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The Cartel Restriction Act of 1979: Response to a Global Economic Problem

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THE CARTEL RESTRICTION ACT OF 1979: RESPONSE TO A GLOBAL ECONOMIC PROBLEM*

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I. INTRODUCTION

The need nor control over international cartel activities was made painfully clear by Congressional exposure of an international uranium cartel which orchestrated the major portion of a sevenfold increase in the price of uranium between 1972 and 1976.[1] Yet this cartel, including its American corporate members, have successfully escaped attempts at regulation because of a serious loophole in United States law. The continued maintenance of uranium prices at the high level they reached during the period of the cartel's greatest control is evidence that the cartel, or its remnant, still dampens competition.

Unfortunately, the uranium cartel is not an isolated phenomenon; the United States faces the prospect of increasing cartel activity. The potential for workable cartels presently exists in several commodit es, and host-countries and multinationals have already initiated or attempted cartel activities in minerals and agricultural goods.[2] The recent success of the OPEC cartel was a significant factor influencing the formation of the uranium cartel by easing corporate and governmental inhibitions against cartel activities. Given the increasing exploitative attitude among developed countries and what has been termed the "irrational solidarity" among developing countries,[3] it is not unreasonable to expect more imitations of OPEC success wherever market conditions would allow a group of producers to extract monopoly rents from consuming nations.[4] Such activity poses a threat to the nation's ability to regulate the economy and forces priorities in the national budget to be determined in response to inflationary pressures in large part generated by political and economic activity which is presently immune from the sanctions of United States antitrust laws. Perhaps an even greater threat is posed by the danger that a resurgence of cartel activity in the mainstream of international commerce could threaten a return to the exploitative mentality that triggered the

1. 1 & 2 *Hearings on the International Uranium Cartel before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce* 95th Cong., 1st Sess. (1977). [hereinafter cited as *Cartel Hearings*].

2. C. FRED BERGSTEN, T. HORST & T. MORAN, AMERICAN MULTINATIONALS AND AMERICAN INTEREST, 138, 139, 140 *et seq.* [hereinafter cited as BERGSTEN]. *See* INTERNATIONAL ECONOMIC STUDIES INSTITUTE, RAW MATERIALS AND FOREIGN POLICY, 77-83, 87-96 (1976) [hereinafter cited as ECON. STUD. INST.]

3. *See* R. Hansen, *The Political Economy of North-South Relations: How Much Change?*, 29 INT'L ORGANIZATION 927 (1975).

4. ECON. STUD. INST., *supra* note 2, at 88-96.

world-wide depression of the interwar period.[5] While the chances of such a recurrence may at this time seem remote, its potential consequences in a world suffering from overpopulation and scarcity of resources must not be risked. Even without such a catastrophe, the social cost of worldwide cartelization would heavily burden efforts aimed at maximizing economic welfare and redressing inequities in this country and abroad.

United States antitrust jurisdiction and regulatory powers are presently too limited in their extraterritorial application to deal effectively with the international cartel problem. The Cartel Restriction Act,[6] now pending in Congress, seeks to correct this problem by minimizing the adverse impact of international cartels on domestic and international commerce, by limiting participation by American firms in cartels and by applying pressure on such activity through trade channels.[7] The proposed legislation attempts to reduce the threat of international cartels in two ways: (1) require U.S. companies to report any solicitation of cartel activities; (2) strengthen the application of present antitrust law by limiting the act of state doctrine and its corollary, sovereign compulsion, as a defense to violations of the antitrust statutes.[8]

II. BACKGROUND

A. *General*

Nearly thirty-five years ago, President Franklin D. Roosevelt wrote Secretary of State Cordell Hull concerning the danger posed by international cartels. After noting the political use of cartels by the Nazis, the President concluded that antitrust law

> goes hand in glove with the liberal principles of international trade . . . . Unfortunately, a number of foreign countries . . . do not possess such a tradition against cartels. On the contrary, cartels have received encouragement from some of these governments. Cartel practices which restrict the free flow of goods in foreign commerce will have to be curbed.[9]

5. For an excellent analysis of the trade policies which led to the worldwide depression, see C. KINDLEBERGER, THE WORLD IN DEPRESSION 1929-1939 (1973).

6. H.R. 4661, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H5421 (daily ed. June 28, 1979) (introduced and referred jointly to the Committees on Interstate and Foreign Commerce and Judiciary). *See* Appendix I where Rep. Gore's bill is reproduced in its entirety.

7. *Id.* § 2.

8. *Id.*

9. Letter from President Franklin D. Roosevelt to Secretary of State Cordell

During the interwar period the international trade system was distorted by the operation of numerous international cartels which fixed prices, set production quotas, and allocated markets, particularly in many commodities and manufactured goods markets.[10] The trade barriers created by these cartels stimulated new interest in placing such organizations under governmental control, and following World War II a number of unsuccessful attempts were made to reach an international antitrust agreement.[11] Despite the possibility of another depression, these attempts failed.

It was also during this period that multinational corporations emerged as an important force in the world economy. A subcommittee of the United States Senate Foreign Relations Committee produced a report outlining several existing and potential threats which these business organizations posed to the worldwide consuming public.[12] Even if one does not accept the proposition that multinationals are currently involved in activities adverse to the interests of the United States or the international economy, the very size and nature of the multinational operations of these firms carry with them a potential for abuse. A leading international economist who specialized in industrial organization theory observed that:

> [M]ultinational corporations reduce the ability of the government to control the economy . . . . [B]ecause of their size and international connections, [they] have a certain flexibility for escaping regulations imposed in one country. The nature and effectiveness of traditional policy instruments-monetary policy, fiscal policy, antitrust policy, taxation policy, wage and income policy—change when important segments of the economy are foreign-owned . . . . [I]t is now becoming obvious that even the United States has reached

Hull (September 6, 1944), *reprinted in* E. HEXNER, INTERNATIONAL CARTELS 405 app. (1st reprint 1971).

10. *See generally* E. HEXNER, INTERNATIONAL CARTELS 184-391 (1st reprint 1971) [hereinafter cited as HEXNER].

11. *See* Metzer, *Cartels, Combines, Commodity Agreements and International Law*, 11 TEX. INT'L L.J. 527 (1976); Joelson, *The Proposed International Code of Conduct as Related to Restrictive Business Practices*, 8 L. & POL'Y INT'L BUS. 837 (1976); Timburg, *An International Antitrust Convention: A Proposal to Harmonize Conflicting National Priorities Towards the Multinational Corporation*, J. INT'L L. & ECON. 157 (1973).

12. P. MUSGRAVE, DIRECT INVESTMENT ABROAD AND THE MULTINATIONALS: EFFECTS ON THE UNITED STATES ECONOMY (Comm. Print 1975) (prepared for the use of the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations, 94th Cong., 1st Sess.) [hereinafter cited as MUSGRAVE].

the point where the international commitments of its corporations reduce the room for flexibility in national economic policy formation.[13]

Perhaps the greatest danger of multinationals lies in their willingness and ability to influence and cooperate with foreign governments in their own economic self-interest to limit competition in the international market place. Because many multinationals already hold oligopolistic positions in their home economies,[14] they may wield significant political as well as economic power there. Furthermore, their cooperation with foreign and domestic governments contributes to the formation of international cartels and may result in virtual immunity to the pressures which lead to the ultimate collapse of most private cartels.

B. *The International Uranium Cartel*

The international uranium cartel is a classic case of cooperation between national and multinational firms, and foreign governments to extort a transfer of resources from consuming to producing nations. As with most vertically integrated[15] multinational firms engaged in mineral extraction, the uranium producers invested abroad in order to secure access to raw materials and thus avoid the necessity of purchasing them at arms-length prices from independent suppliers.[16]

The uranium cartel was formed in response to the "demoralized" price structure of the industry in the 60's and early 70's. The industry had acquired considerable excess capacity which could be expected to stay idle or underutilized for some time to come.[17] This excess capacity had led to falling prices such that ultimately revenue from uranium production barely covered pro-

13. Hymer, *The Efficiency (Contraditions) of Multinational Corporations*, 60 AM. ECON. REV. 441 (1970).

14. MUSGRAVE, *supra* note 12, at 60, 61.

15. F. M. Scherer explains vertical integration as "the extreme to which firms . . . cover the entire range of production and distribution stages." F. M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 70 (1970). [hereinafter cited as SCHERER]. For a description of the nature and effect of vertical integration, see *id.* at 69-71.

16. For a discussion of the economics of raw material extraction industries see BERGSTEN, *supra* note 2, at 121-64; MUSGRAVE, *supra* note 10, at 59-61.

17. DUCHESNEAU, COMPETITION IN THE U.S. ENERGY INDUSTRY 87, 88 (1975) [hereinafter cited as DUCHESNEAU].

duction costs.[18] Aggravating the situation was the fact that anticipated increase in demand had been foreclosed by a slowdown in construction of nuclear-powered electrical generators caused by growing concerns about the potential dangers presented by nuclear power.[19] Additionally, foreign producers had been especially burdened by the 1966 AEC decision to ban imports of uranium for domestic use.[20] In 1971 the uranium market was further destabilized by the possibility that the Australian government might start production from its vast uranium reserves.[21]

In 1971 uranium producers with foreign operations joined with their host-country governments in discussions which led to the establishment of a formal marketing organization. The organization, referred to by its members as "the club,"[22] was intended to allocate market shares, set floor prices, and police the cartel agreement through what amounted to a system of collusive tendering. The club divided the "non-U.S." market among its member countries, who then divided that share among producers operating in areas under its control.[23] The club also established a schedule of minimum prices below which no member was allowed to bid without express permission.[24] The bidding itself was tightly controlled by the cartel's operating committee which would designate a leading bidder and runner-up bidder whose bids would differ from the floor price by a margin of 20 to 30 cents per pound of processed uranium.[25] Separate floor prices were established for the European and Asian markets with the Asian market floor price set at thirty cents higher than the European market.[26] Within these markets,

18. BERGSTEIN, *supra* note 2, at 180; J. YAGER & E. STEINBERG, ENERGY AND U.S. FOREIGN POLICY 346 (1974); 1 *Cartel Hearings, supra* note 1, at 648-49 app. (confidential report to Irwin J. Landes, Chairman, Corporations, Authorities, and Commissions Committee, from William F. Haddad, Office of Legislative Oversight and Analysis (May 20, 1977) (revised)).

19. T. DUCHESNEAU, *supra* note 17, at 87; 1 *Cartel Hearings, supra* note 3, at 648, 649; YAGER AND STEINBERG, *supra* note 18, at 346.

20. 2 *Cartel Hearings, supra* note 3, at 71-77.

21. 1 *Cartel Hearings, supra* note 3, at 651, 653.

22. The member countries of the club included Australia, Canada, France, and South Africa. Great Britain and West Germany also had corporate nationals involved in the cartel.

23. 1 *Cartel Hearings, supra* note 3, at 628, 629 app. (Rules for Orderly Marketing).

24. *Id.* at 631, 639 app.

25. *Id.* at 628, 635-40 app.

26. *Id.* at 667-69 app.

all bids had to be routed through the committee,[27] with any attempt at price shaving or other "cheating" punishable by a reduction in the whole country's market share.[28]

Traditional theories of cartel operation hold that under normal circumstances producer cartels are susceptible to internal pressures which lead to their demise in the long run:

> Though over the short run its (the cartel) members may gain by limiting production and dividing the market, any one member can gain more—can expand its market share—by discounting the cartel price (provided it doesn't, by this action, cause the breakup of the cartel). Once a member starts to cheat, moreover, any member that does not will lose out.[29]

Once cheating has begun, the cartel will break up unless there is an adequate enforcement mechanism. Even in the absence of cheating, over the long run, the cartel's monopoly pricing should, under normal market conditions, induce new firms to enter the market. Unless the cartel can successfully freeze out new competitors, or consistently under-bid them, the cartel will lose revenues, increasing the pressures for its members to adopt an "every man for himself" attitude.

The economic and political realities of the uranium market, however, helped to insulate the cartel from these internal pressures. Inelasticity of demand facilitated price discipline, and economies of scale and absolute cost requirements made it risky for new firms to enter, particularly in view of the past weakness of the market. Finally, and perhaps most importantly, the availability of government sanctions for cheaters gave the enforcement mechanism real clout.[30] The governments involved were sufficiently sophisticated to understand that their long-term advantage lay in maintaining high price levels.

Although the rules of the club specifically excluded the United States market from this pricing agreement, some members of the cartel had direct links to United States producers, which provided the mechanism for a system of price leading. An internal Gulf Oil memorandum stated:

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27. *Id.* at 635 app.

28. Wall St. J., June 23, 1977, at col. 2.

29. BERGSTEN, *supra* note 2, at 140.

30. Uranium cartel producers alleged that the Canadian government had vowed to deny any application for an export license where the price did not follow the "club's" schedule. 2 *Cartel Hearings, supra* note 3, at 12 *et seq.* (Gulf legal dept. opinion memorandum).

> The international producers are in effect setting the world price via (a) establishing a floor that is higher than the U.S. offers to buy, (b) the U.S. producers refuse to sell at any price that doesn't give them a substantial margin above the floor being quoted by the non-U.S. producers, (c) thus in essence the international producers can stop any transaction by constantly nudging the floor upward. In the interim the U.S. buyer becomes increasingly frustrated, offers a higher price in order to get some response, and the cycle starts over again.[31]

A survey of electric utilities in the United States by the Oversight and Investigation Subcommittee found that members of the foreign cartel signed contracts with United States utilities that paralleled the prices set secretly by the cartel.[32] Rather than compete, American producers merely raised their prices to meet or exceed world price.[33]

III. The Effectiveness of United States Antitrust Laws In Dealing With Foreign Government Cartels

A. *The General Regime*

The basic purpose of United States antitrust law is to encourage the efficient allocation of productive resources within the market economy. In other words, these laws attempt to maximize the economic welfare of the populace by requiring, insofar as possible, business behavior to conform to a model of perfect competition

31. Memorandum from W. D. Fowler to L. J. Colby, Jr. (Mar. 28, 1974), *reprinted in* 1 *Cartel Hearings, supra* note 1, at 627 app. [hereinafter cited as Memorandum].

32. 1 *Cartel Hearings, supra* note 1, at 342-44 (testimony of P. McLain).

33. The uranium cartel is not an isolated example of attempts by a cartel to restrain international trade. Its discovery closely followed the first assertions of economic power by the Organization of Petroleum Exporting Countries (OPEC). At that time some analysts maintained that "oil was the exception" because the conditions which facilitated OPEC's survival as a functioning unit were unique. *See* Krasner, *Oil is the Exception*, 1974 Foreign Policy 68 *et seq.*; Varon & Takenchi, *Developing Countries and Non-Fuel Minerals*, 52 Foreign Aff. 497-510 (1974). Therefore, it was felt that the possibility that OPEC's success might be imitated in another commodity was unlikely. According to these analysts, OPEC maintained the cartel price without internal price wars by a combination of inelastic demand and the ability of the Saudis to vary production to demand. Bergsten, *supra* note 2, at 140, 141. Moreover, OPEC's core of Arab states gave it greater unity because of common religious and political beliefs. *Id.* The uranium cartel experience tends to place this argument in serious doubt.

tempered by other societal goals and aspirations. Antitrust law seeks to achieve this goal by influencing business conduct and market structure in such a way as to "increase the likelihood that desirable conduct and performance will emerge more or less automatically."[34]

United States antitrust laws have succeeded in eliminating or severely weakening most domestic cartel activity.[35] By applying its antitrust policy to all firms engaged in *private* anticompetitive activity which may affect or is intended to affect United States commerce, the United States has nominally attempted to protect its economy from the effects of foreign anticompetitive activity. Foreign sovereigns and their agents, however, have been largely immune from antitrust prosecution in United States courts as a result of judicially created doctrines of restraint which include the act of state doctrine and its corollary, the doctrine of sovereign compulsion.

B. *The Extraterritorial Application of United States Antitrust Law*

1. Violations of the Antitrust Acts Abroad

The first case to consider the extraterritorial effect of United States antitrust law was *American Banana Co. v. United Fruit Co.*[36] United Fruit was accused of having influenced the Costa Rican government to expropriate the holdings of American Banana by force. The Court applied the restrictive territorial principle of jurisdiction, ruling that the Sherman Act afforded the Court no jurisdiction over acts which take place outside of the United States. The Court stated "the character of an act as unlawful must be determined wholly by the law of the country where the act is done."[37]

American Banana has never been expressly overruled, but developments have led the Second Circuit to conclude that it is no longer controlling on the jurisdictional issue.[38] *American Banana* may have been correctly decided, however, even by today's standards, because the complaint failed to allege any effects on United

34. SCHERER, *supra* note 15, at 422.
35. POSNER, *supra* note 33, at 39, 40.
36. 213 U.S. 347 (1909).
37. *Id.* at 356.
38. Hunt v. Mobil Oil Corp., 550 F.2d 68, 74 (2d Cir. 1977) *cert. denied*, 434 U.S. 984 (1977).

States commerce.[39] Moreover, *American Banana* involved an act of state by a foreign sovereign—an aspect that will be explored shortly.[40]

In *United States v. American Tobacco*[41] the Supreme Court ruled that a lower court had erred in dismissing an antitrust action brought against two British firms that had agreed with an American combination to allocate the British and American tabacco markets, as well as the export markets of both.[42] The Government argued that an agreement in violation of the laws of the United States, although made in a foreign country, "gives no immunity to parties acting here in pursuance of it."[43] While the Court did not fully justify its decision, it found by implication that "division of the world's business by the two foreign contracts" was within the jurisdiction of the United States because the contracts affected commerce.[44]

In *United States v. Sisal Sales Corp.*[45] the Supreme Court found a violation of the Sherman and Wilson Tariff Acts where several American corporations and a Mexican corporation had conspired together to monopolize the importation of sisal. The Court held that the doctrine presented in *American Banana* was not controlling because the conspiracy was entered into and made effective by acts committed within the United States.[46] The Court suggested that acts outside the U.S. which bring about "forbidden results" within it would be actionable.[47]

The jurisdictional basis for extraterritorial application of United States antitrust laws was firmly established in *United States v. Aluminum Co. of America.*[48] The Government had charged a subsidiary of Alcoa with participation in an international aluminum cartel known as the Alliance.[49] Alliance, a Swiss corporation made up of several foreign corporations, functioned as a marketing committee for the cartel. Members were initially allocated production

39. W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 76 (2d ed. 1973) [hereinafter cited as FUGATE].

40. *See* text accompanying notes 157-74 *infra*.

41. 221 U.S. 106 (1911).

42. *Id.* at 187-88.

43. *Id.* at 120.

44. *Id.* at 180.

45. 274 U.S. 268 (1927).

46. *Id.* at 276.

47. *Id.*

48. 148 F.2d 416 (2d Cir. 1945).

49. *Id.* at 439-45.

quotas on the basis of shares held with any unused portion of the quota to be bought by Alliance at a fixed price.[50] The cartel later discarded that method and adopted a royalty system under which each producer paid Alliance for production in excess of its quota. Ultimately, these royalties were divided among the members of the cartel. Although the quota production scheme of the cartel included American imports, the trial court found that such an agreement could not be held to be a violation of United States law. A special bench of the Second Circuit reversed, holding that a foreign corporation could be held liable for acts in violation of United States antitrust law even when those acts were committed abroad so long as the acts "were *intended* to affect and *did* affect" United States commerce.[51] The Court distinguished this rule from cases involving restrictive agreements concerning only foreign markets which have indirect repercussions on United States trade. In other words, the antitrust law did not apply in cases where there was no intent to restrain United States trade even though there was some indirect effect on domestic commerce. However, the Court did not deny that the Act would apply in cases where there was intent but no effect. The test requiring both intent and effect is flexible, and where intent is provided, there is a strong presumption of effect:

> [A]fter the intent to affect imports was proved, the burden of proof shifted to "Limited" . . . . [A] depressant upon production which applies generally may be assumed, ceteris paribus, to distribute its effect evenly upon all markets. Again, when the parties took the trouble specifically to make the depressant apply to a given market, there is reason to suppose that they expected that it would have some effect, which it could have only been lessening what would otherwise have been imported.[52]

Since *Alcoa*, the courts and the Justice Department have used this "direct and substantial effect" test within the framework articulated by the Second Circuit.[53] While nationality and locale may provide grounds for asserting jurisdiction, the primary test for applying United States antitrust laws extraterritorially is the existence of effects actually occurring within the United States.[54]

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50. *Id.* at 442, 443.

51. *Id.* at 444 (emphasis added).

52. *Id.* at 444.

53. FUGATE, *supra* note 117, at 73, 74; UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 6 (1977) [hereinafter cited as GUIDE].

54. *See, e.g.*, Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th

The Court of Appeals for the Ninth Circuit substantially reiterated the "effects" test in 1976 in *Timberlane Lumber Co. v. Bank of America.*[55] The *Timberlane* court applied a three-part analysis: First, there must be "some effect—actual or intended—on American foreign commerce." Second, in civil cases there must be a showing of cognizable injury to the plaintiff. Third, the interests of other nations must be considered.[56]

The Department of Justice's *Antitrust Guidelines for International Operations* adopts the view that foreign transactions which have a "substantial and forseeable effect" on United States commerce are subject to United States law.[57] While some courts may have difficulty applying this standard, it is the currently accepted statement of the scope of extraterritorial application of domestic antitrust law.[58] Through this policy, the Justice Department seeks to achieve two goals: (a) the protection of the domestic consumer from the effects of restricted competition especially in markets heavily dominated by imports, and (b) protection of United States export and investment opportunities against privately imposed restrictions.[59] The Justice Department specifically disavows any intent to apply the antitrust laws to activities which do not directly affect United States consumers or exporters in order to avoid impinging on the jurisdiction of a foreign sovereign.[60]

The *Antitrust Guide for International Operations* outlines two basic types of jurisdictional defenses that may be involved in cases involving government-sponsored cartel activity: the doctrine of sovereign immunity and the act of state doctrine with its corollary, the doctrine of sovereign compulsion. The doctrine of sovereign immunity precludes exercise of jurisdiction over a defendant when that defendant is a sovereign state.[61] The problem raised by the

Cir. 1976). *See* E. KINTER & M. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER 27 (1974).

55. 549 F.2d 597 (9th Cir. 1976).

56. *Id.* at 613.

57. GUIDE, *supra* note 53, at 6, 7.

58. *Id.* at 6.

59. *Id.* at 4, 5.

60. *Id.* at 7.

61. *Id. See also* The Exercise of State Jurisdiction Under National and International Law (Nov. 13, 1978) at 19 (Congressional Research Service monograph prepared by Kenneth Merin, American Law Division, Library of Congress.) [hereinafter cited as Cong. Research Monograph]. *See generally* 6 WHITEMAN, DIGEST OF INTERNATIONAL LAW 553-726 (1968).

doctrine were the subject of the Sovereign Immunities Act[62] which was signed into law in 1976. A discussion of the doctrine and its application is beyond the scope of this paper.

2. Act of State Doctrine

The act of state doctrine is a choice-of-laws principle under which United States courts refrain from inquiring into the validity of the acts of a foreign government within its own territory.[63] The United States Supreme Court in *Underhill v. Hernandez*[64] described the doctrine as follows:

> Every sovereign State is bound to respect the independence of every other sovereign State and the courts of one country will not sit in judgment on the acts of government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[65]

The Court's holding in *Underhill* was reaffirmed in *Banco Nacional de Cuba v. Sabbatino.*[66] In *Sabbatino* the court refused to review the validity of an expropriation of a cargo of sugar by the Cuban government even though the expropriation was alleged to have violated international law.[67]

The courts have created two exceptions to the act of state doctrine. Under the Bernstein exception, courts may review the acts of a sovereign when the State Department determines that United States foreign policy would not be damaged by such recognition.[68]

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62. 28 U.S.C. § 1602 *et seq.* (1976).

63. Cong. Research Monograph, *supra* note 153. at 29. *Cf.* Joelson & Griffin, *The Legal Status of Nation-State Cartels Under States Antitrust Law and Public International Law*, 9 INT'L LAWYER 631 (1976) [hereinafter cited as Joelson & Griffin]. Joelson and Griffin view the Act of State doctrine as an "exception" to conflict principles.

64. 168 U.S. 250 (1897).

65. *Id.* at 252.

66. 376 U.S. 398 (1964).

67. *Id.* at 428.

68. Bernstein was a former German citizen who sought to recover property taken by the Nazi's under the antisemitic confiscation law. His claim was initially rejected on the basis of the act of state doctrine. Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246, 251 (2d Cir.), *cert. denied*, 332 U.S. 772 (1947). Bernstein had brought a concurrent suit on essentially the same claim against other defendants. That portion of his claim which related to acts of Nazi officials was again denied. Bernstein v. N.V. Nederlandsche-Amerikaanche Stoomvaart-Maatschappij, 76 F. Supp. 335 (S.D.N.Y. 1948), *aff'd*, 173 F.2d 71, 76 (2d Cir.

More recently the Supreme Court apparently recognized a "commercial exception" in *Alfred Dunhill of London, Inc. v. Republic of Cuba.*[69] In *Dunhill* the government of Cuba was attempting to recover some monies from Dunhill that were due from Dunhill to a nationalized firm prior to the fall of the Batista regime.[70] Dunhill counterclaimed to recover monies that were "wrongfully" paid after the fall and which agents of the new government refused to repay.[71] Four of the members of the Court agreed that the doctrine should not be extended "to acts committed by foreign sovereigns in the course of their purely commercial operations."[72] The Court observed that there was a greater potential for embarrassment if the courts were to recognize repudiation of a commercial debt by a foreign government as an act of state:

> . . . subjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts. In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. Instead, they exercise only those powers that can also be exercised by private citizens. Subjecting them in connection with such acts to the same rules of law that apply to private citizens is unlikely to touch very sharply on "national nerves."[73]

The opinion of the Court analogized the act of state doctrine to the

1949). The State Department then wrote a letter to the court stating that it was the policy of the Executive "to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity" of the Nazi confiscatory acts. Letter from Jack B. Tate, Acting Legal Advisor, Dept. of State to the Attorneys for [Bernstein] (April 27, 1949), *cited in* Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375, 376 (2d Cir. 1954). Upon receipt of the letter, the court modified its previous ruling and allowed the district court to decide the case upon all the merits. *Id.* at 376. The Supreme Court refrained from passing on the "Bernstein" exception until First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972). Three of the five member majority approved of the "Bernstein" exception. *Id.* at 768. While concurring in the result, Justice Douglas felt that the *Bernstein* exception was not at issue. *Id.* at 773 (Douglas, J. concurring). Powell also withheld his approval of the *Bernstein* exception. *Id.* at 773 (Powell, J. concurring). The four dissenters were firmly against the exception. *Id.* at 785-93 (Brennan, J. dissenting).

69. 425 U.S. 682 (1976).
70. *Id.* at 691-95.
71. *Id.*
72. *Id.* at 706.
73. *Id.* at 703-05 (footnotes omitted).

theory of sovereign immunity and determined that the act of state doctrine was limited by a commercial activities exception. Justice Marshall's dissent, which was joined by three other justices, rejected the similarity of act of state and sovereign immunity stressing that such a broad exception would be difficult to apply.[74]

A simple connection between the exceptions noted above and the use of the act of state doctrine as a defense in antitrust cases by foreign firms engaged in cartel activities affecting the United States does not exist. The doctrine is technically a defense that is only open to sovereign states, but private parties may ask a court to take cognizance of an act of state.[75] In *American Banana Co. v. United Fruit Co.*[76] United Fruit claimed that even if charges that it had influenced the Costa Rican government to expropriate American Banana's holdings there were true, it could not be held liable for the expropriation, because the expropriation was an act of a foreign sovereign government.[77] Relying upon *Underhill* the Court agreed on the grounds that a foreign sovereign's conduct was not subject to judicial review under the antitrust law, even where it was influenced by and beneficial to a U.S. citizen.[78] The Court found any consideration of the influence of the defendants inappropriate because the acts were lawful within the foreign sovereign's territory and an examination of the motivation of the Costa Rican government would have been equivalent to sitting in judgment on the validity of that government's act.[79]

In *United States. v. Sisal Sales Corp.*,[80] the defendants were charged with conspiring to monopolize the sisal market. It was alleged the defendants had procured from the Mexican government discriminatory legislation which eliminated the company's competition.[81] The Court managed to sidestep the act of state question by finding that the defendants could not rely upon the legislative acts of a foreign state to give them immunity because there were violations of United States law within United States

74. *Id.* at 725-26 (Marshall, J. dissenting).

75. Cong. Research Monograph, *supra* note 153, at 29; *Sovereign Compulsion Defense in Antitrust Litigation: New Life for the Act of State Doctrine?*, PROC. AM. SOC. INT'L L. aa (1978) (remarks of E. Fox) [hereinafter cited as PROC. INT'L L.].

76. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

77. *Id.* at 352 (argument for defendant in error).

78. *Id.* at 358. *See* Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

79. American Banana Co. v. United Fruit Co., 213 U.S. at 351-58.

80. 274 U.S. 268 (1927).

81. *Id.* at 273.

territory which gave effect to the entire conspiracy.[82]

In *Occidental Petroleum Corp. v. Buttes Gas and Oil Co.*,[83] the court held that an inquiry into the motivation behind a foreign government's action would have the very consequences on foreign relations that the act of state doctrine was intended to avoid.[84] The court observed:

> [P]laintiffs have in another phase of this motion dubbed the states involved . . . as co-conspirators. The implication to be drawn from this allegation is that plaintiffs do question the conduct of these states under the antitrust laws—an inquiry which the act of state doctrine bars.[85]

In *Hunt v. Mobil Oil Corp.*,[86] the act of state defense was raised in what appeared to be a cartel-like conspiracy by the "Seven Sisters" group of oil companies which had sought to keep Persian Gulf crude oil prices competitive with those of Libyan producers.[87] Hunt alleged that an agreement entered into by the area producers had the effect of manipulating Hunt's negotiations with Libya with the net result being that Hunt's oil interests in Libya were expropriated.[88] The Court of Appeals held that Hunt's failure to cite Libya as a co-conspirator did not remove the necessity of examining the Sovereign's actions. The court reasoned that Hunt would first have to show that Libya would not have acted *but for* the conspiracy.[89] Hunt's ultimate success was contingent upon his showing that there was a direct injury from the defendant's actions.

Multinational corporations may be able to use the *Hunt* court's prohibition of the examination of a foreign State's motives to immunize their activities from suit even in cases involving monopolization and cartel conspiracies instituted by private parties conspiring with a foreign government. When the "offending" action is committed by a government, under the *Hunt* rational the courts may not inquire into the role played by the private party defen-

82. *Id.* at 276.
83. 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972).
84. *Id.* at 102, 110.
85. *Id.* at 110.
86. 550 F.2d 68 (2d Cir. 1977).
87. *Id.* at 70-72.
88. *Id.* at 71, 72.
89. *Id.* at 72, 76.

dants in facilitating the anticompetitive result.[90] This conclusion is reinforced by Justice Department guidelines which provide that under the *Noerr-Pennington* doctrine[91] corporations are free to advocate anticompetitive acts to foreign governments. "The collection exercise of the right of political expression is protected, even where its goal is highly anticompetitive."[92] Exceptions are made only in cases of "sham," collective lying, and bribery.[93] The reasoning in *American Banana, Hunt* and *Occidental* tends to sustain the application of this doctrine in foreign antitrust cases.[94]

The threat of government-sponsored cartels protected by the act of state doctrine is obvious and growing. To enjoy the benefits of cartel activity, multinational firms need only quietly accept the foreign governments' directions.[95] For example, OPEC price increases are effected through a mandatory increase in posted prices.[96] A similar scheme appears to be underway in the International Bauxite Association in which the member governments have or plan to implement a mandatory increase in prices and taxes.[97] The companies involved are expected to cooperate unhesitatingly.[98] As long as restrictive action is effectuated in response to a direct act of a foreign government, the act of state doctrine would apparently require dismissal of the action.[99] Consequently, when

90. *See,* FUGATE, *supra* note 39, at 82, 84. K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 95 (1958) [hereinafter cited as BREWSTER].

91. As originally developed by the Court, the doctrine provides: essentially that in domestic cases, the Sherman Act cannot be applied to bar collective political activity. *See* Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965).

92. GUIDE, *supra* note 137, at 63.

93. *Id. See also* California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972).

94. *See, e.g.*, Bokkelan v. Grumman Aircraft Corp., 432 F. Supp. 329 (E.D.N.Y., 1977) (act of state doctrine barred inquiry into role of firm in causing denial of import license). *See* BREWSTER, *supra* note 207, at 95, 96. *See also* Schwartz, *The Anti-Foreign Compulsion Act*, 12 INT'L LAW. 649, 653, 654 (1978). It seems a rather simple proposition that if multinational firms have a right to "advise" host-country governments, and if the courts cannot question either the "validity" or motivation of the acts of foreign governments, multinational firms can easily cooperate with those host-country governments to form cartels where the enforcement sanctions are meted out by the governments and the multinations are immune from antitrust liability.

95. *See* BERGSTEN, *supra* note 2, at 213.

96. *See* Joelson & Griffin, *supra* note 63, at 620-22.

97. ECON. STUD. INST., *supra* note 2, at 89.

98. BERGSTEN, *supra* note 2, at 155.

99. *See, e.g.*, Hunt v. Mobil Oil Corp., 550 F.2d 68, 70 (2d Cir., 1977) (court

the restraints on trade are effected by an act of state, the private parties involved in the controversy have not been held liable for their anticompetitive acts.

Griffin and Joelson have suggested that the act of state defense may be available to government agencies which would otherwise be amenable to suit in United States courts under a theory of restrictive sovereign immunity so long as they are acting on behalf of their government.[100] While acts of states outside their territory will not be recognized for purposes of the act of state doctrine by United States courts, the validity of domestic acts with extraterritorial effects is immune from judicial review.[101] Under this analysis, the increase in posted prices by OPEC would fall into the act of state category because it involved regulation of commerce within the oil producing Arab nations which had an extraterritorial effect.[102]

Such an analysis would immunize almost all government sponsored and directed cartels from antitrust action so long as the government in question was sufficiently sophisticated to follow the OPEC model. As with OPEC, the multinationals can be depended upon to cooperate with the foreign government in order to capitalize on the opportunity to collect oligopoly profits. In effect this relationship establishes a pattern for division of labor between the foreign government and the cartel: multinationals contribute their market power and expertise in production and marketing, while the participating governments issue commercial regulations which effectively limit production, set prices and allocate markets. In this hypothetical but very possible worst case interpretation of the act of state doctrine, foreign governments and multinational corporations are provided with the incentive and opportunity to join together to arrange and operate effective production cartels which will be protected from United States antitrust action so long as certain requisite elements appear in the cartel organization. (I.e. the acts which restrain trade must be carried out by authorized government entities in the pursuit of a clearly announced public policy, and must take place within the territory of the participating states.) While the legality of such cartels has yet to be tried in

held that lower court properly granted a motion under FED. R. CIV. P. 12 (b)(2) to dismiss a claim for failure to state a claim upon which relief can be granted because act of state doctrine rendered claim nonjusticiable).

100. Joelson & Griffin, *supra* note 63, at 631.

101. *Id.* at 631, 632.

102. *Id.* at 635.

a proper case, it is reasonable to assume that these kinds of cartels will be found to be immune from prosecution under current law.

3. Sovereign Compulsion

The defense of sovereign compulsion is distinguished from the act of state doctrine in that it applies to private parties compelled by the government of a foreign state to commit an act that would otherwise violate U.S. law.[103] As one commentator has stated, an act of state defense says "the government did it, you can't come after me" whereas a defense of sovereign compulsion says "I did it, but I'm not guilty because the government made me do it."[104] Apparently, Gulf Oil's decision to join the uranium cartel relied at least in part on the proposition that it could not be held liable for its otherwise unlawful acts because the acts were required by the Canadian government and would therefore fall within the sovereign compulsion defense.[105]

In *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*,[106] the district court dismissed an antitrust action where the government of Venezuela had ordered the defendants to refrain from selling oil to the plaintiffs.[107] The plaintiffs alleged that compliance with the order constituted participation in a secondary boycott. The government order itself was based in part on political grounds[108] and the desire to prevent oil from entering "unnatural markets" which would have had a depressing effect on prices of duty-free sales.[109] To enforce its decision, the government threatened to suspend defendants' concessions.[110] Although the court found no clear precedent, it accepted the defense of sovereign compulsion:

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103. Note, *Development of the Doctrine of Sovereign Compulsion*, 69 MICH. L. REV. 888, 897 (1971); *see generally* PROC. INT'L L., *supra* note 189, at 99, 100.

104. PROC. INT'L L., *supra* note 189, at 99 (remarks of M. Cooper, moderator).

105. Gulf Oil Legal Dep't. Opinion Memorandum (Sept. 8, 1972) 47-57, 84-87, *reprinted in* 2 *Cartel Hearings*, *supra* note 1, at 237-47 app., 247-77 app.

106. 307 F. Supp. 1291 (D. Del. 1970).

107. *Id.* at 1296.

108. The owners of *Interamerican* were former Venezuelan nationals who were one-time political rivals of the regime then in power. *Id.* at 1294-96.

109. The oil in question would have been shipped to a bonded refinery in New York and then the refined products sold on foreign markets. Since the reshipped oil products would not have been subject to a duty, they could have been sold at a lower price thereby causing instability in the cartel price for refined products. *Id.* at 1294, 1295.

110. *Id.* at 1294.

> [S]overeignty includes the right to regulate commerce within the nation. When a nation compels a trade practice, firms there have no choice but to obey. Acts of business become effectively acts of the sovereign. The Sherman Act does not confer jurisdiction on United States courts over acts of foreign sovereigns.[111]

The court agreed with the position that refusal to deal in this context would not constitute a restraint on trade, because trade was conditioned on acceptance of the laws of the foreign government.[112]

While most commentators agree that sovereign compulsion is not a good defense for acts committed wholly within the United States, the status of foreign transactions not wholly within the territory of the commanding sovereign is less clear.[113] For example, the recent consent decree in the *Bechtel* case in effect allows the defendant to discriminate against businesses listed on the Arab blacklist so long as he solicits bids from foreign firms outside the United States.[114]

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111. *Id.* at 1298.

112. *Id. See* BREWSTER, *supra* note 90, at 94. The court found an analogy to the sovereign compulsion doctrine in the state action defense articulated in Parker v. Brown, 317 U.S. 341 (1943). In *Parker* the Supreme Court held valid a California prorationing system which decreased competition and increased prices, and controlled about 95 percent of the raisin industry. *Id.* at 359. The Court found that the system did not violate the Sherman Act because the system was established by the "legislative command" of the State acting in its capacity as sovereign. The Court emphasized that the Sherman Act was concerned with individual action rather than state action. The Court observed that, "the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command." *Id.* at 350. Although the producers had solicited and approved the prorationing program, it was adopted and implemented by the State. *Id.* at 351-52.

The *Interamerican Refining* court equated compulsion by a foreign sovereign with compulsion by a state; the act of refusing to sell would have been a violation of the Sherman Act but for the command of the foreign sovereign. 370 F. Supp. at 1298. The Court in *Parker*, however, was careful to declare that a state could not give immunity to those who violate the Sherman Act; it was the state's action in prescribing and applying the regulation that was exempt from the Sherman Act. 317 U.S. at 351-52.

113. *See* GUIDE, *supra* note 53, at 52. *See also* Note, *Development of the Defense of Sovereign Compulsion*, 69 MICH. L. REV. 888, 900 (1971); Graziano, *Foreign Governmental Compulsion as a Defense in United States Antitrust Law*, 7 VA. J. INT'L L. 100 (1967).

114. *See generally* Proposed Final Judgment, 796 ANTITRUST & TRADE REG. REP. (BNA) E-1 (Jan. 10, 1977). For an excellent analysis of the sovereign compul-

One may conclude, therefore, that cartel participation is protected from antitrust liability under the act of state and sovereign compulsion doctrines whenever the cartel activities of the participants are carried out under the control of a member government. For example, suppose Company X manufacturers widgets in country B, a member of the international widget cartel. B may order X to control the prices and quantity of widgets produced in B. If all or most of X's widget production is located within other member countries, the cartel can control the widget market directly. However, if X and other widget producers have significant production in the United States, the economic factors within the widget industry that led X and other companies to invest abroad will probably give the member countries of the cartels sufficient leverage to effectively control prices and production without acting outside their own jurisdiction. If the widget industry is highly concentrated in the United States, an intergovernmental cartel adopting a system of posted floor prices and production quotas within the member countries would provide guidelines for a widget oligopolist to follow without resorting to overt collusion.[115] This was essentially the effect the uranium cartel had on the domestic United States industry.

OPEC has remained a viable cartel without regulating activities

sion issues posed by this case, see Note, *United States v. Bechtel Corp., Antitrust and the Arab Blacklist*, 11 VAND. J. TRANSNAT'L L. 299, 313-17 (1978).

115. The main problem with such a system is policing the agreement. The cartel would be vulnerable to cheating or to new entrants. The cartel price serves as a guide for the pricing policies of firms with plants or production located in non-cartel countries. Likewise, the production quotas set for operations in cartel countries would have to take outside production into account. Firms that attempt to cheat by increasing their production or undercutting prices outside of the cartel countries can still be penalized via their holdings inside the cartel countries. However, even firms outside the cartel countries may find it profitable to abide by the cartel prices, so long as they are reasonably confident that other firms are also abiding by them.

An analogous example was the domestic oil cartel that was operating in the United States up until the rise of OPEC. Under the Interstate Oil Compact, state commissions set production quotas for each oil well. The Bureau of Mines published monthly demand estimates at given prices. Although the oil companies could not overtly collude in order to set prices, sufficient information was exchanged via the government agencies that the industry was able to follow fairly uniform pricing policies. *See* Adams, *Corporate Power and Economic Apologetics: A Public Policy Perspective*, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING 370, 371 (H. Goldschmid, H. Mann, & J. Weston eds. 1974). *Cf.* M ADELMAN, THE WORLD PETROLEUM MARKET (1972) (Adelman states that major purpose of the cartel was to keep small producers in the market).

of oil companies in non-OPEC countries because of the high inelasticity of demand and higher production costs in non-OPEC nations. In a manufacturing industry with typical oligopoly characteristics, the host may be able to implement a cartel without having to resort to controls on United States production. Price leadership in the world market can induce producers in a non-cartel jurisdiction to tacitly abide by the rules.

The *Interamerican Refining* decision raises the question whether a court can consider the validity of the foreign sovereign's command under any circumstances.[116] The Justice Department's *Guide* does require a valid government decree.[117] However, the *Interamerican Refining* court, basing its decision on the act of state doctrine, refused to consider the plaintiff's contention that the Venezuelan boycott order was invalid under Venezuelan law.[118] The *Hunt* decision also indicates that courts may not inquire into the motivation or appropriateness of a "decree."[119] Apparently, the *Guide's* requirement of a valid decree is a formal requirement without substance; United States courts accept the act of a foreign state without question.[120]

This position grants firms a type of vicarious immunity for cartel activities carried out pursuant to an order of a foreign government.[121] Placing what amounts to an absolute bar on prosecution aggravates the risk that the multinational firm will actively seek such cartel arrangement and inspires tacit collusion, if not outright cooperation, between businesses and host governments. This cooperation makes the government-sponsored cartel particularly dangerous and requires that greater control be placed on the participation of multinational firms in government-sponsored cartels.

4. Foreign Law Analogs to the Act of State and Foreign Compulsion Doctrines

Although the doctrines of act of state and sovereign compulsion have been justified on grounds of international comity, other modern industrial states have taken a less charitable view of these theories, at least when the acts done or required by foreign govern-

116. Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1299 (D. Del. 1970).

117. GUIDE, *supra* note 53, at 54.

118. 307 F. Supp. at 1298-99.

119. Hunt v. Mobil Oil Corp., 500 F.2d 68 (2d Cir., 1977).

120. *See* PROC. INT'L L., *supra* note 75, at 102, 103 (remarks of M. Joelson).

121. *See* Buttes Gas and Oil Co. v. Hammer, [1975] Q.B. 557, 579-80.

ments are contrary to the public policy of the home country.[122] In Great Britain, the doctrine does not extend to all acts by a foreign sovereign, even where it involves acts committed which affect only persons and property within the territorial jurisdiction of the sovereign.[123] In a case arising out of the same events as *Occidental*,[124] a British court, taking exception to the Supreme Court decision in the *Underhill* case, refused to strike the pleadings on the basis of the act of state doctrine.[125] Noting that courts in the United Kingdom had never interpreted the doctrine so broadly[126] the court held that such a broad interpretation would grant immunity to acts by a foreign sovereign urged by businesses.[127] Under British law, the government may order a British corporation that is a member of a foreign cartel to resign.[128]

Other common law jurisdictions also narrowly interpret the act of state doctrine. An Australian writer has commented that the decision in *Buttes v. Hammer* stands for the general proposition that the doctrine should be restricted to a narrow class of acts. The exempt acts must relate to belligerency, quasi-belligerency, or treaty obligations,[129] and parties not entitled to sovereign immunity should not be allowed to "shelter behind the acts or approval of a sovereign."[130] In Canada the Restrictive Trade Practices Commission has the authority to restrain a Canadian firm from implementing a foreign law or decree if that law or decree would adversely affect competition, decrease the efficiency of Canadian industry, or otherwise restrain or injure Canadian commerce.[131]

Most European countries do not have a doctrine analogous to the act of state doctrine; they rely on their own conflict of laws rules.[132] These principles prohibit recognition of a foreign governmental act

122. *See generally* Antitrust Laws and the Act of State Doctrine in Foreign Countries (Oct. 3, 1978) (report prepared by the staff of the Law Library, Library of Congress for use of Rep. Gore) [hereinafter cited as LOC Report].

123. LOC Report, *supra* 122 ("Great Britian").

124. Buttes Gas and Oil Co. v. Hammer [1975] Q.B. 557.

125. *Id.* at 574, 575.

126. *Id.* at 573.

127. *Id.* at 579-80.

128. LOC Report, *supra* note 122 ("Great Britain"). *See also* V. KORAH, COMPETITION LAW OF BRITAIN AND THE COMMON MARKET 31 (1975).

129. P. NYGH, CONFLICT OF LAWS IN AUSTRALIA 68 (1976).

130. *Id.*

131. An Act to Amend the Combines Investigation Act, 1974-75-76 Can. Stat. c. 76, §§ 31.5, 31.6. *See also* LOC Report, *supra* note 122 ("Canada").

132. *See generally* LOC Report, *supra* note 122.

when the act runs counter to public policy or morals.[133] For example West Germany generally recognizes judgments of foreign courts or the legal effect of foreign governmental acts in matters involving private law, however the German courts may refuse to recognize those which are primarily intended to protect economic interests of a public law nature.[134] Moreover, the public policy exclusion is generally applicable. Under Italian law, the government will not enforce a foreign law or decree which runs counter to the Italian public policy and morals.[135] This public order principle "protects the country of the court from being forced to tolerate or to execute as valid, legal relationships which in themselves are a violation of the legal and moral concepts of the people."[136]

IV. SUMMARY OF THE PROPOSED LEGISLATION H.R. 4661, THE CARTEL RESTRICTION ACT OF 1979

The Cartel Restriction Act of 1979, as recently introduced in the Ninety-sixth Congress, offers a balanced approach toward redressing the distortion of international and national economies resulting from the excessive economic power of today's multinational corporations joined with the power of sovereign states in cartels.[137] Those who find it presumptuous for the United States to force its own ideas about competition on the rest of the world should remember that the United States should and does have a leadership role in economic as well as political affairs. In encouraging competition, the United States is not simply asserting its own views of how the world's resources should be allocated but is promoting an economic system that will efficiently allocate increasingly scarce resources among a growing and hungry world. House Resolution 13922,[138] the predecessor to the current legislation, contained two sections not included in the Cartel Restriction Act. Section 2 would have called on the President to convene a conference of the GATT signatories, or other appropriate fora, in order to negotiate an international agreement aimed at limiting restrictive business practices. Upon assurance that ongoing negotiations toward a restrictive business

133. *Id.*

134. LOC Report, *supra* note 122 ("Federal Republic of Germany").

135. THE ITALIAN CIVIL CODE 4 (M. Beltramo trans. 1969), *cited in* LOC Report, *supra* note 122 ("Italy").

136. F. CASTBERG, STUDIER I FOLKERETT 247-48 (1952).

137. H.R. 4661, 96th Cong., 1st Sess. (1979).

138. H.R. 13922, 95th Cong. 2d Sess. (1978). *See* Appendix II where H.R. 13922 is reproduced in its entirety.

practices agreement are proceeding at an acceptable pace,[139] and upon further assurance that the Executive Branch already had sufficient authorization to impose sanctions on countries that attempt to cartelize international trade,[140] the legislation introduced in the Ninety-sixth Congress focused on two major proposals. The first section of the bill would amend the Federal Trade Commission Act so as to require firms to report participation or solicitation of participation in anticompetitive activities abroad. With this monitoring tool, the Government will be able to increase its control over what would otherwise be covertly arranged cartel activity. The second section provides for a clearer and narrower application of the act of state doctrine. This section is intended to clarify an area of the law in which court rulings have been vague and inconsistent with the declared antitrust policy of the United States. The major provisions of the legislation are discussed below.

A. *Section 2—Reporting Requirements*

Gulf's internal discussions about the uranium cartel indicate that Gulf would not have participated in the cartel had they been required to report their activities to the United States government.[141] In addition, had the cartel been exposed earlier, public and diplomatic pressure probably would have inhibited or prevented its success. Section 2 of the the proposed legislation requires domestic firms to report to the Federal Trade Commission and the Attorney General any request or command to engage in restrictive business practices. The FTC has the expertise to vigorously enforce this provision through its administrative procedures, without the necessity of lengthy court proceedings. In turn, the FTC would notify the Secretary of State and the Special Trade Representative. Failure of a corporation to report solicitation of its participation in cartel activities would result in a civil penalty of $1 million. The legislation also imposes an additional $25,000 penalty for each corporate officer involved in the failure to report.

Since its initial introduction in the Ninety-fifth Congress, the idea of requiring United States firms to report anticompetitive activity required by foreign governments has received considerable

139. Letter from Patricia M. Wald, Assistant Attorney General, to the Honorable Harley O. Staggers, Chairman of the House Committee on Interstate and Foreign Commerce 8, 9 (April 23, 1979) [hereinafter cited as Wald letter]. Ms. Wald's provocative letter is reproduced in full elsewhere in this volume.

140. *Id.* at 10. *See* 19 U.S.C. § 2411(a)(2) (1976).

141. Memorandum, *supra* note 31.

favorable response. Donald Flexner of the Antitrust Division commented as follows on the usefulness of the reporting requirement:

> [S]ome sort of reporting onus . . . would dovetail nicely with our increased emphasis on bilateral consultations . . . . A requirement imposed on United States entities operating abroad to notify us of such actions would serve as an early alert to the United States government to institute the consultation process. If it came promptly, we would have a good chance to employ diplomatic means to prevent or to mitigate the effects of essentially private restraints of international trade initiated or sponsored by foreign governments. The resulting transparency would also minimize subsequent discovery and enforcement conflicts by moving of the conflict of national policies into the diplomatic realm.[142]

The Department of Justice's original objections to the 1978 legislation were centered on what it considered to be an overly broad description of regulated activities.[143] The activities requiring a report under the 1979 proposal are limited to price-fixing, market or customer allocation, restriction of production.[144] This somewhat narrower range of targeted activities provides for governmental notice for those anticompetitive activities most likely to adversely affect United States commerce.

B. *Proposed Amendments to the Federal Trade Commission Act*

While the reporting requirements of the Cartel Restriction Act will provide the United States with a potent tool for early detection and prevention of the formation of future OPEC-styled cartels, direct steps must be taken to counter government sponsored cartels. The Act provides for the amendment of the Federal Trade Commission Act by insertion of a new section 21 which severely restricts the use of the act of state and sovereign compulsion defenses in antitrust cases involving firms that participate in anticompetitive activities that are sponsored, "commanded," or otherwise made effective by foreign governments.[145]

142. Donald Flexner, Deputy Assistant Attorney General, Antitrust Division, Foreign Discovery and U.S. Antitrust Policy—The Conflict Resolving Mechanisms (remarks before the 1978 Fordham Corporate Law Institute, November 15, 1978). Mr. Flexner's remarks are reproduced in full elsewhere in this volume.

143. Wald letter, *supra* note 139, at 3-6.

144. *See* H.R. 4661, 96th Cong. 1st Sess. § (2)(20).

145. *Id.* § (2)(21).

C. *Impact of the Act on Application of the Act of State Doctrine*

Whereas the legislation introduced in the Ninety-fifth Congress would have flatly prohibited the use of the act of state doctrine and the corollary sovereign compulsion defenses, the Cartel Restriction Act allows a court to exercise its discretion in whether to refrain from examining the validity of the public acts of a foreign government.[146] However, the Act specifically allows judicial inquiry into the motivation or circumstances behind the official act of state.[147] Moreover, where a foreign government requires conduct inconsistent with United States antitrust law, the Act sets broad criteria for determining whether a firm should be held liable for engaging in the anticompetitive behavior.[148]

Although the act of state and the doctrine of sovereign compulsion are distinguished by most international lawyers,[149] they present essentially the same policy issue. Both have served to immunize private firms, and state trading enterprises from antitrust liability for otherwise illegal acts. The doctrines recognize or fail to challenge foreign laws that may have harmful effects on United States citizens. The act of state doctrine imposes a choice of law rather than allowing a court to base its decision on proper conflict of laws analysis.[150] As is common in other countries, foreign laws or decrees should only be recognized where they are not contrary to the public policy of the United States. Antitrust laws are an important expression of United States public policy which is circumvented by granting immunity from prosecution or liability to a firm or commercial entity. Unlike expropriation cases where the act of state doctrine has arisen in a dispute over ownership between a foreign government and a private firm,[151] the act of state has been invoked in antitrust cases only as a defense for private firms. These cases did not involve a challenge to the validity of the foreign act

146. *Id.* § (2)(21)(b). *See generally* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 41 (1965).

147. H.R. 4661, 96th Cong. 1st Sess. § (2)(21)(a) (1979).

148. *Id.* § (2)(21)(c).

149. *See* PROC. INT'L L., *supra* note 75 at 99, 102-03, 106; Griffin, *Symposium: American Antitrust Laws and Foreign Governments, An Introduction to the Problem*, 13 J. INT'L L. & ECON. 137, 141, 143 (1978); GUIDE, *supra* note 53 at 7-8.

150. Joelson & Griffin, *supra* note 63, at 631-32.

151. *See, e.g.*, Sabbatino v. Banco Nacional de Cuba, 376 U.S. 398 (1964). *See also* Griffin, *A Critique of the Justice Department's Antitrust Guide for International Operations*, 11 CORNELL INT'L L.J. 215, 243-48 (1978).

of state,[152] rather, the doctrine has been interpreted to allow the coparticipation by a state in an anticompetitive commercial endeavor to bar inquiry into the activities of multinational firms. This result is not justifiable in policy terms since the right of the state to act is really not at issue; the object of inquiry is the role of the private firms in schemes with foreign governments to eliminate or reduce competition. The fact that acts of states may be used to achieve the desired result should not prevent inquiry into whether a multinational firm is a participant in a cartel. In cases of government-sponsored international cartels, there is no doubt that the government-applied sanctions stimulate anticompetitive results. There should be, however, no doubt that the contribution of the multinational corporation is critical to the success of the cartel.

The defense of sovereign compulsion requires an act of state[153] and is therefore subject to much of the same criticism. The sovereign compulsion doctrine permits foreign governments to require persons subject to United States jurisdiction to engage in activity which is harmful to United States citizens. Many corporations may be willing to join an international cartel not only because of the immunity from antitrust jurisdiction but because they know that such immunity will encourage other firms to cooperate.[154]

International comity generally requires that a sovereign respect the right of another to prescribe laws within its jurisdiction.[155] For this reason, it has been argued that courts should not enforce United States antitrust laws against persons who were required by

152. In *American Banana* plaintiff alleged that defendant had conspired with a foreign government to have the government expropriate its competitors' holdings. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). In *Occidental* the defendant was charged with inducing foreign governments to assert a claim over territory of another sovereign in order to gain possession of the plaintiff's oil concession. Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal., 1971). In *Hunt* the defendants allegedly interfered with plaintiff's negotiations with a foreign government which indirectly caused that government to nationalize the plaintiff's oil concession. Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir., 1977). In all these cases the issue was not the title to expropriated property, but rather the defendants role in bringing about the expropriation.

153. GUIDE, *supra* note 53, at 54. *See* Griffin, *supra* note 149, at 144.

154. Generally, firms are more likely to join a cartel when they believe other competitors are also cooperating. If a significant number of firms, in some cases as few as one, are likely to resist out of fear of antitrust prosecution, then the entire cartel may be under pressure to dissolve in the classic pattern.

155. Hilton v. Guyot, 159 U.S. 113, 164-66 (1894).

a foreign power to break them. This argument ignores the fact that the antitrust laws are directed against firms and commercial entities, not sovereign states.These laws also seek to compensate injured parties.[156] Restricting the sovereign compulsion defense will require firms to abide by domestic antitrust laws as a condition of doing business in the United States. This position reflects the practice of other industrialized countries which have refused to recognize foreign laws that contravene their public policy.

Superficially, such a requirement seems unfair. The fact is, however, that multinational firms have considerable bargaining power when dealing with host governments. United States multinational firms bring with them capital, high technology, marketing expertise, and easy access to the United States market. Developing countries are particularly vulnerable to this bargaining power because they are most lacking in technology and capital.[157] Few countries would be willing to forego access to the resources of multinational firms in order to impose a cartel arrangement because such an arrangement would have little likelihood of success without the cooperation of the multinational firms. Ultimately the relationship between firm and host-country must be a symbiotic one.[158]

Multinationals and host governments undergo a learning process as the relationship matures.[159] Initially, the bargaining power is on the side of the multinational, because it holds the capital, technology, and marketing expertise. Over time, the balance of power shifts as both sides learn the actual constraints of the other side. An absolute prohibition on cartel participation by firms doing business in the United States is likely to increase the ability of multinational firms to refuse to participate in a cartel. Host countries now depend on virtual immunity being granted to the multinational participants in a "compulsory" cartel to insure the firms' participation. It is unlikely that multinational firms would invest in a country without an understanding that they would not be required to violate United States antitrust laws. As the agreement matured, the firm could reasonably argue that continued access to the United States market depends upon abstention from cartel activity.

156. Note, *Development of the Defense of Sovereign Compulsion, supra* note 113, at 903-94.

157. Hymer, *supra* note 13, at 446-47.

158. *Id. See generally* BERGSTEN, *supra* note 2.

159. T. MORAN, MULTINATIONAL CORPORATIONS, AND THE POLITICS OF DEPENDENCE: COPPER IN CHILE, (1974).

160. *Id.*

Political risk insurance from the Overseas Private Investment Corporation could be expanded for firms whose assets are expropriated in retaliation for obeying United States laws.[161] A country legitimately seeking to insulate itself from destabilizing variations in commodity prices may be amenable to a mutual commodity agreement in lieu of cartel activity.[162]

Even if restricting the act of state and sovereign compulsion defenses results in a corporation's ouster from a foreign country, this would not necessarily be an intolerable result. In domestic law, *per se* violations of the Sherman Act are still illegal no matter how reasonable the restraints on trade may seem.[163] The Supreme Court has held that participation in a private international cartel is illegal no matter how "reasonable" the cartel activity may be in light of foreign trade conditions. By the same token, it seems appropriate to require firms to refrain from cartel participation even where there may be some risk to their operations in the host-country. As foreign trade increases in its importance to the economy, the United States has an increasing public policy interest in insuring that it takes place within the bounds of competition.

Under the Cartel Restriction Act, the mere presence of a sovereign act in "the factual chain" of anticompetitive conduct would not preclude a court from examining the cause, motivation, or circumstances related to such activity. This was the position of the Department of Justice in its amicus brief in *Hunt v. Mobil.*[164] The Department's opposition to H.R. 13922, the earlier version of the Act introduced in 1978, was based on its concern that liability should not be attached to acts of state that are "of a sovereign and discretionary nature" and "within the power and jurisdiction" of

161. The Overseas Private Investment Corporation was established in order to promote economic development and secure American access to resources and markets abroad by insuring direct investment against political and other risks, e.g., expropriation. *See* The Overseas Private Investment Corporation: A Critical Analysis (1973) (Congressional Research Service report originally prepared by the Library of Congress for the House Committee on Foreign Affairs).

162. *See* Diaz-Alejandro, *Delinking North and South: Unshackled or Unhinged?* in RICH AND POOR NATIONS IN THE WORLD ECONOMY 87 (A. Goldman ed. 1978).

163. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). *See also* Note, *Development of the Defense of Sovereign Compulsion, supra* note 254, at 899.

164. Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari, Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir. 1976), *cert. denied*, 434 U.S. 984 (1977).

the acting state.[165] The revised Act attempts to reconcile this concern with the need for effecting the Congressionally mandated public policy of the United States which requires that trade be free of competitive restraints. The Act adopts an approach suggested by Sections 40 and 41 of the RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES.[166] In the particular situation where a foreign government requires firms engaging in commerce affecting the United States to participate in a government organized cartel, the RESTATEMENT suggests that the effect of the sovereign act of the foreign state on the antitrust liability of the firms depends on a balancing of the relative interests of the United States and the foreign state.[167] While the Act does not adopt specifically the criteria set out in Section 40, it does adhere to the notion of a balancing test involving the relative interests. Given the history and importance of the antitrust policy of the United States, it is only natural that a weighty presumption should be given to the public policy interests of the United States. On the other hand the Act preserves the notion that a foreign government may have such a strong public interest in a particular act that its anticompetitive effects on the United States should be given less weight. While specific language better defining the balancing test to be applied by the court must yet be devised, it is still of paramount importance that the United States be allowed to enforce its competition policy where it strongly affects United States commerce. A court must be permitted to seek a factual understanding of the nature and genesis of activities in question in order to determine whether an antitrust charge will stand—not necessarily against the foreign government, but against those persons or firms who actively engage in cartels. In situations where the cartel would not have been effective but for the activities of the firms involved, those firms should still bear antitrust liability for their acts, even though there is a sovereign act involved.

V. CONCLUSION

The post-war era has seen a tremendous growth in the trade of raw materials and manufactured goods. More capital for direct investment has flowed across national boundaries. Direct invest-

165. Wald letter, *supra* note 297, at 7.

166. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 40, 41 (1965).

167. *Id.* § 41, illustration 13.

ment abroad has occurred in raw materials and manufacturing industries mainly as a result of oligopoly pressures. The oligopoly characteristics—high concentration ratios, high barriers to entry, and the threat of declining market position—which have pushed these industries past their national borders, induce them into overt or tacit cartel activity. When that activity is removed from antitrust jurisdiction by the acts, "commands," or active cooperation of a foreign sovereign, the resulting cartels may also be immune from most of the pressures which generally cause cartels to fall apart.

United States antitrust laws have been effective against the majority of the worst anticompetitive domestic activities, especially cartels. The "direct and substantial effects" test allows United States courts to exert jurisdiction over anticompetitive activities abroad which adversely affect the welfare of United States consumers. The most glaring exceptions, however, to the rule of law are presented by the doctrines of act of state and sovereign compulsion. These exceptions immunize from antitrust liability multinational corporations that participate in foreign government-sponsored cartels. These sorts of government-sponsored arrangements, however, are most dangerous to the welfare of consumers. Such cartels impose a regressive sort of excise tax through artificial restraints, burdening those who can least afford it. They also cause massive misallocation of scarce resources.

United States antitrust policy must be revised to prevent anticompetitive activity undertaken by businesses with the cooperation of foreign governments. The United States must reach an agreement with its trading partners regarding restrictive business practices. In return for such an agreement, the United States should respond to the needs of countries which suffer from fluctuations in commodity prices. Mutual commodity agreements, technological aid, and even increased levels of loans and assistance present options significantly preferable to cartels. Should such multilateral efforts fail, however, the United States should be prepared to use its full economic power in order to negate anticompetitive behavior by multinational firms and foreign governments.

The United States should limit the act of state and sovereign compulsion doctrine as they apply to violations of the antitrust laws. The courts should apply a standard conflict of laws test with a special regard to the importance of antitrust law to United States commerce and trade. Large multinational corporations should no longer escape examination simply because they are able to induce or persuade foreign governments into taking anticompetitive ac-

tions. While the right to lobby foreign governments may be protected, the exercise of such right should be subject to rigorous scrutiny.

It is time for the United States to implement an effective anti-cartel policy. The United States has allowed foreign governments to tamper directly with its economic well-being. The inflationary pressures which threaten our social equity programs are due in part to the effects of cartel action by foreign governments. Any solution must respect the principles of comity and must harmonize our policy with that of our trading partners. This does not preclude the United States from taking firm action against cartels. The Cartel Restriction Act pending in the 96th Congress will be the nucleus of an anti-cartel policy which will safeguard the welfare of all consumers in the United States and other countries as well.

APPENDIX I*

A BILL

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That this Act may be cited as the "Cartel Restriction Act of 1979".

SEC. 2. The Federal Trade Commission Act (15 U.S.C. 41 et seq.) is amended by redesignating section 20 and section 21 as section 22 and section 23, respectively, and by inserting after section 19 the following new sections:

"SEC. 20. (a) (1) In any case in which any United States person, partnership, or corporation, or any foreign subsidiary of a United States person, partnership, or corporation—

"(A) engages, in concert with any foreign concern which competes with such person, partnership, or corporation, in any activity which relates to (or which may be construed to relate to)—

"(i) the establishment of prices;

"(ii) the allocation of markets or customers;

or

"(iii) the limitation or other restriction of the production, distribution, or availability of any product or service made or otherwise provided by such person, partnership, or corporation; or

"(B) is required or requested by a foreign state to engage, in concert with any foreign concern which competes with such person, partnership, or corporation, in any activity specified in subparagraph (A);

such United States person, partnership, or corporation shall submit notice of any such activity, requirement, or request to the Commission and to the Attorney General not later than 20 days after the commencement of such activity, or the date on which such requirement is imposed or such request is made, as the case may be.

"(2) In any case in which any United States person, partnership, or corporation—

"(A) is engaged in a joint venture with any foreign concern (other than a foreign subsidiary of such United States

*This bill was introduced in the House of Representatives by Mr. Gore to amend the Federal Trade Commission Act to require persons subject to the Act to submit reports regarding certain business activities conducted by such persons in foreign states in order to enable the Federal Trade Commission to determine whether such activities may involve anticompetitive practices, and for other purposes.

person, partnership, or corporation) with respect to the sale or other offering of any product or service;

"(B) such person, partnership, or corporation has knowledge that such foreign concern is engaging, in concert with any of its competitors, in any activity specified in paragraph (1)(A) relating to such product or service;

such United States person, partnership, or corporation shall submit notice of any such activity to the Commission and to the Attorney General not later than 20 days after acquiring knowledge of such activity.

"(b) The Commission shall submit timely notice to the Secretary of State, the Special Representative for Trade Negotiations, and the Securities and Exchange Commission of any activity which is the subject of a notice received by the Commission under subsection (a).

"(c)(1) Any United States person, partnership, or corporation which fails to submit any notice required in subsection (a) shall be subject to a civil penalty of not more than $1,000,000 for each violation, and not more than $20,000 for each day during which such violation occurs.

"(2)(A) In any case in which a United States person, partnership, or corporation fails to make timely notice under subsection (a), any officer or director of such United States person, partnership, or corporation who knowingly so fails shall be subject to a civil penalty of not more than $25,000.

"(B) In any case in which a fine is imposed under subparagraph (A) upon any officer or director of a United States person, partnership, or corporation, such fine shall not be paid, directly or indirectly, by such United States person, partnership, or corporation.

"(3) Any penalty imposed under this section shall be subject to section 162(f) of the Internal Revenue Code of 1954 (relating to fines and penalties).

"(d)(1) The Commission shall by rule require that the notice required in paragraph (1) and paragraph (2) of subsection (a) shall be in such form, and shall contain such documentary material and information relating to the activity, requirement, or request involved, as is necessary and appropriate to enable the Commission to determine whether such activity violates this Act or the antitrust Acts, or whether such requirement or request would result in any activity which violates this Act or the antitrust Acts.

"(2) The Commission may by rule exempt from the requirements of this section any class of persons, conduct, or agreements which is not likely to violate this Act or the antitrust Acts.

"(e) The Commission may exercise its authority under section

5, with respect to unfair methods of competition or unfair or deceptive acts or practices, in order to enforce the provisions of this section, except that only the penalties set forth in subsection (c) shall apply with respect to violations of this section.

"(f) As used in this section:

"(1) The term 'concern' means an individual or a corporation, partnership, association, or other entity.

"(2) The term 'foreign concern' means—

"(A) an individual who is not a citizen, national, or resident of the United States; and

"(B) a concern (other than an individual) which is organized or exists under the laws of a foreign state.

"(3) (A) The term 'foreign state' includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state.

"(B) The term 'agency or instrumentality of a foreign state' means any entity which—

"(i) is a separate legal person;

"(ii) is an organ of a foreign state or a political subdivision of a foreign state, or a majority of whose shares or other ownership interest is owned by a foreign state or a political subdivision of a foreign state; and

"(iii) which is neither a citizen of a State of the United States, nor created under the laws of any third country.

"(4) The term 'foreign subsidiary' means a foreign concern which is controlled by or under common control with, or which controls, a United States person, partnership, or corporation, as determined under rules promulgated by the Commission.

"(5) The term 'joint venture' means an association of 2 or more concerns to carry out a business enterprise for profit, for which purpose such concerns combine property, money, expertise, or other assets.

"(6) The term 'United States person, partnership, or corporation' means—

"(A) an individual who is a citizen, national, or resident of the United States; and

"(B) a person (other than an individual), partnership, or corporation which has its principal place of business in the United States or which is organized under the laws of a State, of the United States, or of a territory or possession of the United States.

"SEC. 21. (a) In any action brought to enforce the provisions of this Act or the antitrust Acts, the court in which such action is brought shall not have any authority to decline to exercise juris-

diction over such action solely on the ground that the complaint involved in such action would require an examination of the reasons or motivations for, and circumstances relating to, any official action of a foreign state. The Federal act of state doctrine and the foreign compulsion doctrine shall not be construed in a manner which restricts or otherwise limits the authority of the court to carry out such an examination.

"(b) In any action specified in subsection (a), the court may refrain from examining the validity or legality of any official action of a foreign state within its territory by which such foreign state has exercised its jurisdiction to give effect to its public interest.

"(c) In any case in which a foreign state enacts, adopts, or otherwise establishes any law or policy requiring or prohibiting any action by a United States person, partnership, or corporation (or any foreign subsidiary of such person, partnership, or corporation) which is inconsistent with any requirement or prohibition in this Act or in the antitrust Acts, and an action is brought against such United States person, partnership, or corporation, or against such foreign subsidiary, to enforce the provisions of this Act or of the antitrust Acts, the court in which such action is brought, in determining whether to exercise jurisdiction over such action, shall take into account—

"(1) the extent to which the vital national interests of the United States or of the foreign state are involved in such action; and

"(2) the extent to which the enforcement of such law or policy by the foreign state with respect to such United States person, partnership, or corporation, or such foreign subsidiary, will have any direct and foreseeable effect upon the commercial interests of the United States.

"(d) For purposes of this section, the terms 'foreign state', 'foreign subsidiary', and 'United States person, partnership, or corporation' have the meanings given them in section 20(f).".

APPENDIX II*
A BILL

To amend the Federal Trade Commission Act to impose certain reporting requirements on United States persons with respect to restrictive business practices abroad, to direct the President to seek an agreement with other countries to prohibit restrictive business practices, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That the Federal Trade Commission Act (15 U.S.C. 41 et seq.) is amended by redesignating sections 20 and 21 as sections 21 and 22, respectively, and by inserting after section 19 the following new section:

"Sec. 20. (a)(1) In any case in which—

"(A) any United States person, partnership, or corporation, or any foreign susidiary of a United States person, partnership, or corporation-

"(i) engages in restrictive business practices on account of any requirement of the government of a foreign country, or

"(ii) is requested directly or indirectly by the government of a foreign country to engage in restrictive business practices; or

"(B) any United States person, partnership, or corporation is engaged in a joint venture with a foreign concern (other than a foreign subsidiary of such United States person, partnership, or corporation) that engages in restrictive business practices,

such United States person, partnership, or corporation shall report such restrictive business practices, or request to engage in such practices, to the Commission.

"(2) The Commission shall notify the Attorney General, the Secretary of State, and the Special Representative for Trade Negotiations of activities reported to the Commission pursuant to paragraph (1).

"(b)(1) Any United States person, partnership, or corporation that fails to make a report required by subsection (a)(1) of this

* This bill (H.R. 13922) was presented by Mr. Gore in the House of Representatives on August 17, 1978.

section shall be subject to a civil penalty of not more than $1,000,000.

"(2) In any case in which a United States person, partnership, or corporation fails to make a report required by subsection (a)(1) of this section, any officer or director of such United States concern who knowingly failed to make such report shall be subject to a civil penalty of not more than $25,000.

"(3) Whenever a fine is imposed under paragraph (2) of this subsection upon any officer or director of a United States person, partnership, or corporation, such fine shall not be paid, directly or indirectly, by such United States person, partnership, or corporation.

"(c) The Commission may exercise its authority under section 5 of this Act, with respect to unfair methods of competition or unfair or deceptive acts or practices, in order to enforce the provisions of this section, except that only the penalties set forth in subsection (b) of this section shall apply with respect to violations of this section.

"(d) As used in this section-

"(1) the term 'restrictive business practices' means-

"(A) fixing prices, terms, or conditions to be observed in dealing with others in the purchase, sale, or lease of any product;

"(B) excluding enterprises from or allocating or dividing any territorial market or field of business activity, allocating customers, or fixing sales quotas or purchase quotas;

"(C) discriminating against particular enterprises; and

"(D) limiting production or fixing production quotas.

"(2) the term 'concern' means an individual or a corporation, partnership, association, or other entity;

"(3) the term 'United States person, partnership, or corporation' means (A) an individual who is a citizen, national, or resident of the United States, and (B) a person (other than an individual), partnership, or corporation that has its principal place of business in the United States or that is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States;

"(4) the term 'foreign concern' means (A) an individual who is not a citizen, national, or resident of the

United States, and (B) a concern (other than an individual) that is organized or exists under the laws of a foreign country;

"(5) the term 'foreign subsidiary' means a foreign concern that is in fact controlled by a United States person, partnership, or corporation, as determined under regulations issued by the Commission; and

"(6) the term 'joint venture' means an association of two or more concerns to carry out a business enterprise for profit, for which purpose such concerns combine property, money, expertise, or other assets."

Sec. 2. The President shall, as soon as practicable after the date of the enactment of this Act, take the steps necessary to convene a conference of the signatory countries of the General Agreement on Tariffs and Trade for the purpose of amending that agreement and any other appropriate international agreement, or entering into a new agreement, to prohibit restrictive business practices, as defined in section 301(f) of the Trade Act of 1974, as added by section 3(b) of this Act. It is the sense of the Congress that any such amendment or agreement should impose an obligation on each signatory country of the agreement being amended or of a new agreement, as the case may be, to enact and enforce legislation to prohibit all persons subject to its jurisdiction from engaging in restrictive business practices.

Sec. 3. (a) Section 301(a) of the Trade Act of 1974 (19 U.S.C. 2411(a)) is amended—

(1) in paragraph (3) by striking out "or" at the end thereof;

(2) in paragraph (4) by adding "or" at the end thereof;

(3) by inserting after paragraph (4) the following new paragraph:

"(5) engages in restrictive business practices which affect or may affect United States commerce or requires directly or indirectly United States concerns to engage in restrictive business practices."

(b) Section 301 of the Trade Act of 1974 is amended by adding at the end thereof the following new subsection:

"(f) For purposes of subsection (a)(5), the term 'restrictive business practices' means any of the following:

"(1) Fixing prices, terms, or conditions to be observed in dealing with others in the purchase, sale, or lease of any product.

"(2) Excluding enterprises from or allocating or dividing any territorial market or field of business activity, allocating customers, or fixing sales quotas or purchase quotas.

"(3) Discriminating against particular enterprises.

"(4) Limiting production or fixing production quotas."

Sec. 4. (a) No court in the United States shall decline on the ground of the Federal act of state doctrine to make a determination on the merits in any case involving the provisions of this Actor of any of the antitrust acts.

(b) For purposes of this section, the term "antitrust acts" means "antitrust acts" as defined in section 4 of the Federal Trade Commission Act and includes that Act and any other law regulating the restraint of trade or commerce.