborating upon the flexibility and adaptability of the Sherman Act, Mr. Baker remarked:

> The basic task of the Antitrust Division is enforcement of the Sherman Act (15 U.S.C. sec.1, *et seq.).* As you will recall, this act is also available to private plaintiffs bringing civil treble damage actions (15 U.S.C. sec. 15). And indeed in the foreign area a great many of the cases are brought. It is the particular genius of this statute that in declaring illegal both conspiracies to restrain trade and monopolizing conduct, it does not become necessary to delineate possible means which might be employed to achieve these objectives. This gives the statute not only elegance of form, but extraordinary adaptability to new situations. Thus, the Sherman Act does not need to and does not in fact declare illegal any specific business practice such as bribery. Rather it focuses on the purpose and effect of conspiratorial behavior which restrains trade or individual or joint conduct leading to monopolization.[8]

This Article examines the feasibility and desirability of marshalling section 2(c)[9] of the Clayton Act as amended by the Robinson-Patman Act and sections 1 and 2 of the Sherman Act[10]

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7. Letter from Elliot L. Richardson, Secretary of Commerce, to Senator William Proxmire, Chairman, Senate Committee on Banking, Housing and Urban Affairs, June 11, 1976 [hereinafter cited as TASK FORCE REPORT].

8. *1975 Hearings, supra* note 1, at 87-88.

9. Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(1) (1970), provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

10. Section 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1 (Supp. V 1975), provides:

against a practice having deep legal, political, and emotional significance in the United States and overseas. Difficult questions of jurisdiction and coverage are presented, as are major issues of public policy on what the role, if any, should be for these provisions.

II. JURISDICTION

A. *Section 2(c)—The "Commerce" Jurisdiction Issue*

Whether the practice of commercial bribery of a foreign official for the purpose of consummating a sale is within the jurisdictional scope of section 2(c) depends in large measure on whether the "brokerage clause" can be construed as coextensive for jurisdictional purposes with the basic price discrimination provision of the statute. If so, the payments in question probably cannot be reached by the Robinson-Patman Act.

Authority for the proposition that discriminatory prices involving a United States firm's sales overseas are not subject to section 2(a) derives from the jurisdictional element of that section, which

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Section 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 hereby declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

42 U.S.C. § 2 (Supp. V 1975) provides:

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

requires that the commodities in question must be "sold for use, consumption, or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States . . . ."[11] Since the products in the bribery cases are sold "for use, consumption, or resale" abroad, the transactions seem plainly beyond the Act, and the inquiry can be concluded.[12] The current situation involving payments to foreign nations differs from that covered by the Supreme Court in *Moore v. Mead's Fine Bread Co.*,[13] in which the Court held that the Act covers intrastate sales by a seller who makes sales from the same location to out-of-state customers at a higher price. A discriminatorily low price to foreign customers, even if subsidized by higher prices in the domestic market, would be outside the scope of section 2(a) since, unlike the local sales in *Moore,* all the sales in question would not be within the United States or its possessions.

Authority exists, however, to the effect that section 2(c) has its own jurisdictional base and practices that may not be reached as price discriminations under section 2(a) can be attacked as unlawful brokerage or commission payments under section 2(c). This issue was faced directly in *Baysoy v. Jessup Steel Co.*[14] The defendant-seller sought to avoid its contractual obligation to deliver the commodities involved in an export transaction on the ground that the sales agreement, which provided for a commission fee payment to the buyer, was unlawful under section 2(c). The court granted defendant's motion to dismiss notwithstanding the buyer's contention that section 2(c) does not cover export transactions. Conceding that a price discrimination under section 2(a) would not be covered, the court concluded that the jurisdictional limitations of the price discrimination provision are inapplicable to section 2(c). The only limitation on the latter section is that the transaction must be consummated in the course of "commerce" by a person engaged in "commerce." According to the court, the term "commerce" is to be construed as defined in section 1 of the Clayton Act, which includes trade with foreign nations.

Although criticized as aberrational,[15] *Baysoy* has been followed

11. Robinson-Patman Act § 1(a), 15 U.S.C. § 13(a) (1970).

12. *See* ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 81-82 (1962); VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATIONS, Vol. 4, § 26.03[1] (1975).

13. 348 U.S. 115 (1954). In Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200 n.17 (1974), the Court was careful to reaffirm and distinguish the *Moore* rationale.

14. 90 F. Supp. 303 (W.D. Pa. 1950).

15. ROWE, *supra* note 12, at 82. Rowe argues that "in light of an explicit Congressional intention to shield American firms' discriminatory export sales or 'dumping' from Robinson-

in the one subsequent decision in which the jurisdictional issue appears to have been raised squarely. The complaint in *Canadian Ingersoll-Rand Co. v. D. Loveman & Sons, Inc.*[16] charged a conspiracy to defraud plaintiff by bribing plaintiff's chief buyer. Defendants sought dismissal of the second count of the complaint, which charged violations of section 2(c), arguing that the Robinson-Patman Act in its entirety does not apply to transactions occurring in foreign commerce. Relying on *Baysoy* and its interpretation of the legislative history, the court concluded that the jurisdictional limitation of section 2(a) is inapplicable to section 2(c).

Older cases indicate that section 2(a) and sections 2(c), (d), and (e) are independent of one another and that no justification can be made for reading the scope, terms, and defenses of one provision into another. Thus, in the seminal case of *Oliver Bros., Inc. v. FTC*,[17] the court of appeals asserted:

> three specific matters were forbidden as unfair trade practices by subsections (c) (d) and (e), viz.: the granting of commission or brokerage, or any allowance in lieu thereof, to the other party to the transaction or his agent, the making of discriminatory payments by seller to buyer for services rendered by the latter and discrimination by the seller in the rendering of services to the buyer. It is perfectly clear that all three of these practices were forbidden because of their tendency to lessen competition and create monopoly, without regard to their effect in a particular case; and *there is no reason to read into the sections prohibiting them the limitations contained in section 2(a) having relation to price discrimination . . . .*[18]

Moreover, the promotional allowance provision has been construed to be independent of section 2(a) by a finding that the "commerce" element is supplied if the disproportional payment crosses state lines, even though the goods to which it relates may not.[19]

Patman consequences [80 Cong. Rec. 6333 (1936)], *Baysoy* appears aberrational." He predicts that future rulings will construe jurisdictional aspects of all sections of the Robinson-Patman Act similarly. *Contra*, W. PATMAN, COMPLETE GUIDE TO THE ROBINSON-PATMAN ACT (1963). In discussing the jurisdictional limitation placed on § 2(a), Congressman Patman observed:

> This delimitation [of 2(a)] is not found in the remaining clauses of the Act, which apply to payment for the use of services and facilities used in furthering the movement of the goods involved in the sales transaction. These clauses apply to any person *engaged in commerce*. . . . To determine the limit and scope of such commerce we must turn to the definition found in the Clayton Act itself.

PATMAN, ROBINSON-PATMAN ACT 208 (1938).

16. 227 F. Supp. 829 (N.D. Ohio 1964).

17. 102 F.2d 763 (4th Cir. 1939).

18. *Id.* at 767. *See also*, Southgate Brokerage Co. v. FTC, 150 F.2d 607 (4th Cir. 1945), *cert. denied*, 326 U.S. 774 (1946); Edison Produce Co., 60 F.T.C. 1 (1962).

19. Shreveport Macaroni Mfg. Co. v. FTC, 321 F.2d 404 (5th Cir. 1963), *cert. denied*, 375 U.S. 971 (1964).

These cases seem contrary, however, to a more recent trend toward mutual accommodation and reconciliation of the Act's various subsections. The Supreme Court's decision in *FTC v. Henry Broch & Co.*[20] presaged the intrusion of the element of discrimination into section 2(c) that even the Federal Trade Commission seems to have adopted.[21] No rational justification can be asserted for basing the applicability of the Robinson-Patman Act on the essentially accidental circumstances whether a concession is made in the form of a lower price or a broker's fee or allowance. Possibly, however, different considerations properly are present when no concession to the buyer is involved but rather the conduct amounts to a gratuity to his faithless servant. In any event no authority appears to require harmonizing the "commerce" elements of sections 2(a) and 2(c), and analysis of the tendency to blend other aspects of the two provisions may best be addressed to the substantive questions relative to coverage of bribery under the brokerage clause.

B. The Sherman Act—"Foreign Commerce"

The Sherman Act prohibitions apply to trade or commerce not "only among the several states," but also "with foreign nations."[22] These words have generated endless controversy centered on the extraterritorial application of the Sherman Act. The traditional starting point in determining whether the Sherman Act applies to particular conduct is the "choice of law analysis" that has evolved in tort actions. This analysis requires the legality of an act to be judged by the law of the jurisdiction in which it occurs.[23] In *American Banana Co. v. United Fruit Co.*,[24] the plaintiff complained of allegedly predatory acts committed by defendant in Cen-

20. 363 U.S. 166 (1960).

21. *See* Garrett, Holmes & Co., 67 F.T.C. 237 (1965); Tillie Lewis Foods, Inc., 65 F.T.C. 1099 (1964), *rev'd on other grounds sub nom.* Flotill Prod., Inc. v. FTC, 358 F.2d 224 (9th Cir. 1966), *rev'd* 389 U.S. 179 (1967); Hruby Distrib. Co., 61 F.T.C. 1437 (1962). In both Jewel Companies, Inc., 83 F.T.C. 1213, 1243 (1974), *aff'd id.* at 1273, and Food Fair Stores, Inc., 83 F.T.C. 1213 (1974), *aff'd id.* at 1273, the administrative law judges granted respondents' motions for summary decision largely on the ground that complainant counsel stipulated that discrimination would not be proven. The Commission allowed the initial decisions to take effect without "necessarily" agreeing in all respects with their rationale.

22. 15 U.S.C. § 1 (Supp. V 1975).

23. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). Mr. Justice Holmes, speaking for the Court, stated: "[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." *Id.* at 356.

24. 213 U.S. 347 (1909). The complaint in *American Banana* did not clearly allege impact upon United States imports, but the Court did not remark upon the absence. *See* P. AREEDA, ANTITRUST ANALYSIS 126 n.443 (2d ed. 1974) [hereinafter cited as AREEDA].

tral America. Plaintiff claimed to have sustained injury because the alleged acts preserved defendant's domination of banana exports to the United States, the home country of both corporations. Mr. Justice Holmes, writing for the Court, concluded that plaintiff did not state a cause of action under the Sherman Act since the acts of which plaintiff complained were committed outside the territorial jurisdiction of the United States and were legal under the laws of the jurisdiction where they were performed.

Two constructions of this case are possible in view of subsequent cases that have distinguished *American Banana* and have upheld the jurisdiction of the Sherman Act over acts abroad substantially *affecting* U.S. commerce. These cases hold either that no such effects were shown in *American Banana* or that the acts abroad were those of a foreign sovereign.[25] For example, in *United States v. Sisal Sales Corp.*,[26] a combination entered into within the United States for the purpose of monopolizing an article of commerce produced abroad was held to violate the Sherman Act. The Court found the conduct illegal even though defendant's control of production was aided by discriminatory legislation of the foreign country that established an official agency as the sole buyer of the product, and further, even though an individual defendant had been the exclusive selling agent for that governmental authority. The Court's decision was based on the impact that the activities of defendants had within the United States and upon its foreign trade. *American Banana* was expressly held inapplicable.

The Second Circuit, in *United States v. Aluminum Co. of America*,[27] held that a Canadian corporation violated the Sherman Act by impliedly agreeing with European aluminum producers to avoid the United States market.[28] Judge Learned Hand, speaking for the court, concluded 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."[29] The court held the Sherman Act is applicable to any conspiracy that is intended to and does affect United States imports and exports, if the conspiracy would be illegal if perpetuated in the

25. W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 41 (2d ed. 1973).

26. 274 U.S. 268 (1927).

27. 148 F.2d 416 (2d Cir. 1945).

28. Although the American company, Alcoa, was not held to be a member of this agreement, the foreign cartel's actions were presumably intended to induce Alcoa to stay out of Europe. The evidence might have justified treating Alcoa and the Canadian company as a single entity, but the district court held otherwise. AREEDA, *supra* note 24, at 126 n.446.

29. 148 F.2d at 443.

United States.[30] Interestingly, the court also indicated that when an intent to cause effects within the United States is proved, the burden of proof shifts to defendants to disprove effects within the United States.[31]

Similarly, in *Continental Ore Co. v. Union Carbide & Carbon Corp.*,[32] the Supreme Court held that a conspiracy between an American corporation and its Canadian subsidiary to monopolize the vanadium market was subject to the antitrust laws because of the parent corporation's conduct within the United States. Although the conspiracy was consummated in Canada, the Court concluded that a "conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries."[33] Thus, even if much of the conspiratorial behavior occurs outside the United States, the conspiracy does not escape the extraterritorial application of the Sherman Act.[34] More recently, the Supreme Court has reaffirmed its view that a conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act simply because part of the conduct occurs in foreign countries. In *Zenith Radio Corp. v. Hazeltine Research, Inc.*,[35] the Court held that it was illegal for American firms to cooperate in a Canadian patent pooling arrangement that had the intended effect of limiting American exports of electronic products to Canada by nonparticipants in the pool.

Thus United States courts have made clear that Sherman Act prohibitions may be applied to conspiracies formed and carried out abroad when such conspiracies have the intended and actual effect of restraining American imports or exports.[36] What makes the in-

30. *Id.*

31. *Id.* at 444.

32. 370 U.S. 690 (1962).

33. *Id.* at 704.

34. In the commercial bribery situation, much of the activity, including corporate decision-making and arranging to make funds available, has a physical site in the United States.

35. 395 U.S. 100 (1969). *See also* United States v. R.P. Oldham Co., 152 F. Supp. 818 (N.D. Cal. 1957), in which the district court stated:

> But assuming, arguendo, that the conspiracy at least "has its situs" in Japan and that most acts in furtherance of the conspiracy have been done in Japan, this does not deprive the court of jurisdiction where, as here, the conspiracy is alleged to operate as a direct and substantial restraint on interstate and foreign commerce of the United States.

Id. at 822.

36. In a recent Ninth Circuit opinion the "effects" test was criticized as being incomplete for failing to consider the other nation's interest. Timberlane Lumber Co. v. Bank of

stant inquiry more difficult, however, are the collateral considerations that must be weighed in determining whether subject matter jurisdiction properly may be exercised. These considerations are discussed later in the Article.[37]

III. The Challenged Conduct

A. *Commercial Bribery Under the Substantive Provisions of Section 2(c)*

Not surprisingly, the facts underlying questionable payments to foreign officials are not readily available, particularly insofar as they might illuminate whether a payment can be construed as a brokerage fee, commission, or other similar payment to an agent for a foreign government customer. The SEC summaries of reports received from various domestic corporations are vague and raise questions relative to the scope of section 2(c).[38]

Nevertheless, some allegations of the SEC, if accepted as true, describe a practice closely approaching those that have been held cognizable under section 2(c) in situations involving domestic commerce. The Commission's complaint against Lockheed Aircraft, for example, alleges that from 1967 to 1975 the company expended approximately 25 million dollars in payments to foreign officials, in part, for the purpose of securing the business of their governments.[39]

America, 797 ANTITRUST & TRADE REG. REP. (BNA) G-1 (9th Cir. Dec. 27, 1976). Judge Choy, speaking for the court suggests:

> [i]n some cases the direct and substantial effect test . . . might open the door too widely by sanctioning jurisdiction over an action when comity considerations would dictate dismissal. At other times, it might fail in the other direction, dismissing a case for which comity does not require forbearance, thus closing the jurisdictional door too tightly since the Sherman Act prohibits some restraints which do not have a direct and substantial effect.

Id. at G-6. As an alternative, the Ninth Circuit adopted a balancing approach:

> The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business or corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad. A court evaluating these factors should identify the potential degree of conflict if American authority is asserted . . . . Having assessed the conflict, the courts should then determine whether in the face of it the contacts and interests of the United States are sufficient to support the exercise of extraterritorial jurisdiction.

Id. at G-7.

37. *See* text accompanying notes 118-51 *infra.*

38. SEC REPORT, *supra* note 2, at Exhibit B.

39. *Id.* at B-23. SEC v. Lockheed Aircraft Corp., Civ. No. 76-0611 (D.D.C., filed April 13, 1976).

In the same general vein, the report of Northrop Corporation, filed in the District Court for the District of Columbia, explains that payments of approximately 450,000 dollars had been made to an agent of the company with knowledge that the money would be conveyed to two foreign officials and that substantial additional amounts were paid to organizations whose principals were foreign officials or were connected closely with foreign officials.[40]

Nevertheless, not every payment by a United States corporation to an official in a nation where it does business automatically raises questions that even conceptually are within the ambit of section 2(c). The payment might be made merely to promote the general acceptability of the company in the nation; it may be a fee permitted or required as a condition of doing business under foreign law; or it may be a payment made to prevent hostile government action.[41] The applicability of the "brokerage provision" of the Robinson-Patman Act to these types of payments is questionable. The applicability of section 2(c) may turn on close factual issues concerning the purpose and use of the payment. The required information concerning the use of the payment may be wholly in foreign hands and not susceptible to discovery, especially assuming that the payment under consideration is a bribe to a foreign official for the purpose of consummating a particular sale.

Approximately a decade ago few would have disputed that commercial bribery undertaken for sales purposes was covered by section 2(c). The courts and Federal Trade Commission, however, increasingly have scrutinized the link between payments or concessions and brokerage fees or commissions. Moreover, a discernible trend has developed in the cases to weave the section 2(a) element of discrimination into section 2(c). Both developments have a significant bearing on whether section 2(c) can reach payments to foreign officials.

(1) Is the Payment a Brokerage Fee or Commission?

Identification of a payment or allowance as a fee or commission to the other party in a transaction or to his agent consistently has plagued the government and private plaintiffs in section 2(c) cases.[42] Problems arise more often when an allowance "in lieu of" brokerage

40. SEC v. Northrop, Civ. No. 75-563 (D.D.C., filed April 16, 1976).

41. *See 1975 Hearings, supra* note 1, at 90-94.

42. *See* Rill, *Brokerage Under the Robinson-Patman Act: Toward a New Certainty*, 41 NOTRE DAME LAW. 337, 341-46 (1966).

to the buyer is alleged rather than a direct payment to the buyer's agent. These allowances have withstood attack in litigated cases as being no more than irregular price concessions,[43] functional discounts,[44] or promotional allowances or similar payments for nonbrokerage considerations.[45] The same uncertainty would arise regarding payments to the buyer's agent, especially if it cannot be shown clearly that the recipient functions as a purchasing intermediary. For example, a complainant apparently would have a difficult road to successful litigation under section 2(c) in the case of a payment to a buyer's marketing agency that is asserted to have been made for promotional purposes.[46]

The identification problems are compounded in attempts to grapple with payments to agents of foreign nations. In many instances, the complainant will be unable to determine whether a payment was in connection with a sales transaction or series of sales transactions. The wording of section 2(c), however, appears to require such a connection. The section proscribes, as here relevant, brokerage, commission, or similar payments to a buyer's agent ". . . in connection with the sale or purchase of goods, wares or merchandise. . . ."[47] Moreover, the statute twice refers to "such transaction," corroborating the need for a specific nexus between a sales "transaction" and the payment, although the antecedent for "such" is unclear.

The government's complaint in the *Lockheed* case illustrates a set of facts that if proved could bring a payment at least within the transactional relationship required by section 2(c). According to paragraph eleven of the complaint:

> During the period from at least 1968 and continuing to at least September 1975, defendants Lockheed, Haughton, Kotchian and others engaged in a course of business whereby they made or caused to be made secret payments of at least $25 million (at times in cash) to foreign government officials to aid

43. *See, e.g.*, Main Fish Co., 53 F.T.C. 88 (1956); Trade Practice Conference Rules for the Fresh Fruit and Vegetable Industry, 16 C.F.R. § 74.2(g) (1976).

44. Hruby Distrib. Co., 61 F.T.C. 1437 (1962).

45. Central Retail-Owned Grocers, Inc. v. FTC, 319 F.2d 410 (7th Cir. 1963). An outright payment for which no particular services are performed or expected would seem to be outside the scope of § 2(c). Such payments to buyers have been considered to be beyond the reach of § 2(d), and the same principles should apply to the brokerage provision. *Cf.* Yakima Fruit & Cold Storage Co., 59 F.T.C. 693 (1961) (payments must be made to a customer as consideration for services or facilities furnished by the customer in connection with the seller's product).

46. *See* Yakima Fruit & Cold Storage Co., 59 F.T.C. 693 (1961). *But see* Tillie Lewis Foods, Inc., 65 F.T.C. 1099 (1964).

47. 15 U.S.C. § 13(c) (1970).

> Lockheed in procuring and maintaining certain contracts with foreign government customers and in expediting certain permits necessary to perform existing contracts.[48]

Specific payments probably would not be required to be linked to specific sales in order to satisfy the transactional element of the statute. Thus, in *Rangen, Inc. v. Sterling Nelson & Sons,*[49] the Ninth Circuit approved the trial court's finding that a series of payments by the defendant were made to a state purchasing agent for the purpose and with the result of generating a large volume of sales over more than six years, and concluded that the payments were covered by section 2(c). Nevertheless, no case under the subsection appears in which liability has been found in the absence of a proven direct relationship between payments and the consummation of sales. The reference in the *Lockheed* complaint to procuring and maintaining certain contracts (which covered sales by Lockheed to foreign governments) appears to contemplate payments relative to specific sales transactions provided for in section 2(c).[50]

Payments to agents of foreign governments, however, can be made for various purposes not directly related to specific sales transactions. As explained by then Deputy Assistant Attorney General Donald I. Baker in his 1975 testimony before a House committee, payments to foreign officials can be made for favorable considerations in general.[51] Indeed, under the practice if not the law of some foreign countries, "palm greasing" may be the nauseating prerequisite to a satisfactory commercial climate or perhaps to the right to trade at all. Establishing that the individual recipient has any procurement responsibilities may be difficult, as would be proving that he is an official or conduit for the payment of money to an official. Under these circumstances, the question remains whether the necessary connection between payment and the closing of a sale can be made.[52] The problems raised by the need for a sales transaction link, while substantial, are largely evidentiary and practical. Deeper issues of law and policy are presented by the question whether continued justification exists for applying what is essentially a price discrimination law to commercial bribery.

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48. Complaint for Defendant at ¶ 11, SEC v. Lockheed Aircraft Corp., Civ. No. 76-0611 (D.D.C. filed April 13, 1976).

49. 351 F.2d 851, 854-55 (9th Cir. 1965).

50. Since the *Lockheed* case was settled and since the connection between alleged payments and specific transactions would probably not have been relevant to the SEC charge, the complaint allegations were not fleshed out to provide a more concrete illustration of the factual setting herein considered. Civ. No. 76-0611 (D.D.C., filed April 13, 1976).

51. *1975 Hearings, supra* note 1, at 90.

52. *See* Yakima Fruit & Cold Storage Co., 59 F.T.C. 693 (1961).

(2) Is the Coverage of Bribery Under Section 2(c) Consistent With the Purposes of the Act?

As early as 1943, in *Fitch v. Kentucky-Tennessee Light & Power Co.*,[53] bribery of a buyer's purchasing agents was held to violate section 2(c). In that case, a buyer successfully maintained an action against its former president under the brokerage section for having received payments from sellers of coal. The court expressly differentiated section 2(a), dealing with discrimination, from section 2(c), concluding that the latter prohibited "unfair trade practice" or bribery that precludes competitors from obtaining business.[54]

More than twenty years after *Fitch,* the Ninth Circuit, in *Rangen v. Sterling Nelson & Sons, Inc.*,[55] affirmed a judgment under section 2(c) for a seller against a competitor who had allegedly obtained business from the State of Idaho by bribing its purchasing agent. The defendants expressly raised the argument that commercial bribery was not covered by a statute which had as its basic thrust the elimination of discriminatory pricing practices. The court rejected this contention, concluding that the elements of a section 2(c) and section 2(a) offense are entirely different at least when a direct payment to a buyer's agent is made as distinguished from an allowance "in lieu of" brokerage to the buyer, and that, particularly in the direct payment situation, price discrimination was not an element of the offense.[56] The court further held that commercial bribery was within the proper scope of section 2(c), which had as an objective the prevention of practices "tending to undermine the fiduciary relationship between a buyer and its agent. . . ."[57] No question appears to have been raised about the propriety of applying section 2(c) to bribery of foreign buyers' agents by the two district courts that have addressed the issue. The *Baysoy* and *Canadian Ingersoll-Rand* cases involved, however, the jurisdictional prerequisite of foreigu commerce rather than any substantive question under section 2(c).[58]

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53. 136 F.2d 12 (6th Cir. 1943).

54. *Id.* at 16.

55. 351 F.2d 851 (9th Cir. 1965).

56. *Id.* at 857. In reaching the conclusion that § 2(c) cases do not require proof of discrimination, the court relied on what may now be outdated opinions of the Ninth and Fourth Circuits, FTC v. Washington Fish & Oyster Co., 271 F.2d 39 (9th Cir. 1959); Southgate Brokerage Co. v. FTC, 150 F.2d 607 (4th Cir. 1945).

57. 351 F.2d at 858.

58. *See* notes 14-16 *supra* and accompanying text.

Until very recently, one could have argued that the commercial bribery application of section 2(c) had been wasted by time, and in light of events in the 1960's and 70's, was no longer appropriate. Two appellate court decisions in 1976, however, one in the Ninth Circuit and one in the Seventh, indicate that forecasts of the demise of this use of the brokerage clause are premature. In *Calnetics Corp. v. Volkswagen of America, Inc.*,[59] the Ninth Circuit reaffirmed its *Rangen* decision that commercial bribery that undermines a fiduciary relationship in order to consummate a sales transaction is cognizable under section 2(c). *Calnetics* involved the section 2(c) claim of a customer whose sales manager was receiving commissions on purchases from a supplier.[60] Unlike the plaintiffs in *Fitch,* the customer in *Calnetics* did not contend that he had been forced to pay inflated prices, but rather he argued that he had been forced to buy an inferior product, causing consumer dissatisfaction and loss of good will. The court of appeals overruled the lower court's dismissal of the claim, concluding:

> The alleged violations in the instant case no less involve the undermining of fiduciary relationships than did those in *Fitch* or *Rangen.* We hold that, if the distributor is able on remand to prove that counterdefendants indeed committed acts of commercial bribery in violation of § 2(c), then the defendants ought to be allowed any damage proximately caused by that violation.[61]

More recently, in *Grace v. E.J. Kozin Co.*,[62] the Seventh Circuit followed the Sixth and Ninth Circuits and held that section 2(c) prohibits payments in the nature of bribes made to consummate a sale. The plaintiff in *Grace* was the trustee for a bankrupt seafood wholesaler whose sales manager was also president of a competitor. The competitor made sales to the wholesaler on which a commission was paid to the common officer. A finding of injury was based on an assumption that the amount of commission to the double agent inflated the price paid by the bankrupt. Curiously, the court also found injury resulting from a deprivation of plaintiff's corporate opportunity that would have produced payments to the wholesaler of the commissions involved. The court observed, however, that the transaction constituted an indirect price discrimination because the victim was forced to pay a higher price in purchasing foods through defendant than defendant, a competitor, was

59. 532 F.2d 674 (9th Cir.), *cert. denied,* 45 U.S.L.W. 3340 (U.S. Nov. 9, 1976).

60. The legal theory underlying a claim by a competing supplier arising out of the same allegations does not appear to have been questioned. 532 F.2d at 687.

61. *Id.* at 696.

62. 774 ANTITRUST & TRADE REG. REP. (BNA) A-12 (7th Cir. July 22, 1976).

forced to pay for seafood brought from independent suppliers. Thus the issue whether price discrimination is an element of the section 2(c) offense by the Seventh Circuit seems unsettled.

If price discrimination is a necessary element of the offense, problems of proof will be increased greatly. A number of significant developments have occurred in the past decade that suggest a new construction of section 2(c), which more nearly harmonizes the section with the principal objectives of the price discrimination law. Notwithstanding *Calnetics* and *Grace,* those developments may undercut the continued vitality of section 2(c) as a weapon against commercial bribery.

The spark of reanalysis was ignited by the Supreme Court's first *Broch* decision, which focused on the capacity of a brokerage concession to operate as a hidden price discrimination.[63] The Court held that preferential treatment accorded a buyer in part through a reduced fee paid by the seller to the buyer's broker was unlawful under section 2(c) and was the kind of discriminatory practice that the statute was designed to prevent. According to the Court's overview, the section's central thrust was exemplified as follows:

> One of the favorite means of obtaining an indirect price concession was by setting up dummy brokers who were employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay "brokerage" to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of § 2(c) of the Act. But it was not the only means by which the brokerage function was abused and *Congress in its wisdom phrased § 2(c) broadly, not only to cover the other methods then in existence but all other means by which brokerage would be used to effect price discrimination.*[64]

The quoted language is in accord with statements from the legislative history describing the purposes of section 2(c). The House Committee explained:

> The object of the bill briefly stated is to amend section 2 of the Clayton Act so as to suppress more effectually discriminations between customers of the same seller not supported by sound economic differences in their business positions or in the cost of serving them. Such discriminations are sometimes effected directly in prices, including terms of sale; and sometimes by separate allowances to favored customers for purported services or other considerations which are unjustly discriminatory in their result against other customers. The bill is accordingly drawn in six lettered subsections, of which the first four (a), (b), (c) and (d), contain substantive measures directed at the more prevalent forms of discrimination.[65]

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63. FTC v. Henry Broch & Co., 363 U.S. 166, 175-76 (1960).

64. *Id.* at 169 (emphasis added).

65. H.R. REP. No. 2287, 74th Cong., 2d Sess. 7 (1936); *see* S. REP. No. 1502, 74th Cong., 2d Sess. 3 (1936).

The Committee's explanations of the brokerage provision further focused on the coercive power used by large buyers to obtain preferences, and again the evil of discrimination was stressed:

> Among the prevalent modes of discrimination at which this bill is directed is the practice of certain large buyers to demand the allowance of brokerage direct to them upon their purchases, or its payment to an employee, agent, or corporate subsidiary whom they set up in the guise of a broker, and through whom they demand that sales to them be made.[66]

The implications of the *Broch* decision, that discrimination is an element in section 2(c) direct payment cases, were considered and rejected by the Ninth Circuit in *Rangen.*[67] The court relied on a footnote in *Broch* citing congressional debates suggesting that bribery of a *seller's* broker by the buyer would be covered under section 2(c). In context, however, the footnote appears merely to expand the Supreme Court's basic theme that section 2(c) reaches all means of effecting discrimination, and bribery of a seller's broker may be one way to obtain a lower price.[68]

Federal Trade Commission decisions and related actions subsequent to *Broch* uniformly appear to have included price discrimination as an element of the offense in both discount and direct payment cases. In *Hruby Distributing Co.,*[69] the Commission in 1962 found that functional discounts paid a wholesaler were not brokerage fees even though so labeled by the parties, relying in part on the dissimilarity of respondent's operations with those subject to section 2(c). The Commission observed:

> Hruby is clearly not a "dummy" broker controlled by a large buyer to whom he passes on phony brokerage payments. Equally clearly, he is not himself a powerful wholesaler or retail chain exacting from his suppliers false brokerage payments, to the competitive disadvantage of his smaller competitors. And, finally, it is clear that the discounts received by Hruby are not granted because on sales to him sellers could dispense with brokerage services regularly required on their sales, thus effecting savings of usual brokerage fees.[70]

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66. H.R. REP. No. 2287, 74th Cong., 2d Sess. 15 (1936). The Senate Committee Report more explicitly identified the type of practice with which Congress was concerned:

> But to permit [a brokerage] payment of allowance where no such service is rendered, where in fact, if a "broker," so laheled, enters the picture at all, it is one whom the buyer points out to the seller, rather than one who brings the buyer to the seller, is but to permit the corruption of this function to the purposes of competitive discrimination.

S. REP. No. 1502, 74th Cong., 2d Sess. 7 (1936).

67. 351 F.2d at 856.

68. FTC v. Henry Broch & Co., 363 U.S. 166, 169 n.6. The congressional debates referred to are at 80 CONG. REC. 7759-60, 8111-12 (1936).

69. 61 F.T.C. 1437 (1962).

70. *Id.* at 1447-48.

Two years later, the Commission framed the issue in another case of alleged brokerage discounts to be whether an allowance was a brokerage payment if it was given only to a favored customer.[71] In *Garrett-Holmes & Co.*, also a buyer case, a violation was found because

> [t]here is no evidence that the buyer rendered any services to the seller . . . nor that anything in its method of dealing justified its getting a discriminatory price as "brokerage" or discounts in lieu thereof.[72]

Possibly the most forthright Commission expression regarding the elements of section 2(c) is found in an *amicus* brief filed by the agency in a private action:

> The crucial question in *every* case brought under Section 2(c) is whether the buyer is receiving preferential treatment effected through the payment of brokerage or other compensation, or any allowance or discount in lieu thereof.[73]

The most recently contested section 2(c) proceedings before the Commission were the "Lettuce Brokerage" cases, involving initially seventeen brokers, buyers, and individuals in the produce industry. A violation was alleged to have occurred as a result of receipt of fees by brokers who were allegedly representatives or under the direct or indirect control of buyers.[74] The cases were determined on crossmotions for summary judgment, with complaint counsel conceding that:

> no evidence [would be offered] that the acts and practices of respondents alleged in the complaint in this matter have resulted in price discrimination or may be substantially to lessen competition or tend to create a monopoly or injure, destroy or prevent competition.[75]

Summary decision was granted by both administrative law judges responsible for the adjudication, largely because of the absence of proof that any price discrimination had been granted.[76] In adopting

71. Tillie Lewis Foods, Inc., 65 F.T.C. 1099, 1138 (1964).

72. 67 F.T.C. 237 at 254 (1965) (citing FTC v. Henry Broch & Co.).

73. Brief of FTC as *amicus curiae* at 5, Empire Rayon Yarn Co. v. American Viscose Corp., 364 F.2d 491 (2d Cir. 1966) (emphasis added). *See also* Modern Marketing Services, Inc., 71 F.T.C. 1676, 1685-86 (1967).

74. Jewel Companies, Inc., 83 F.T.C. 1243 (1974); Food Fair Stores, Inc., 83 F.T.C. 1213 (1974).

75. Jewel Companies, Inc., 83 F.T.C. 1243, 1249 (1974) (initial decision).

76. Jewel Companies, Inc., 83 F.T.C. 1243, 1254 (1974); Food Fair Stores, Inc., 83 F.T.C. 1213, 1229-30 (1974). In the *Jewel* initial decision, the administrative law judge noted with approval but distinguished the bribery cases, apparently agreeing with the breach of fiduciary duty theory. 83 F.T.C. at 1251. The approving reference seems at odds with the administrative law judge's more careful inclusion of discrimination as an element of the offense.

the dismissals ordered by the administrative law judges, the Commission avoided the discrimination issue, holding only that the evidence that complaint counsel would offer could not establish that the brokers were acting for or in behalf of or subject to the direct or indirect control of the buyers.[77]

If discrimination is an element of the offense, the principles of fiduciary responsibility that purport to justify coverage of commercial bribery seemingly are not controlling in section 2(c) litigation. For present purposes, one would have extreme difficulty showing that a bribe to a foreign official resulted in a discriminatory disadvantage to any other buyer with whom the Robinson-Patman Act might be concerned.[78] In any event, the vitality of the section 2(c) bribery cases may be open to question.[79] The difficulty is made more severe by attempts to reconcile the questionable force of the bribery cases with the elements of foreign relations intruding on the payments here considered. These elements may present the greatest impediment to section 2(c)'s application to payments to foreign officials.[80]

B. Commercial Bribery Under the Sherman Act

To the extent corporate activities such as the payment of bribes to foreign officials for the purpose of obtaining business have the effect of furthering conspiratorial behavior that restrains trade or leads to monopolization, the entire pattern of anticompetitive behavior, including the bribe, may be subject to prosecution. While bribery, as yet, has not been explicitly at issue in cases involving international trade, some private inducements to foreign governments to engage in anticompetitive behavior have been the subject of litigation. In addition, bribery has been an element in a few domestic antitrust cases.[81]

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77. 83 F.T.C. at 1273.

78. The "commerce" elements of § 2(a) would become indirectly relevant to § 2(c), if only to the extent necessary to identify a cognizable discrimination.

79. The only apparent reference to the bribery cases by the Supreme Court occurred in dicta in California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972). In undertaking to add interpretive gloss to the *Noerr* doctrine, the Court included bribery of a public purchasing agent as among the practices that may violate § 2(c), citing *Rangen*. This reference is so remote from the Court's rationale that it is of little or no instructive value in attempting to discern how the Court would deal directly with the discrimination issue under § 2(c).

80. *See* text accompanying notes 142-44 *infra*.

81. More often bribery questions come up under other federal laws; *e.g.*, I.R.C. § 162(c), which deals with bribes paid to foreign officials, and the federal bribery statute, 18 U.S.C. § 201 (1970), which deals with bribes paid to U.S. officials.

(1) The *Noerr-Pennington* Antitrust Exemption

The natural starting point for an analysis of whether payments made by United States corporations to foreign nationals for the purpose of securing foreign business are prohibited by the Sherman Act is the *Noerr-Pennington* doctrine, which states generally that joint efforts to influence legislative or executive actions are not antitrust violations. In *Eastern Ry. Presidents Conference v. Noerr Motor Freight, Inc.*,[82] the Supreme Court held that a Sherman Act violation cannot be predicated on mere attempts to influence the passage or enforcement of laws, even if for an anticompetitive purpose and by deliberate deception of public officials. In *UMW v. Pennington*,[83] the Court added that such conduct is not illegal whether standing alone or as part of a broader scheme violative of the Sherman Act. The doctrine appears to rest on two grounds: (1) the Sherman Act was not intended to regulate political activities; and (2) the constitutional right of petition.[84]

Subsequent cases have narrowed the scope of the *Noerr* immunity. In *Continental Ore Co. v. Union Carbide & Carbon Corp.*,[85] the Supreme Court held *Noerr* plainly inapposite to a situation in which defendants were "engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws." The Court concluded:

82. 365 U.S. 127 (1961). The Supreme Court in *Noerr* expressly carved out an exception to the antitrust immunity doctrine when the activities at issue are nothing more than an attempt to interfere with the business relationships of competitors ("sham exception"). Thus in factual settings similar to those contained in the complaints against Lockheed and Northrop, when one corporation bidding on a project bribes a foreign official for the purpose of winning the contract, application of the *Noerr* exemption is at least questionable. To date, the sham exception has arisen primarily in cases involving an alleged abuse of process. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) (defendants engaged in concerted action to institute state and federal actions to resist and defeat applications by plaintiff to acquire operating rights); Israel v. Baxter Laboratories, Inc., 466 F.2d 272 (D.C. Cir. 1972) (defendants, including an FDA official, conspired to keep plaintiff's drug off the market); Aloha Airlines, Inc. v. Hawaiian Airlines, Inc., 1972 Trade Cas. ¶ 74,234 (D. Hawaii) (defendant airline opposed plaintiff airline's request before the Civil Aeronautics Board for a subsidy). The policies on which the sham exception rests, however, may apply as well to the commercial bribery situation. The Supreme Court, in protecting the constitutional right of petition, could not have envisioned that such protections would also be applied to cases of commercial bribery. Further, influencing a public official by deliberate deception is distinguishable from the bribery situation in that in the former case, prosecution may deter others from petitioning the government in fear that the facts they present may subsequently be proven false. In the latter case, the official is a party to the illegality; accordingly no legitimate interest exists to be protected.

83. 381 U.S. 657 (1965).

84. Annot., 17 A.L.R. FED. 645, 648 (1973).

85. 370 U.S. 690 (1962).

> [T]o subject [defendants] to liability under the Sherman Act for eliminating a competitor from the Canadian market by exercise of the discretionary power conferred upon Electro-Met of Canada [a co-conspirator] by the Canadian Government would effectuate the purposes of the Sherman Act and would not remotely infringe upon any of the constitutionally protected freedoms spoken of in Noerr.[86]

Recently, the *Noerr-Pennington* doctrine was held "inappropriate" with respect to attempts to influence a foreign government. *Occidental Petroleum Corp. v. Buttes Oil & Gas Co.*[87] involved efforts by defendants to instigate an international dispute over sovereign rights to part of the Persian Gulf in order to block their competitors' efforts to acquire oil deposits in that area. The court dismissed the complaint, citing the "act of state" doctrine as controlling. In dicta, however, the court observed that the *Noerr* doctrine does not apply readily in a foreign context, because the right of petition doctrine has limited applicability to petitioning of foreign governments.

A number of lower court decisions have distinguished the *Noerr* doctrine in cases in which attempts to influence agencies or officials involved conduct that was plainly illegal, including bribery. The Ninth Circuit, in *Sacramento Coca-Cola Bottling Co. v. Teamsters Local 150,*[88] held that the *Noerr* doctrine does not protect coercive measures such as threats and duress. The court concluded that the basic thrust of the *Noerr* doctrine is the protection of the first amendment right to petition the government without regard to the petitioner's intent and without the chilling effect of possible antitrust litigation. The court held that the doctrine was not intended to protect those who employ illegal means to influence their governmental representatives. Two cases from the Fifth Circuit have held the doctrine inapplicable when a government official is influenced by false or misleading information.[89] These cases, however, appear to conflict with *Noerr,* in which the Supreme Court concluded that deliberate deception of public officials, reprehensible as it may be, is of no Sherman Act consequence.

In *George R. Whitten Jr., Inc. v. Paddock Pool Builders, Inc.,*[90]

86. *Id.* at 707-08.

87. 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd,* 461 F.2d 1261 (9th Cir.), *cert. denied,* 409 U.S. 950 (1972).

88. 440 F.2d 1096 (9th Cir. 1971), *cert. denied,* 404 U.S. 826 (1972).

89. Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972); Marketing Assistance Plan, Inc. v. Associated Milk Producers, Inc., 338 F. Supp. 1019 (S.D. Tex. 1972).

90. 508 F.2d 547 (1st Cir. 1974), *cert. denied,* 421 U.S. 1004 (1975).

the First Circuit drew a distinction between attempts to influence the government in political matters and attempts to influence the government when acting as a consumer.[91] *Whitten* grew out of efforts of both parties to sell their products (pipeless swimming pools) to public bodies acting under competitive bidding procedures. Defendant conceded that it had combined with dealers and others to effect the use of its specifications in the public swimming pool industry, but argued that such activities do not constitute a violation of the Sherman Act. The court held that antitrust immunity for efforts to influence public officials in the enforcement of laws does not extend to efforts to sell products to the government by means of high pressure salesmanship, fraudulent statements, and threats to public officials acting under a competitive bidding statute. The scope and force of *Whitten*, however, is questionable. The First Circuit's distinction between political and commercial activity is belied by the fact that *Pennington* involved attempts to influence the Secretary of Labor and a Tennessee Valley Authority official with respect to government coal purchases.[92] Nevertheless, when defendants are "engaged in private commercial activity no element of which involved seeking to procure the passage or enforcement of laws" the *Noerr* doctrine does not apply.[93]

(2) Domestic Antitrust Cases Involving Commercial Bribery

To date, United States courts have not held that bribery, by itself, is an offense under the Sherman Act. In a case involving bribery of a public official, the Seventh Circuit held that not every unlawful act is an antitrust violation even if the *Noerr-Pennington* doctrine does not immunize it from antitrust scrutiny. In *Parmelee Transport Co. v. Keeshin*,[94] defendant was charged with improperly influencing the chairman of the Interstate Commerce Commission. Plaintiff alleged that it would have been awarded a contract for the business of transferring passengers and their baggage to and from railway stations in Chicago, but for the illegal conduct of defen-

91. This distinction was later adopted by the Fifth and Ninth Circuits. Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); Sacramento Coca-Cola Bottling Co. v. Teamsters Local 150, 410 F.2d 1096 (9th Cir. 1971), *cert. denied*, 404 U.S. 826 (1972).

92. *See also* Household Goods Carriers Bureau v. Terrel, 452 F.2d 152 (5th Cir. 1971) (government purchases of mileage guides); United States v. Johns-Manville Corp., 245 F. Supp. 74 (E.D. Pa. 1965) (government purchases of pipe).

93. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707 (1962).

94. 292 F.2d 794 (7th Cir. 1961).

dant.[95] Defendant allegedly had secured the aid of the ICC chairman by buying thirty tractors from the chairman's son and offering the chairman an executive position. In finding no violation of the Sherman Act, the court observed:

> An assertion that the competitive market for this contract was destroyed or that the competition for it was eliminated is belied by the record. While one competitor succeeded and necessarily tbe other failed, unmistakably there was very strenuous competition. This unavoidable fact undermines the plaintiff's charges under §§1 and 2 of the Sherman Act. Nor is this result precluded by the fact (which a court might well find on the case presented by way of offers of proof) that the victory of the successful bidder was made easier by the wrongful conduct of a public official. Assuming the record presented as to his involvement reflects the truth (which we are for this purpose required to do), any party damaged thereby has (and would have had, even before the enactment of the Sherman Act) a ground for relief in the courts of this country. However, the use of conventional antitrust language in drafting a complaint will not extend the reach of the Sherman Act to wrongs not germane to that act, even though such wrongs be actionable under state law. We are not concerned with labels. Otherwise, an adroit antitrust lawyer might use his skill in the use of words to convert many unlawful acts into antitrust violations. The antitrust laws were never meant to be a panacea for all wrongs.[96]

Three years later, in *Sterling Nelson & Sons, Inc. v. Rangen, Inc.*,[97] a district court, relying on *Parmelee Transport Company*, held the Sherman Act was not violated when the evidence proved bribery of an influential state employee which had a detrimental restraining effect upon interstate commerce. Concluding that commercial bribery was not the type of activity proscribed by the Sherman Act, the court noted:

> The evidence here proves only bribery of an influential state employee which had a detrimental restraining effect upon interstate commerce. This is not the type of misconduct within the purview of the concepts of a combination in restraint of trade or monopoly as used in the Sherman Act . . . . *[T]he Sherman Act must be interpreted in the light of well understood common law doctrines relating to monopolies and restraints of trade such as contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like.* Nothing of that kind occurred here. This is a simple case of buying influence, sometimes called commercial bribery . . . .[98]

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95. Plaintiff's offer of proof was that prior to September 30, 1955, pursuant to an oral agreement with the railroads, it had engaged in the business of transferring passengers and their baggage to and from the railway stations in Chicago. Evidence offered by plaintiff indicated that the railroads found such service satisfactory. In 1955 the railroads, in an effort to reduce costs, solicited bids from plaintiff and a number of its competitors. Plaintiff alleged that it submitted the lowest bid and tbat but for the intervention of the chairman of the ICC, it would have been awarded the contract. *Id.* at 795-96.

96. *Id.* at 804.

97. 235 F. Supp. 393 (D. Idaho 1964), *aff'd on other grounds*, 351 F.2d 851 (9th Cir. 1965).

98. *Id.* at 400 (emphasis added).

Recently in *Calnetics Corp. v. Volkswagen of America, Inc.*,[99] the Ninth Circuit, relying on *Rangen,* concluded that commercial bribery, standing alone, does not constitute a violation of the Sherman Act. In a footnote, however, the court stated:

> This case does not present the question nor do we here decide under what circumstances a claim of commercial bribery tied to claims of other acts tending to restrain trade would state a cause of action under §§1 and 2 of the Sherman Act.[100]

Thus, although there is substantial authority for the proposition that commercial bribery by itself is not cognizable under the Sherman Act,[101] the courts appear to have left open the possibility that the Act may apply when the bribe is tied to other acts tending to restrain trade.[102]

(3) Application to Bribery of Foreign Officials

Domestic antitrust cases involving commercial bribery are distinguishable from foreign bribery cases. The domestic cases appear to be decided on the ground that other relief for the alleged wrong was available to the plaintiff. In *Parmelee Transport Company* and *Rangen,* the courts held that commercial bribery was cognizable under state bribery statutes and implied that the impact on interstate commerce was insufficient to constitute a violation of the Sherman Act. Although Congress presently is considering a number of bills designed to prohibit bribery of foreign officials,[103] such activity, if properly disclosed to the SEC, is not prohibited at present by United States laws. Absent congressional action, the Department of Justice should consider applying the Sherman Act to situations involving bribery of foreign officials, especially when siguificant impact on foreign trade is demonstrated. In factual settings similar to those alleged in the complaints against Lockheed and Northrop, in

99. 532 F.2d 674 (9th Cir. 1976).

100. *Id.* at 687 n.20.

101. *See also* United States v. Boston & Maine R.R., 380 U.S. 157, 162 (1965); Norville v. Glohe Oil & Refining Co., 303 F.2d 281, 282-83 (7th Cir. 1962).

102. *See also* Harman v. Valley Nat'l Bank, 339 F.2d 564 (9th Cir. 1964), in which the Ninth Circuit reversed the district court's dismissal of a Sherman Act complaint alleging inducement of a public official. The court's holding gave a rather expansive reading to plaintiff's complaint:

> The complaint can be read as alleging that appellees' joint effort to influence the Attorney General was but one element in a larger, long-continued scheme to restrain and monopolize "commercial banking . . . within the State of Arizona."

Id. at 566.

103. *See, e.g.,* S. 3133 (H.R. 13870), 94th Cong., 2d Sess. (1976); S. 305, 95th Cong., 1st Sess. (1977).

which a corporation pays a bribe specifically to insure that a foreign procurement officer buys its product to the exclusion of its principal competitor, foreign commerce clearly is affected. The question whether such an effect is sufficient to satisfy the requirements of the Sherman Act is not amenable to generalized answers.

Application of the Sherman Act to bribery of foreign officials is supported by a number of cases involving other types of private inducements designed to encourage anticompetitive behavior. In *Continental Ore,* the Canadian government appointed a Canadian corporation to act as that nation's exclusive agent to purchase the rare metal vanadium for allocation to Canadian industry. Without authorization, the Canadian agent made purchases that discriminated against plaintiff and aided the Canadian agent's United States parent in restraining and monopolizing the vanadium industry. Although bribery does not appear to have been involved, because the agent already had a vested interest in pleasing the U.S. principal, the proscribed conduct clearly is analogous to bribery of foreign officials.[104] The Supreme Court holding that the defendant violated the Sherman Act, emphasized that its decision was designed to further the purposes of the Act.[105]

Continental Ore had rather unique facts that are not likely to be present in most situations involving bribery of government procurement officers. First, *Continental Ore* involved a conspiracy that included other private firms as well. The requirement of section 1 of the Sherman Act that proscribes only "contracts, combinations . . . or conspiracies, in restraint of trade" may not be met by a simple relationship between a single private firm and a single bribed government official. One person acting alone cannot violate section 1, since agreement between two or more persons is necessary before a violation of section 1 can be established. Further, concerted action by persons within a single business enterprise does not constitute a combination or conspiracy, and so long as the business enterprise is regarded as an individual economic unit, it is permitted to act as such.[106] Thus an agreement between a corporation and one of its agents that the latter will bribe a foreign official does not consititute a combination in restraint of trade unless the agent can be considered sufficiently independent to have distinct and separate interests.[107]

104. *1975 Hearings, supra* note 1, at 91.
105. 370 U.S. at 707-08.
106. AREEDA, *supra* note 24, at 319.
107. *See* Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 469 (1962).

Whether the bribed foreign official can be considered a party to the conspiracy is unclear at present. In *Parker v. Brown,*[108] the Supreme Court specifically reserved the question of the applicability of the Sherman Act when a state or its agent becomes a participant in a private agreement to restrain trade. In *Harman v. Valley National Bank of Arizona,*[109] the Ninth Circuit reversed a district court's dismissal of a Sherman Act complaint that alleged that several Arizona banks conspired with the Attorney General of Arizona to restrain and monopolize commercial banking in Arizona, and that pursuant to the conspiracy, the Attorney General closed down plaintiff's bank. In both cases, however, more than one private firm was involved in the alleged conspiracy. Further, in both *Continental Ore* and *Harman* the alleged antitrust violation involved much more extensive conduct than merely inducing specific discriminatory behavior by a specific government official. Thus, unless the commercial impact of the bribe is significant, courts may be reluctant to apply section 1 of the Sherman Act.[110]

The need to show the actual or potential impact of a questionable payment to a foreign official presents even greater barriers to relief under section 2 of the Sherman Act.[111] Under the preponderance of authority, a plaintiff must establish an economically significant and identifiable relevant market in cases alleging an attempt to monopolize[112] as well as in those alleging actual monopolization.[113] Moreover, when proving an illegal attempt to monopolize, the plaintiff generally must demonstrate both an unlawful intent[114] and a

108. 317 U.S. 341, 351-52 (1943).

109. 339 F.2d 564 (9th Cir. 1964).

110. *See* Parmelee Transp. Co. v. Keeshin, 292 F.2d 794 (7th Cir. 1961).

111. 15 U.S.C. § 2 (1970).

112. *See, e.g.,* George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547 (1st Cir. 1974), *cert. denied,* 421 U.S. 1004 (1975); Bernard Food Indus., Inc. v. Dietene Co., 415 F.2d 1279 (7th Cir. 1969); United States v. Charles Pfizer & Co., 245 F. Supp. 737 (E.D. N.Y. 1965); Becken v. Safelite Glass Corp., 244 F. Supp. 625 (D. Kan. 1965); United States v. Johns-Manville Corp., 231 F. Supp. 690 (E.D. Pa. 1964). *See also* Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965) (dictum). *But see* Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), *cert. denied,* 377 U.S. 993 (1964).

113. *See, e.g.,* United States v. Grinnell Corp., 384 U.S. 563 (1966); United States v. E.I. duPont de Nemours & Co., 351 U.S. 377 (1956); United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954); United States v. Griffith, 334 U.S. 100 (1948); Swift & Co. v. United States, 196 U.S. 375 (1905); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

114. Times-Picayune Publ. Co. v. United States, 345 U.S. 594 (1953); Lorain Journal Co. v. United States, 342 U.S. 143 (1951); United States v. Columbia Steel Co., 334 U.S. 495, *rehearing denied,* 334 U.S. 862 (1948); United States v. Griffith, 334 U.S. 100 (1948); American Tobacco Co. v. United States, 328 U.S. 781 (1946).

dangerous probability of success.[115] The prospects that a plaintiff will satisfy either standard, much less both, are not bright. The *specific* intent that must be identified involves a much more culpable design than the general intent applicable to a monopolization charge. Thus, in *George R. Whitten, Jr., Inc.*,[116] the First Circuit concluded that *improper* attempts to influence state purchasing agents would not be per se violations of section 1 of the Sherman Act, and that under the "rule of reason," the attempts would only be unlawful if substantial market powers were coupled with a specific intent to injure a specific competitor or competitors.

The analogy to section 2 attempt situations is apt. Unless it can be shown that a defendant possessed the intent to injure competitors to the point of driving them from the competitive arenas to secure a monopoly position, an attempt *to monopolize* seems unlikely to be proven. In the typical reported bribery situation, the payments allegedly are made to conclude a particular sale or a number of sales to an official of a single foreign nation. Moreover, these payments are typically not made with any hostile design on a competitor's business existence but are intended principally to secure a limited amount of trade. Under these circumstances, proof of the requisite unlawful intent would appear to be difficult to establish. Similarly, the ordinary bribery situation does not appear to support a "dangerous probability of success" claim on which a successful attempted monopolization case depends, much less provide a market share sufficiently definable to establish a monopolization claim. In fact, the affected markets in virtually every instance would be too thin—a single nation—and the time span too brief—often a single sale—to support a section 2 complaint.[117]

IV. The Act of State Doctrine

If the recipient of a questionable payment is in fact an official of a foreign nation acting in an official capacity when he receives a payment, the most substantial barrier to a successful charge under section 2(c) of the Robinson-Patman Act or sections 1 or 2 of the Sherman Act may result from application of the "act of state" doctrine.[118] This principle, originally applied to antitrust litigation in

115. American Tobacco Co. v. United States, 328 U.S. 781 (1946).

116. 508 F.2d at 559-60.

117. The typical bribery situation is dissimilar from tbat involved in *Continental Ore*, in which a § 2 charge was sustained upon evidence that defendant had effectively monopolized the North American vanadium market.

118. Closely related to the "act of state" doctrine are the doctrines of sovereign immun-

the *American Banana* case,[119] has neither a constitutional nor statutory base, but is rooted in concepts of international comity and judicial restraint. In general, the courts of the United States have not considered themselves the appropriate arbiter of the legality or propriety of foreign actions having a restraining influence on commerce in the United States.[120] Much of the rationale of Justice Holmes' opinion in *American Banana*—dealing with the inability of the Sherman Act to reach conspiracies formulated and occurring abroad but having effect in the United States—has been criticized and is probably not presently sound.[121] What does remain is the basic rule that the Sherman Act does not apply when the allegedly unlawful act is committed through the participation of a foreign sovereign.

The threshold authoritative expression of the act of state doctrine in the United States occurred in *Underhill v. Hernandez,*[122] decided by the Supreme Court in 1896. In that case, the Court held that the judiciary could not inquire into the legality of the kidnapping of an American citizen by a Venezuelan guerilla leader whose government was later recognized by the United States. The underlying rationale of the *Underhill* case does not appear to have been questioned in the eighty years since it was announced, and the examination of the legality of a commercial payment to a foreign officer seems far less appropriate than a determination of the legal grounds for an abduction by a war lord.

Perhaps the most comprehensive explication of the doctrine is found in *Banco Nacional de Cuba v. Sabbatino.*[123] In facing a concededly discriminatory and unjust expropriation by the communist government of Cuba, the Supreme Court held that the judiciary

ity and sovereign compulsion. The doctrine of sovereign immunity provides that official agencies of foreign sovereigns are entitled to immunity from the process of United States courts with respect to their sovereign diplomatic and political activities, even if these have anticompetitive consequences. The doctrine of sovereign compulsion directs that a private firm should not be held liable for certain violations of law that may occur because it is *compelled* to act under risk of penalty by the foreign sovereign. In the typical bribery case, however, neither of these defenses are likely to apply.

119. 213 U.S. 347 (1909).

120. *See, e.g.,* Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 108 (C.D. Cal. 1971), *aff'd,* 461 F.2d 1261 (9th Cir.), *cert. denied,* 409 U.S. 950 (1972).

121. 213 U.S. at 353-59.

122. 168 U.S. 250 (1897).

123. 376 U.S. 398 (1964). The so-called "Sabbatino amendment," 22 U.S.C. § 2370(e)(2) (1970), designed to overrule some of the effects of the decision, is not relevant to the present analysis, because it relates only to confiscations of property or property rights and then only in a limited manner.

could not examine the legality of acts by a foreign sovereign, even when those acts may be patently violative of international law. The Court stated:

> [The doctrine's] continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs.[124]

The Court suggests, therefore, that the doctrine is not rigid and inflexible but one that may be adapted to varying circumstances.

Two years before *Sabbatino,* in *Continental Ore Co.,*[125] the Court suggested one area in which the act of state doctrine may be inapplicable. One element of plaintiff's complaint was that defendant used its allocation authority to foreclose plaintiff from the Canadian vanadium market. Reversing the rulings of the trial and appellate courts, the Supreme Court determined that defendants were not necessarily immunized from liability for the terminated allocations by reason of Carbide's having acted, through its agent, as an arm of the Canadian government.[126] The Court stated:

> A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries.[127]

This statement constitutes neither a novel expression of law nor deals in any way with the act of state issue. The Court seems to have approached this issue in two ways. First, it indicated that when the conduct of a foreign official is only one part of an overall conspiracy to restrain trade, the defendants are not wholly insulated from liability.[128] The Court concluded that the evidence should go to a jury for a determination whether injury resulted from defendants' conspiratorial acts. The Court's rationale in this respect is probably inapplicable to the present situation, in which foreign action is not only a part of the challenged conduct, but is the central operative act giving rise to the claim. The second aspect of the Court's reasoning involved the unusual circumstance of a defendant acting both as a commercial entity and as a governmental agency. Additionally, the Court did not believe that the Canadian government would have approved the discriminatory allocation by its delegate or that such

124. 376 U.S. at 427-28.
125. 370 U.S. 690 (1962).
126. *Id.* at 704.
127. *Id.*
128. The Court in *Continental Ore* relied on its earlier decision in United States v. Sisal Sales Corp., 274 U.S. 268 (1927), in which discriminatory foreign legislation was only one element of a widespread private conspiracy to control production.

action was consistent with Canadian law. The latter basis for the Court's decision seems inconsistent with the customary judicial reluctance to probe the legality of a foreign agent's actions under the laws of his own country. It may be that *Continental Ore* should be limited to its peculiar facts, which are remote from those presently under consideration.

Occidental Petroleum Corp. v. Buttes Gas & Oil Co.[129] is probably the most instructive analysis of the use of antitrust laws to challenge payments to foreign officials. A complex, if not exotic, factual situation arose from the Trucal states of the Persian Gulf, resulting in a claim that the defendants had fabricated an international boundary dispute by which plaintiff was precluded from exploiting petroleum concessions through the action of various oil-state rules. The district court holding that the claim was barred under the act of state doctrine was affirmed by the Ninth Circuit, and the Supreme Court denied certiorari. Although plaintiff claimed that the state action involved was fraudulently motivated and unlawful under international law, the district court observed:

> [S]uch inquiries by this 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.[130]

In a recent decision, *Alfred Dunhill of London v. Republic of Cuba,*[131] the Supreme Court refused to extend the act of state doctrine to a situation in which the foreign sovereign had acted in the capacity of an entrepreneur. The action was brought by former owners of expropriated Cuban cigar companies against United States importers to recover payments for cigar shipments made both before and after the nationalization of the industry in Cuba. Cuban government appointees[132] intervened and the importers brought cross-claim against them seeking to recover payments made by the importers to the intervenors for prenationalization shipments. The intervenors countered with the contention that any repayment of the obligation was a quasi-contractual debt which had Cuba as its situs, and that their refusal to return the payments constituted an act of

129. 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd,* 461 F.2d 1261 (9th Cir.), *cert. denied,* 409 U.S. 950 (1972). This case was cited by Donald Baker in his House testimony as one imposing barriers to United States antitrust attacks on bribes to officers of foreign governments. *See 1975 Hearings, supra* note 1, at 90.

130. 331 F. Supp. at 110.

131. 96 S. Ct. 1854 (1976).

132. These were individuals appointed by the Cuban government to operate the cigar industry. *Id.* at 1857.

state. In accordance with the *Sabbatino* decision, the district court directed the importers to pay the owners for prenationalization shipments and the intervenors for postnationalization shipments.[133] In addition, the court directed the importers to set off from the amount owed to the intervenors any payments made to them for prenationalization shipments. The Second Circuit, while agreeing with the district court in all other respects, held that the intervenor's obligation to repay the importer was situated in Cuba and that their repudiation of the obligation constituted an act of state.[134] The Supreme Court reversed, refusing to conclude that "the conduct in question was the public act of those with authority to exercise sovereign power and was entitled to respect in our courts."[135] The Court held that no proof was offered that the failure of the intervenors to repay the money reached the level of an "act of state," and further stated:

> No statute, decree, order or resolution of the Cuban government itself was offered in evidence indicating that Cuba had repudiated her obligations in general or any class thereof or that she had as a sovereign matter determined to confiscate the amounts due three foreign importers.[136]

The Ninth Circuit, in *Timberlane Lumber Co. v. Bank of America,*[137] held that the act of state doctrine does not require dismissal of an action brought under sections 1 and 2 of the Sherman Act alleging a conspiracy to interfere with the importation into the United States of Honduran lumber, when the challenged activity does not appear to reflect official Honduran policy, neither Honduras nor any Honduran official was named as a party-defendant, and the challenge does not threaten relations between Honduras and the United States. Timberlane's basic claim alleged that officials of the Bank of America and others located in Honduras and the United States conspired to prevent Timberlane from milling lumber in Honduras and exporting it to the United States. Defendants argued that Timberlane's injury resulted from acts of the Honduran government in connection with the enforcement of a disputed security interest in the lumber mill held by the Bank of America and cannot be reviewed by United States courts. Relying on *Continental Ore Co.* and *Alfred Dunhill,* the court held that the act of state doctrine

133. Menendez v. Faber, Coe & Gregg, Inc., 345 F. Supp. 527 (S.D.N.Y. 1972).
134. Menendez v. Saks & Co., 485 F.2d 1355 (2d Cir. 1976).
135. 96 S. Ct. at 1861.
136. *Id.*
137. 797 ANTITRUST & TRADE REG. REP. (BNA) G-1 (9th Cir. Jan. 18, 1977).

is flexible and that "the doctrine does not bestow a blank-check immunity upon all conduct blessed with some imprimatur of a federal government."[138] Applying the standard enunciated in *Sabbatino*—potential for interference with our foreign relations—the court held:

> The so-called "act of state" here was the application by the courts and their agents of the Honduran laws concerning security interests and the protection of the underlying property against diminution. The judicial proceedings were initiated by Caminals, a private party and one of the alleged co-conspirators, not by the Honduran government. *There is no indication that the court action reflected any official Honduran policy that Timberlane's efforts should be crippled or that trade with the United States should be restrained.* Timberlane does not name Honduras or any Honduran officer as a defendant or co-conspirator, nor challenge Honduran policy or sovereignty in any fashion that appears on its face to hold any threat to relations between Honduras and the United States. Under the circumstances, the act of state doctrine does not require the dismissal of the Timberlane action.[139]

Alfred Dunhill and *Timberlane* may have a marked effect on cases applying the act of state doctrine to bribery of foreign officials. When the foreign sovereign officially condemns or quietly acquiesces in the payment of bribes to its officials, and the possibility of disrupting foreign relations is remote, perhaps the act of state defense will be rejected.

In the most recent case involving the act of state defense, *Hunt v. Mobil Oil Corporation,*[140] the Second Circuit upheld the dismissal of Texas oilman Nelson Hunt's antitrust suit charging a conspiracy among the major oil companies to preserve the competitive advantages of Persian Gulf crude oil over Libyan crude oil by causing Libya to nationalize Hunt's holdings in that country. Holding the act of state defense applicable, the court concluded:

> [T]he United States has officially characterized the motivation of the Libyan government, the very issue which Hunt now seeks to adjudicate here. The attempted transmogrification of Libya from lion to lamb undertaken here does not succeed in evading the act of state doctrine because we cannot logically separate Libya's motivation from the validity of its seizure. The American judiciary is being asked to make inquiry into the subtle and delicate issue of the policy of a foreign sovereign, a Serbonian Bog, precluded by the act of state doctrine as well as the realities of the fact finding competence of the court in an issue of far reaching national concern.[141]

Thus the act of state doctrine effectively may prevent successful challenge to payments to foreign officers in their official capaci-

138. *Id.* at G-3.

139. *Id.* at G-4 (emphasis added).

140. 798 ANTITRUST & TRADE REG. REP. (BNA) A-9 (2d Cir. Jan. 25, 1977).

141. *Id.* at A-10. The *Hunt* decision is a classic justification of the applicability of the act of state doctrine and should not be interpreted as expanding the defense.

ties under the antitrust laws. The principle underlying the doctrine may prevent judicial inquiry in the United States into the legality of the officer's conduct under foreign law, since such an inquiry would involve the courts in constructions of foreign law.[142] The only exception to a general preclusion against United States attack on these payments may arise when the official's receipt of payment is repudiated by the foreign government itself, as has recently occurred to the extent that at least one former chief of state has been jailed.[143] Even under those circumstances, some basis may exist for interposing the act of state doctrine, in view of the vicissitudes of law and policy in some nations; however, the application of the principle to circumstances resembling bribery that have been attacked by the foreign government itself seems to be an unduly cautious exercise of judicial restraint. In balance, however, attacks on bribery of foreign officials under most circumstances would appear to founder as a result of the act of state doctrine.[144]

V. Private Actions—The Problems of Proving Injury

Assuming inaction by the government, another hurdle standing in the way of successful challenge to bribery of foreign officials under the antitrust laws is the requirement set forth in section 4 of the Clayton Act that a private plaintiff establish injury to his business or property caused by an antitrust violation.[145] While this burden falls on every plaintiff seeking recovery under the antitrust laws, the difficulty may be particularly acute when the payment is made to secure a single order or relatively few orders of astronomically costly products such as airplanes. If the private plaintiff is a competing seller of these items, he would be required to show that he would have made the sale but for the bribe, and that failure to make the sale caused him injury.[146] Clearly, the road to recovery

142. *See* Interamerican Ref. Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1298-99 (D. Del. 1970). The exceptions to the act of state doctrine derived from hostilities between the United States and the foreign power involved are beyond the scope of this paper. *See Ex parte* Colonna, 314 U.S. 510 (1942).

143. Malcolm, *Japan Vows Full Inquiry in Wake of Tanaka Arrest,* N.Y. Times, July 28, 1976, § 1, at 1, col. 2.

144. Obviously, the doctrine has no application when a foreign business representative rather than a foreign official is the recipient of a payment although proof of the agent's capacity may be a problem. The other considerations discussed in this paper would apply to payments not involving governmental functionaries.

145. 15 U.S.C. § 15 (1970).

146. A foreign nation, having repudiated the action of a faithless official, may not face so great a problem in attempting to recover alleged overcharges. *Cf.* Fitch v. Kentucky-Tennessee Light & Power Co., 136 F.2d 12 (6th Cir. 1943).

would be more arduous than in primary line situations involving competing sellers of fungible products who confront one another in their attempts to make regularly recurring sales to the same customers.[147]

The Ninth Circuit confronted treble damage claims by a competing seller in a commercial bribery context in the *Rangen* case. The appellate court held that the trial court correctly found that plaintiff had proved ascertainable damages when plaintiff displayed that it successfully had made bids for a portion of the purchase of fungible fish food to the state after termination of the bribery agreement.[148] The court held that while the market was contaminated by the bribe no finding was necessary that plaintiff would have been required to reduce its regular prices in order to obtain the state's business.

No reason exists why the basic principles applicable to antitrust recovery by a plaintiff not yet selling in a particular market would not apply to the unusual situation involved in the commercial bribery of a foreign official to influence a single contract. At a minimum, a plaintiff seemingly could be required to show that he actively is attempting to sell the same kind of merchandise to the same prospective customers.[149] Some objective evidence would be required of the plaintiff's intention and preparation to enter the market in question. According to one formulation, the objective standards would include the following:

> [T]he background and experience of the principals, including their previous successes or failures in the same or a related business as well as possession of the requisite skill and abilities . . . [;] the financial capability of the enterprise, which encompasses the extent of investment and the ability to finance operations and to make necessary purchases . . .[;] [and] the taking of substantial affirmative actions towards entry . . . .[150]

Whether a plaintiff competing seller could make such a showing would depend on the product and the national market involved as well as his experience and capacities. Political and similar considerations, coupled with possible blind alleys in the discovery process, could frustrate the recovery efforts of plaintiffs in many situations.

147. *See, e.g.,* Continental Baking Co. v. Utah Pie Co., 386 U.S. 685 (1967).

148. Rangen v. Sterling Nelson & Sons, Inc., 351 F.2d 851, 855 (9th Cir. 1965).

149. *See* Brooks, *Injury to Competition Under the Robinson-Patman Act,* 109 U. PA. L. REV. 777, 802 (1961).

150. Denver Petroleum Corp. v. Shell Oil Co., 306 F. Supp. 289, 308 (D. Colo. 1969). *See also* Fleer Corp. v. Topps Chewing Gum, Inc., 1976-2 Trade Cas. ¶ 60,969 (E.D. Pa. 1976).

VI. CONCLUSION

None of the impediments to the use of section 2(c) of the Robinson-Patman Act or sections 1 or 2 of the Sherman Act against United States companies' bribery of foreign officials appears by itself to establish a clear barrier under present law. In combination, however, the various difficult elements that must be established and the various defenses that can be raised justify a less than sanguine view about the prospects that these antitrust provisions will be effective weapons against these questionable payments. In balance, moreover, these provisions seem inappropriate as well as probably unequal to the task. Enormously important issues of national policy, commercial ethics, and international relations are involved. Recommendations have been made for comprehensive remedial legislation,[151] and Congress seems in a mood to deliberate the basic questions. That avenue of national policy development seems far preferable to placing hope in the problematical, at best, route offered by the antitrust laws.

151. SEC REPORT, *supra* note 2, at 57-69.