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ANTITRUST REMEDIES AGAINST GOVERNMENT-INSPIRED BOYCOTTS, SHORTAGES, AND SQUEEZES: WANDERING ON THE ROAD TO MECCA

Donald I. Baker†

Today's governments serve ever more visibly as price regulators, cartel managers, and economic bullies. In fact, they are doing what governments have generally done over the centuries—promoting mercantilism and monopoly. Today, however, governments are acting on a more open and larger scale. Thus, the "oil cartel"—made up of producer-country governments—quadrupled the price of crude oil in a short time and became a household word around the world.[1] Nations that produce other primary products seek to follow its lead with their own cartels, while consumer nations talk about "counter-cartels" and other counter measures. The government-organized Arab boycott of pro-Israeli businesses has become a rising source of frustration in Western nations during the past two years. Even the United States government has done a little quiet cartelizing of its own: most notably, the Nixon administration's efforts to obtain so-called "voluntary import quotas" from foreign producers of steel.[2] It has also helped to create artificial shortages, with artificial monopoly power, by various schemes of price regulation.[3]

This world of "cartels," "boycotts," and "monopoly" sounds very

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[1] The Organization of Petroleum Exporting Countries (OPEC) was founded in 1960 by five major petroleum states. The present member states of OPEC, and the year in which each joined are: Algeria (1969), Ecuador (1973), Gabon (Associate Member, 1973), Indonesia (1962), Iran (1960—Founding Member), Iraq (1960—Founding Member), Kuwait (1960—Founding Member), Libyan Arab Republic (1962), Nigeria (1971), Qatar (1961), Saudi Arabia (1960—Founding Member), United Arab Emirates (1967), and Venezuela (1960—Founding Member). THE WORLD ALMANAC AND BOOKS OF FACTS 1976, at 675; "Brief," note 6 *infra*.

For a general discussion of the legal and economic position of the oil industry in the Middle East, see G. LENCZOWSKI, MIDDLE EAST OIL IN A REVOLUTIONARY AGE (National Energy Project 1976).

[2] *See* Consumers Union v. Rogers, 352 F. Supp. 1319 (D.D.C. 1973), *aff'd in part sub nom.* Consumers Union v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974).

[3] *See, e.g.*, Economic Stabilization Act of 1970, 12 U.S.C. § 1904 (1970); Emergency Petroleum Act of 1973, 15 U.S.C. §§ 751-56 (Supp. IV, 1974).

much at odds with what antitrust law seeks to achieve—a world of consumer choice and entreprenurial initiative. Antitrust law in theory punishes the instigators of cartels, boycotts, and market allocation as per se violations,[4] and protects businessmen against "strong arm" tactics by others in the market.[5]

Press coverage and public frustration with these governmental "cartels" have generated demands for "antitrust" solutions to what are essentially "political" problems.[6] In fact, there are no exciting new antitrust remedies against governments for their sovereign conduct, however reprehensible that conduct may seem to those dedicated to free markets.[7] Direct remedies against these new restraints of trade must come through politics and diplomacy.

The antitrust concern is with corporations that participate in, or take special advantage of, government-imposed restraints and government-created opportunities to restrain. Corporations, unlike governments, can be reached by the antitrust laws. Indeed, the greatest antitrust risks occur when corporations forget that they are corporations and pretend that they are governments. "Playing government" may be heady, but it can also be dangerous. In essence, the antitrust laws are used routinely to punish corporations for doing what governments routinely do. "Restraints of princes" have long

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[4] In Northern Pacific Ry. v. United States, 356 U.S. 1 (1958), the Court noted:

> [T]here are certain agreements of practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use .... Among the practices which the courts have heretofore deemed to be unlawful in and among themselves are price fixing . . . division of markets . . . group boycotts . . . and tying arrangements.

Id. at 5 (citations omitted).

[5] *See, e.g.*, Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959), where the Supreme Court rejected the defendant's argument that the market must be hurt by a boycott, and not just the plaintiff:

> Alleged in this complaint is a wide combination consisting of manufacturers, distributors and a retailer. This combination takes from [the plaintiff retailer] its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendant's products .... As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups.

Id. at 212-13 (footnotes omitted).

[6] *See, e.g.*, so-called "Brief" for Gulf & Western Industries to the Attorney General on OPEC's Status under United States Antitrust Law (also called the "Bludhorn Brief"), produced in 1975 by the New York law firms of Simpson, Thatcher & Bartlett, and Paul, Weiss, Rifkind, Wharton & Garrison, apparently for Gulf and Western Industries, on file at the *Cornell Law Review*.

[7] *Compare* Parker v. Brown, 317 U.S. 341 (1943), *with* Goldfarb v. Virginia State Bar Ass'n, 421 U.S. 778 (1975). *See* notes 38-45 and accompanying text *infra*.

been expressly recognized in commercial law,[8] while "restraints of trade" have long been punished as antitrust violations.[9]

The corporation caught in the middle faces some novel antitrust risks. It can be prosecuted if it too willingly goes along with a government-inspired cartel or boycott, if it relies on government acquiescence or approval of basic restraints, or if it uses government-delegated power or government-created shortages to exclude competition. In short, governments, so frequently bent on restraining competition to serve political ends, are a fertile source of new antitrust problems for the private sector.

In analyzing these problems, we should be pragmatic rather than mechanical. As Judge Wyzanski so wisely stressed: "[I]n connection with the Sherman Act, it is delusive to treat opinions written by different judges at different times as pieces of a jig-saw puzzle which can be, by effort, fitted correctly into a single pattern."[10] The antitrust statutes speak in general terms. Their language does not mandate answers to the close questions. Rather, the antitrust statutes embody a broad commitment to competition as the fundamental economic regulator, but leave room for shifts in the nature of the commitment over time. Chief Justice Hughes made this point in deciding *Appalachian Coals, Inc. v. United States,*[11] a case that was first a shift,[12] and then an aberration,[13] in antitrust enforcement: "As a charter of freedom, the [Sherman] Act has a generality and an adaptability comparable to that found to be desirable in constitutional provisions."[14]

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[8] *See, e.g.,* Bradlie v. Maryland Ins. Co., 37 U.S. (12 Pet.) 378, 402 (1838). The "restraints of princes" concept has been more recently embodied in statutory law in the Carriage of Goods by Sea Act § 4(2)(g), 46 U.S.C. § 1304(2)(g) (1970). *See* Lekas & Drivas, Inc. v. Goulandris, 306 F.2d 426, 430 (2d Cir. 1962). The thrust of the rule is, of course, to excuse the private party from performance of his duty (rather than punish the prince for interfering with it!).

[9] *See* Mitchel v. Reynolds, 1 P. Wms. 181, 24 Eng. Rep. 347 (K.B. 1711); United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898). *See generally* Letwin, *The English Common Law Concerning Monopolies,* 21 U. CHI. L. REV. 355 (1954).

[10] United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 342 (D. Mass. 1953), *aff'd per curiam* 347 U.S. 521 (1954).

[11] 288 U.S. 344 (1933).

[12] It in effect cut back on the force of the strong rule announced in United States v. Trenton Potteries Co., 273 U.S. 392 (1927), that "uniform price-fixing by those controlling in any substantial manner a trade or business in interstate commerce is prohibited by the Sherman Law, despite the reasonableness of the particular prices agreed upon." *Id.* at 398.

[13] Its effective force was in turn limited in United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), which revived *Trenton Potteries* and laid down a strong per se rule against price fixing which has generally been followed ever since. *See, e.g.,* United States v. Container Corp. 393 U.S. 333, 337 (1969).

[14] 288 U.S. at 359-60.

Current shifts are clearly visible. The more conservative justices of the Supreme Court's "new antitrust majority"[15] are putting a brake on the proliferation of antitrust remedies by insisting on tougher factual standards of proof.[16] At the same time, they are often using lower standards for determining implied exemptions from antitrust prohibitions.[17] Meanwhile, in the Houses of Congress, the shift is in the opposite direction. Political leaders who were uninterested in antitrust law a decade ago are now vying with each other to propose bigger antitrust penalties and sanctions, and stronger antitrust enforcement.[18]

Antitrust law provides a basic series of public and private remedies against private restraints of trade and business monopolies. Section 1 of the Sherman Act[19] makes price fixing, group boycotts, divisions of markets, and tying arrangements per se illegal,[20] and it punishes other restraints that have an unreasonable effect on competition.[21] Section 2 of the Act punishes conspiracies to monopolize and successful monopolization.[22] Section 5 of the Federal Trade

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[15] In Justice White's dissenting opinion in United States v. Marine Bancorp., 418 U.S. 602, 642 (1974), he referred to Justice Stewart, and the four justices appointed by President Nixon (Burger, C.J., Blackmun, Powell, and Rehnquist, J.J.) as the new "antitrust majority."

[16] *See* United States v. General Dynamics Corp., 415 U.S. 486 (1974).

[17] *See* United States v. National Ass'n of Sec. Dealers, Inc., 422 U.S. 694 (1975); Gordon v. New York Stock Exch., Inc., 422 U.S. 659 (1975). *But see* Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975) (showing shift the other way in labor exemption area); and Cantor v. Detroit Edison Co., 96 S. Ct. 3110 (1976) (discussed at text accompanying notes 54-59 *infra*).

[18] *See, e.g.*, Antitrust Procedures and Penalties Act of 1974, 88 Stat. 1706 (codified in scattered sections of 15, 32, 47, 49 U.S.C.) (stiffened penalties for violations of Sherman Act); Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. § 45 (Supp. IV, 1974) (strengthened FTC investigation powers); Consumer Goods Pricing Act of 1975, 89 Stat. 801, *amending* 15 U.S.C. §§ 1, 45(a)(2)-(b) (Supp. IV, 1974) (repealed federal authorization for "fair trade" (resale price maintenance)).

Presently, numerous bills aimed at increasing the effectiveness of the antitrust laws are being considered in both the House and Senate. The Scott-Hart bill, S. 1284, 94th Cong. 1st Sess. (1975), passed by the Senate on June 10, 1976 as H.R. 8532, 94th Cong., 1st Sess. (1975), would (*1*) allow state attorneys general to sue for antitrust violations for treble damages on behalf of injured citizens; (2) broaden the Justice Department's pre-complaint discovery; and (*3*) enable the Justice Department and Federal Trade Commission to obtain notice and limited stay of a merger. BNA ANTITRUST & TRADE REG. REP. No. 68, E-1 (June 15, 1976). Also see S. 2845 (H.R. 11380), 94th Cong., 2d Sess. (1976), which makes provision for antitrust review of proposed energy research contracts given by the Energy Research and Development Administration (ERDA) to companies with assets over $250 million. The Justice Department would scrutinize the proposals with an eye toward evaluating whether the contracts would increase concentration, reduce competition, or result in conflicts of interest.

[19] 15 U.S.C. § 1 (Supp. IV, 1974).

[20] Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

[21] Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

[22] 15 U.S.C. § 2 (Supp. IV, 1974).

Commission Act[23] authorizes the FTC to prohibit "unfair" methods of competition, a prohibition that embraces Sherman Act violations.[24] All these provisions apply to restraints of trade and monopolies affecting United States interstate and foreign commerce if personal jurisdiction can be obtained over the offender. The Department of Justice can bring criminal indictments (with punishment up to one million dollars in fines for corporations),[25] and suits for injunctive relief[26] and damages on sales to the Government under the Sherman Act.[27] The Government can also use the Wilson Tariff Act of 1894[28] to go directly after cartel-produced goods upon their entry into the United States, but the Government has rarely done so in recent years.[29] In addition, there are important private remedies for antitrust victims who stand within the relevant area of impact.[30]

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SOVEREIGN ACTIVITIES OF GOVERNMENTS

These remedies, private and public, have been used against private firms in circumstances where governments were actively involved in restraining competition,[31] but generally they have not been used against the restraining government itself.[32] The exact role

[23] 45 U.S.C. § 45 (Supp. IV, 1974), *amending* 15 U.S.C. § 45 (1970).

[24] *See, e.g.*, FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244-45 (1972).

[25] 15 U.S.C. § 1 (Supp. IV, 1974), *as amended*, 89 Stat. 801.

[26] 15 U.S.C. § 25 (1970).

[27] *Id.* § 15a (1970).

[28] *Id.* §§ 8-11 (1970).

[29] *See* W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 498-543 (2d ed. 1973) (collecting cases under Wilson Tariff Act). Very few recent cases have been brought under this Act. When used, it has generally been in conjunction with a Sherman Act charge. *See, e.g.*, United States v. R.P. Oldham Co., 152 F. Supp. 818 (N.D. Cal. 1957). The limited use of the Wilson Act may be explained in part by Congress's failure to update its sanctions; a violation is still a misdemeanor punishable by a maximum fine of only $5,000. 15 U.S.C. § 8 (1970). The other reason is that exclusion of foreign-produced goods, even goods produced by a cartel, has the effect of reducing the domestic supply and will inevitably increase the price to domestic consumers. Therefore, effective antitrust relief against a foreign cartel generally requires more than a remedy against the goods.

[30] These remedies include treble damages for past injuries (15 U.S.C. § 15 (1970)), and injunctive relief to prevent repetition (*id.* § 26 (1970)).

[31] *See, e.g.*, American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909); United States v. Sisal Sales Corp., 274 U.S. 268 (1927).

[32] Suits have generally been attempted only when a government agency was acting in an essentially "commercial" capacity (*see* text accompanying notes 92-98 *infra*), or where the government officials were acting beyond their legal authority (*see* text accompanying notes 68-77 *infra*).

of the government has been an important factor in determining whether antitrust liability exists. At least four levels of government "political" involvement can exist with respect to private anticompetitive activity: government can command as sovereign,[33] it can formally approve,[34] it can informally encourage,[35] or it can delegate power that creates opportunities to restrain trade.[36] Different antitrust problems arise from each level of involvement for the commercial enterprise acting in reliance upon such governmental anticompetitive activity. In addition, as a "commercial" buyer or seller, a sovereign government (or a state-owned corporation) can contractually command, authorize, or create anti-competitive opportunity.[37] It can, in essence, become a participant in a private conspiracy.

A. *Sovereign Commands*

A government may command its citizens to engage in anti-competitive activity. In *Parker v. Brown*[38] the Supreme Court held that obedience of such a governmental command was a defense to a private antitrust action where the defendant carried out the anti-competitive activity within the territory of the commanding sovereign. The *Parker* principle has been recently reaffirmed by the Court in *Goldfarb v. Virginia State Bar Association,*[39] and in *Cantor v. Detroit Edison Co.*[40] *Parker* upheld a California raisin market stabilization scheme, carried out directly by the state government under its statutory power, which gave growers a voice in instigating the operation of the plan.[41] Speaking loosely, it was a "primary producers' cartel." California growers produced ninety-five percent of the raisins consumed in the United States,[42] and the clear purpose of the scheme was to raise the price of raisins above the competitive level.[43] The Court rejected all antitrust claims against the state director of agriculture and upheld the scheme on constitutional grounds. The

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[33] *See* text accompanying notes 38-53 *infra.*
[34] *See* text accompanying notes 54-67 *infra.*
[35] *See* text accompanying notes 68-77 *infra.*
[36] *See* text accompanying notes 78-88 *infra.*
[37] *See* text accompanying notes 89-109 *infra.*
[38] 317 U.S. 341 (1943).
[39] 421 U.S. 773 (1975).
[40] 96 S. Ct. 3110 (1976). *See* text accompanying notes 54-59 *infra.*
[41] 317 U.S. at 346-47.
[42] Brown v. Parker, 39 F. Supp. 895, 896 (S.D. Cal. 1941).
[43] 39 F. Supp. at 901; 317 U.S. at 355.

Sherman Act, the Court held, must be read as a prohibition of individual and not state action.[44] Concluding that the Sherman Act did not apply to activity commanded by a state, the Court noted:

> The state in adopting and enforcing the [raisin marketing] program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish [a] monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.[45]

In other words, the clear, unequivocal, and legal command of the sovereign is a defense to an antitrust violation, subject to some "territorial wrinkles." If a foreign government commands an American business to do something anticompetitive in that government's territory, the firm has no problem; it can participate in a market allocation scheme, or help the government keep other American producers out of the market. The ancient *American Banana* case[46] stands for at least that much.[47]

If, on the other hand, a foreign sovereign commands an American corporation to do *in the United States* an act that would violate American antitrust law, such a command should not be an antitrust defense. The sovereign lacks the effective power to make such an

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[44] Parker v. Brown, 317 U.S. 341, 351 (1943).

[45] *Id.* at 352.

[46] American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

[47] Here the Government alleged that the defendant had monopolized the Central American banana trade by a variety of acts—including procuring Costa Rican militia to drive the plaintiff off its banana plantations. The Supreme Court announced a sweeping rule of territoriality: "We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned." 213 U.S. at 357.

This holding has been narrowed by subsequent cases. The Supreme Court has stressed that *American Banana* involved direct action by the government and the case has not been followed where a government merely approved the implementation of a private scheme. *See* United States v. Sisal Sales Corp., 247 U.S. 268, 275-76 (1927). Additionally, it has not been followed where the government involved was merely delegating authority. *See, e.g.,* Continental Ore Co. v. Uniou Carbide & Carbon Corp., 370 U.S. 690, 704-05 (1962). Thus, *American Banana* now seems confined to situations involving compulsory government action, direct commands of the state, or direct action of the state within its own territory. As the Supreme Court said in 1952, the *Banana* decision

> was not meant to confer blanket immunity on trade practices which radiate unlawful consequences here, merely because they were initiated or consummated outside the territorial limits of the United States. . . . As in *Sisal,* the crux of the complaint here is 'not merely of something done by another government at the instigation of private parties;' petitioner by his 'own deliberate acts, here and elsewhere, . . . brought about forbidden results within the United States.'

Steele v. Bulova Watch Co., 344 U.S. 280, 288 (1952), *quoting* United States v. Sisal Sales Corp., 274 U.S. at 276. *See* note 67 *infra.*

extraterritorial command. At issue are several separate but related concepts. The first is "sovereign immunity," which exempts a foreign government from an antitrust or other suit simply because of its legal status as an entity. The second concept is "Act of State," which essentially says that the courts of one state will not sit in judgment on the legality of governmental action that another sovereign state takes within its own territory. The third concept is "foreign government compulsion," or "force majeure." This doctrine generally exempts a private party from performing certain duties that it would normally be required to perform, or excuses performance or conduct that is ordinarily prohibited. This is because a foreign government has required that the infringing conduct be performed, or not performed, as the case may be. Normally, as with the Act of State doctrine, this concept would be subject to territorial limitations and would not necessarily provide immunity, except where the government-compelled acts or omissions took place in its own territory.[48] Finally, there is the doctrine of comity, which may cause one state to refrain from exercising jurisdiction when another state has a stronger interest.[49] This doctrine would support the application of American antitrust law to clearly anti-competitive private activities within the United States, notwithstanding contrary directives or demands based upon foreign law.

Any other approach would be untenable. Suppose, for example, that a member government of the Organization of Petroleum Exporting Countries (OPEC)[50] commanded an oil company to sell oil to independent refiners in the United States, at a price fixed by OPEC, or not to sell oil to independent refiners in the United States.[51] If such a command were allowed as an antitrust defense,

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[48] *See generally* Alfred Dunhill v. Republic of Cuba, 96 S. Ct. 1854 (1976).

[49] RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 40, provides:

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as

(a) vital national interest of each of the states,

(b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,

(c) the extent to which the required conduct is to take place in the territory of the other state,

(d) the nationality of the person, and

(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

[50] *See* note 1 *supra*.

[51] These facts are similar to those in Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970). There, the Venezuelan government ordered certain international oil companies not to provide Venezuelan oil to the plaintiff. The plaintiff was an American company controlled by former high Venezuelan government officials. The plain-

the inroads on our competitive system would be very great indeed. Governments, already the world's leading cartelizers, would have every reason to strengthen their cartels by issuing such broad commands. A case recently instituted by the Department of Justice, *United States v. Bechtel Corporation*,[52] squarely raises this issue. The complaint broadly alleges that Arab governments are ordering American businesses, doing business in their countries, not to deal even *in the United States* with "blacklisted" businesses the Arab governments wish to punish.[53]

No doubt such broad commands—which I would label "economic bullying"—do place the bullied business in a difficult position. What the foreign government commands, the American government prohibits in its antitrust laws. If both sides persist, and the business is unable to find some way to deceive one or the other, then it may be forced to give up doing business in both places at the same time.

B. *Sovereign Approval*

Sometimes a government will formally approve, under its legal processes, privately-initiated action that would otherwise violate the antitrust laws. That mere sovereign approval does not automatically convey antitrust immunity is clear from the Supreme Court's decision in *Cantor v. Detroit Edison Co.*,[54] which denied immunity to the defendant for an allegedly anticompetitive utility tariff. The tariff had been proposed by the defendant and approved by the Michigan Public Service Commission.[55] Noting that "cases of this kind involve

tiff's purpose was to buy low-cost Venezuelan crude oil and process it, outside the American oil quota system, at a bonded refinery in New Jersey. The oil was then to be sold for bunker fuel in New York Harbor. Apparently, the Venezuelan government was moved by a mixture of animosity towards the plaintiff's owners and by concern about the impact of tbis operation on fuel prices generally. The district court allowed the defendant to plead the Venezuelan government's action as a defense. *Id.* at 1292-93.

One might regard this as a very narrow and special case turning on the "Venezuelan" flavor of the operation and the fact that it was operating outside the American domestic market. *See* W. FUGATE, *supra* note 29, at 80-81. On any other grounds, the decision is wholly unsupportable.

[52] No. 76-99 (N.D. Cal., filed Jan. 16, 1976), reprinted in BNA ANTITRUST & TRADE REG. REP. No. 747, D-1 (Jan. 20, 1976); Answer, filed by Bechtel Corp., reprinted in BNA ANTITRUST & TRADE REG. REP. No. 762, at F-1 (Apr. 26, 1976).

[53] *Id.*, Complaint ¶ 15-17.

[54] 96 S. Ct. 3110 (1976).

In that case the defendant, a public utility, had proposed a service tariff. The plaintiff argued that an illegal tie-in was involved. The state utility commission held a long hearing on the overall tariff and approved it. The district court dismissed the complaint, applying *Parker v. Brown* (392 F. Supp. 1110 (E.D. Mich. 1974)), and the Sixth Circuit affirmed *per curiam* (513 F.2d 630 (6th Cir. 1975)).

[55] 96 S. Ct. at 3113-14.

a blend of private and public decision-making,"[56] the Court contrasted two polar situations. On the one hand, notwithstanding state participation, the private party might have exercised sufficient freedom of choice so that it could be held responsible for the consequences of its decision.[57] On the other hand, the state might have been so heavily involved in any choice that it would be inequitable to hold a private party responsible for conduct implementing it.[58] The Court found the particular utility tariff in *Cantor* to fall closer to the first pole, and stated that

> there can be no doubt that the option to have, or not to have, such a [tariffed] program is primarily respondent's, not the Commission's. Indeed, respondent initiated the program years before the regulatory agency was even created.[59]

In essence, the Supreme Court was extending the logic of earlier dictum. In *Parker v. Brown,* the Court had held that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it."[60] And in its 1975 decision in *Goldfarb v. Virginia State Bar Association,* the Supreme Court noted that "it is not enough that . . . anticompetitive conduct is 'prompted' by state actions."[61] Rather, said the Court, private actions are beyond the reach of the antitrust laws only when "the activity is required by the State acting as sovereign . . . [or] compelled by direction of the State acting as a sovereign."[62] On the other hand, the Supreme Court has

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[56] *Id.* at 3118.

[57] *Id.*

[58] *Id.* at 3119.

[59] *Id.* at 3118-19. The Supreme Court justices were clearly divided on key issues. Justice Stevens wrote an opinion joined by Justices Marshall, Brennan, and White, holding in part that *Parker v. Brown* only exempted actions against state public officials. *Id.* at 3116-17. The second part of the opinion included the analysis quoted in the text accompanying note 124-28 *infra.* Justice Blackmun concurred separately, urging a "rule of reason" analysis. *Id.* at 124-28. Justice Stewart wrote a dissenting opinion, joined by Justices Powell and Rehnquist, urging that the conduct in issue was indeed exempt because established antitrust precedents protected both the utility's rigbt to petition government, and its compliance with a holding order. *Id.* at 3128-40, *citing* Parker v. Brown, 317 U.S. 341 (1943).

[60] 317 U.S. at 351.

[61] 421 U.S. at 791.

[62] ld. at 790-91. *Goldfarb* involved a challenge under the Sherman Act to the legality of fee schedules promulgated by local bar associations and "prompted" by the State Bar, an instrumentality of the Commonwealth of Virginia. The Supreme Court largely disposed of the case on the grounds that the authority given the Virginia Court of Appeals by statute to regulate the legal profession and delegated to the State Bar, did not explicitly deal with, or require, this action. "The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members." *Id.* at 791. The Supreme Court's resolution of the case puts it in the same category with Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962). *See* notes 78-87 *infra.*

allowed mere governmental approval by a federal agency to create an implied antitrust exemption for private conduct that would otherwise violate the antitrust laws.[63] These decisions have generally turned on the nature of the statutory arrangements under which approval was granted. Where a statutory scheme would be thwarted by application of the antitrust laws, the Court has held that the antitrust laws have been impliedly repealed by the statute.[64] The appropriate balancing test can be phrased as a question: Would imposition of antitrust liability on a party acting with the approval of a federal agency thwart the agency's role as assigned by Congress?

Such a balancing approach does not work where another sovereign (a state or a foreign government) approves private conduct that would otherwise violate the Sherman Act. In these circumstances, about the best we can do is apply the strict *Parker* concept of command within the domestic realm (where federal supremacy is constitutionally provided) and work a more pragmatic accommodation where foreign government approval is involved. In essence, this would involve applying the "rule of reason" test or some concept of comity to a restraint formally approved by a foreign government, even though the restraint would be per se illegal if no such approval had been given. Applying the "rule of reason" would involve a careful inquiry into the restraint involved, its relationship to United States foreign commerce, the nature of the foreign government's action, and the rationale supporting the foreign action.[65] Where the pri-

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[63] *See, e.g.,* Gordon v. New York Stock Exch., 422 U.S. 659 (1975) (SEC approval creates an antitrust exemption); United States v. National Ass'n of Sec. Dealers, Inc., 422 U.S. 694 (1975) (SEC acquiescence can create exemption). These decisions are discussed in Baker, *Antitrust Law and Policy in the Securities Industry: A Tale of Two Days in June,* 31 BUS. LAWYER 743, 745-47 (1976).

[64] The standard test is whether implied repeal of the antitrust laws is necessary to make the regulatory scheme work. Silver v. New York Stock Exch., Inc., 373 U.S. 341, 357-58 (1963). The situation is clearly different where a statutory scheme provides that mere approval will carry with it antitrust immunity. *See, e.g.,* Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363 (1973). The latter situation, of course, does not apply where *another sovereign* (a state or a foreign government) has given the approval in question. These bodies, by definition, do not have the constitutional authority to grant federal antitrust exemptions.

[65] In Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918), Mr. Justice Brandeis stated the standard of inquiry in an oft-quoted passage:

> But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of tbeir very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, and the purpose or end sought to be obtained, are all relevant facts. This is not because a good intention will save an otherwise objec-

mary effects of the government-approved restraint are on the commerce of the country imposing the restraint, and the impact on United States commerce is more or less incidental, then governmental approval should serve as a justification for the restraint under the "rule of reason" or the normal concepts of comity. At the other extreme, where the governmentally-approved conduct significantly affected American markets (as would be true of most world-wide cartels), formal approval for the restraint by one or more interested governments should not serve to justify the scheme. Clearly many tough cases lie between the ends of such a spectrum and courts would have to draw a line between "mercantilist" approvals designed primarily to injure others, and "domestic regulatory" approvals aimed at regulating the economy of the approval-granting government.

The essential analysis is well-illustrated by *United States v. Sisal Sales Corp.*,[66] decided by the Supreme Court in 1927. The Government charged that the defendant American firms had secured a monopoly of the foreign supply sources for sisal, and this, combined with their control over domestic stocks, gave them market control within the United States. What they actually did depended heavily on the special legislation they obtained from the Mexican federal and provincial governments. However, the Supreme Court did not allow this legislation—a form of governmental approval—to justify the scheme under American antitrust laws:

> The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties. True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws.[67]

Therefore, where the foreign government is approving a restraint—rather than commanding it—the antitrust court usually

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> tionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Id. at 238.

[66] 274 U.S. 268 (1927).

[67] *Id.* at 276. *See also* Steele v. Bulova Watch Co., 344 U.S. 280 (1952), in which the Supreme Court, relying in part upon *Sisal Sales,* sustained jurisdiction under the Lanham Trade-Mark Act §§ 1-45, ch. 540, 60 Stat. 427 (1946), *as amended,* 15 U.S.C. §§ 1051, 1127 (1970 & Supp. IV, 1974), against an American defendant who set up a business in Mexico selling watches to Americans under a Mexican "Bulova" trademark. The result was to impair plaintiff's goodwill in the genuine "Bulova" watches sold in the United States.

can bind "deliberate acts" of private parties sufficient to invoke antitrust rules.

C. *Informal Sovereign Encouragement*

A third situation exists where the government or government officials merely *encourage* anticompetitive conduct. Encouragement is plainly different from the *command* at the heart of the *Parker* doctrine, and it presents particularly knotty difficulties for parties dealing with the encouraging government. Official encouragement may give comfort, but not immunity. This message is made particularly clear in the landmark *Socony-Vacuum* case,[68] which involved an earlier government-encouraged effort to prop up oil prices. Although the program was never formally approved under the National Industrial Recovery Act (NIRA),[69] officials of the Department of the Interior encouraged oil companies to engage in programs to prop up the price of gasoline by keeping "distress gas" off the market,[70] even after the NIRA itself was declared unconstitutional.[71] When the Department of Justice subsequently sued, the defendant oil companies pleaded the Interior Department's action as a defense. The Supreme Court responded strongly:

> As to knowledge or acquiescence of officers of the federal government little need be said. . . . Though employees of the government may have known of those programs and winked at them or tacitly approved them, no immunity would have thereby been obtained. For Congress had specified the precise manner and method of securing immunity [under the National Industrial Recovery Act]. None other would suffice. Otherwise national policy on such grave and important issues as this would be determined not by Congress nor by those to whom Congress had delegated authority but by virtual volunteers. . . . But even had approval been obtained for the buying programs, that approval would not have survived the expiration in June 1935 of the Act which was a source of that approval. . . . Hence, approval or knowledge and acquiescence of federal authorities prior to June 1935 could have no relevancy to respondent's activities thereto.[72]

The Court reemphasized this point by adding:

> The fact that the buying programs may have been consistent with the general objectives and ends sought to be obtained under the

[68] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[69] Act of June 16, 1933, ch. 90, §§ 1-304, 48 Stat. 195.

[70] 310 U.S. at 225-26.

[71] Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

[72] 310 U.S. at 225-27.

> National Industrial Recovery Act is likewise irrelevant to the legality under the Sherman Act of respondent's activities either prior to or after June 1935.[73]

The effect of informal governmental encouragement on antitrust liability was also raised in the recent *Consumers Union* litigation.[74] Various State Department officials had pressured a group of foreign steel producers to enter into "voluntary import quota" agreements in order to diminish the competitive pressure on American domestic producers. The defendant officials were found to have exceeded their legitimate authority.[75] Hence, under *Socony Vacuum,* their actions should not provide the steel companies with any form of antitrust immunity. The facts of *Consumers Union* also illustrate the practical difficulties businesses face in the political world: the State Department had pressured foreign producers into accepting the voluntary quotas by threatening the producers with the possibility that Congress might enact even more restrictive quotas.[76] Ironically, congressional action would have removed the risk of antitrust liability for the producers, although such tough quotas would probably have created even more anticompetitive results than the voluntary system.[77]

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[73] *Id.* at 277-28.

[74] Consumers Union v. Rogers, 352 F. Supp. 1319 (D.D.C. 1973), *aff'd in part sub nom.* Consumers Union v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974).

[75] Judge Gesell stated:

> The President clearly has no authority to give binding assurances that a particular course of conduct, even if encouraged by his representatives, does not violate the Sherman Act or other related congressional enactments any more than he can grant immunity under such laws. A flat agreement among private foreign producers mutually to limit a substantial amount of goods to be sold in the United States is a violation of the Sherman Act and to the extent participants are subject to the jurisdiction of our courts criminal penalties may be imposed and civil actions for damage or equitable relief may be pressed. . . .
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> . . . While official assurances to this effect may or may not have been given, there is no doubt that the companies proceeded in the belief the arrangements were legal under our law and the quiescence of all public authorities of the United States on this score was notable.

352 F. Supp. at 1323. Since the plaintiff had already stipulated the dismissal with prejudice, of its antitrust claim, these comments were really quite gratuitous, and on review, the Court of Appeals for the District of Columbia went out of its way to disassociate itself from them:

> Since there is nothing in the record that shows the Executive as purporting to grant such an exemption, this observation by the court does not have the stature of a declaratory disposition of an actual controversy. . . . [T]hese expressions of the court's opinion are without judicial force or effect and are not appropriate for pursuit upon appeal.

506 F.2d at 140-41 (footnote omitted).

[76] *See* 506 F.2d at 138-39.

[77] Congress ultimately enacted a provision removing antitrust liability for this type of voluntary agreement. Trade Act of 1974, 19 U.S.C. § 2485 (Supp. IV, 1974).

D. *Sovereign Delegation of Power to Restrain*

Antitrust analysis is easier where the foreign (or state) government has been entirely passive with respect to a restraint on United States commerce. In other words, the government involved has not commanded, approved, or even encouraged the private firm; it has simply delegated the power that made the restraint possible. In these circumstances, fundamental conflict between the interests of the sovereign and the United States government in antitrust enforcement is much less likely. Hence, the need for any full "rule of reason" inquiry is less compelling than where the other sovereign has formally approved the conduct in question. Where delegation of governmental power is involved, the recipient of that delegation can appropriately be held to a standard requiring it to avoid *unnecessary* inroads into competitive markets.

The delegation situation is illustrated by the Supreme Court decision in *Continental Ore Co. v. Union Carbide & Carbon Corp.*[78] During World War II, Union Carbide's Canadian subsidiary had been entrusted by the Canadian Metals Controller (a federal agency) with "the discretionary agency power to purchase and allocate to Canadian industries all vanadium products required by them."[79] The plaintiff alleged that the defendant subsidiary had exercised the power to favor its own affiliates and to exclude the plaintiff from the Canadian market.[80] The Supreme Court unanimously rejected the lower courts' rulings that this delegation of authority constituted a defense.[81] It found "no indication that the Controller or any other official within the structure of the Canadian government approved

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[78] 370 U.S. 690 (1962).

[79] 370 U.S. at 703 n.11. The Court described tbe governmental process as follows:

> Canada's entry into World War II prompted the Canadian Government to take extraordinary measures to assure optimum availability of strategic materials to Canadian private industries engaged in the war effort. Pursuant to these measures, the Office of Metals Controller was established and given broad powers to regulate the procurement of the materials and to allocate them to industrial users. . . . The Metals Controller enlisted the aid of [the defendant] in early 1943, delegating to it the discretionary agency power to purchase and allocate to Canadian industries all vanadium products required by them. The validity of these wartime measures and delegations under Canadian law is not here contested.

Id. at 702-03 n.11 (citations omitted).

[80] *Id.* at 695, 702-03.

[81] In describing the preceding history of the case, the Supreme Court stated that the district court had ruled that any proposed sale of vanadium was

> a transaction wholly in the hands of the Canadian Government and . . . whether or not this plaintiff was permitted to sell his material to a customer in Canada was a matter wholly within the control of the Canadian Government.

370 U.S. at 703 (quoting unreported opinion of district court).

or would have approved of" the allegedly monopolistic acts.[82] The Court also emphasized that even if the defendant's acts were permitted by Canadian law, "[t]here is nothing to indicate that such law in any way *compelled* discriminatory purchasing . . . ."[83] This line of analysis underlay the Supreme Court's decision in *Goldfarb v. Virginia State Bar Association.*[84] The defendant State Bar was delegated broad authority by the Virginia legislature and the Virginia Court of Appeals to control professional standards in the legal profession.[85] "The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign."[86] Only then, the Court held, is it exempt.[87]

To separate these four categories—command, formal approval, informal encouragement, and delegation of power—does not in itself answer many hard questions facing lawyers and businessmen in actual cases. The crucial question will frequently be: What precisely is the government doing? Is it commanding? Or is it just authorizing, encouraging, or delegating? Less sophisticated legal systems may leave such questions very much in doubt.

In addition, there is a related question of whether the action involved is legal under the law of the country commanding or approving a restraint. As a practical matter, our courts must grant some presumption of legality to the action of foreign governments in close cases. Nevertheless, where the foreign official or agency is *clearly* acting beyond its legal powers, then its commands, or approval, should not provide the basis for granting antitrust immunity within the United States.[88] This follows directly from the reasoning

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[82] 370 U.S. at 706.

[83] *Id.* at 707 (emphasis added). The Court stressed the similarity to the legislative approval obtained in United States v. Sisal Sales, 274 U.S. 268 (1927) (*see* note 67 *supra*), and the essential difference between the voluntary nature of the conduct in *Union Carbide* and the compulsory government action in *American Banana* (*see* note 47 *supra*). 370 U.S. at 704-05.

[84] 421 U.S. 773 (1975), *rehearing denied,* 423 U.S. 886 (1976).

[85] *Id.* at 789-91.

[86] *Id.* at 790.

[87] *Id.* at 791.

[88] The district court decision in Interamerican Ref. Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970) (*see* note 51 *supra*), suggests that the legality of the command under foreign law is not relevant. 307 F. Supp. at 1298-99. The *Interamerican* court relied on Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), to support this conclusion. This reasoning seems incorrect when applied to the *clearly* illegal foreign command in the context of an antitrust case challenging a restraint whose anticompetitive effect is principally within the United States. Both the plurality and dissenting opinions in Alfred Dunhill v. Republic of Cuba, 96 S. Ct. 1854 (1976) made the territorial aspects of the act of state clear. The majority stated:

of the Supreme Court's *Socony-Vacuum* decision. If prospective antitrust defendants knew they could hide behind clearly illegal commands or approvals of "virtual volunteers" who happened to have some tenuous connection with a sovereign, then they would surely find such volunteers in sufficient quantity to obtain a broad antitrust exemption. In other words, the prima facie legality of a. foreign command or approval is an appropriate subject for inquiry under a "rule of reason" test because it bears on a defendant's good faith.

II

"Commercial" Activities of Governments

The *Parker* and *Goldfarb* cases repeatedly stress the role of the state "as sovereign" when discussing antitrust immunity. This suggests that perhaps the state should be treated differently when it is acting as "merchant" or as "entrepreneur." Foreign states, even in capitalist countries, run a great many enterprises that we would consider essentially "commercial" in nature. Many of these enterprises—including state-owned shipping lines, air carriers, commercial banks, and natural resource developers—directly affect our commerce.

This raises some important questions under the preceding analysis. Should the *contractual* "command" or "approval" of a state-owned corporation be given the same effect as a parliamentary statute or an executive order? To put the issue more baldly: Does ownership by the state give a corporation a carte blanche to enter into cartels that disrupt our markets? Can a government, by agreement, immunize its co-conspirators?

Surely the answer to these questions must be no; yet the answer is not an easy one. If a state-run enterprise is recognized to be "commercial" by both the owner state and the United States, American antitrust law can and should be applied to it to the extent that its activities affect our commerce, and it is subject to our jurisdiction. Conversely, if both the United States and the foreign state would

> The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states *on their own soil* that might embarrass the Executive Branch of our Government in the conduct of our foreign relations.

Id. at 1863 (emphasis added). The dissent stated that "the act of state doctrine commands that the acts of a sovereign nation committed *in its own territory* be accorded presumptive validity." *Id.* at 1876 (emphasis added). Where a clearly illegal command is directed at a party to do something in the territory of the United States, the issue is not so much the legality of the command, but the good faith of the antitrust defendant.

treat the activity as "political," it should be exempt without regard to corporate form. The truly difficult situation arises when we regard the state-owned corporation's activities as "commercial," but the owning state regards them as "political." Untold diplomatic difficulties are likely to follow from applying American antitrust laws to such an enterprise, and each case will have to be examined individually. Courts will be forced to judge the character of a state-run enterprise by the law of the country owning the enterprise. In many cases, the legal systems of the owning country will lack any great degree of precision on such questions.[89] To take the extreme case, the Persian Gulf prince, asked whether his private oil drilling company was a "political" or "commercial" operation would, at best, smile wryly at western naïveté and respond, "I am king." At the worst, he would lock his questioner up instantly without due process (conduct which sounds more "political" than "commercial!").[90] Courts and commentators have increasingly had to face this issue, usually under the rubric of "sovereign immunity." In essence, they have been asking whether a state-owned business enterprise is on a different footing from more traditional state activity.[91]

Several older antitrust cases deal with this issue, although not in a wholly consistent manner. One case, *In re Investigation of World Arrangements*,[92] upheld immunity based on government stock ownership during an earlier investigation of a possible international oil cartel. At issue was a grand jury subpoena against Anglo-Iranian Oil Co., Ltd., a British company in which the British government owned a minority of the voting shares and contributed about thirty-five percent of the company's total capital. The court treated the com-

[89] The practical problem is well-illustrated by the allegations in Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972). The gravamen of the complaint was an allegation that the defendant oil companies "induced and procured" one Persian Gulf prince to claim ownership over an area covered by the concession granted to the plaintiffs by the neighboring prince, and that the defendants "induced and procured" the British political agent in the Trucial States to support them. Needless to say, the complaint described a legal system that was at best, informal. It was dismissed by the district court under the Act of State doctrine. 331 F. Supp. at 113.

[90] *See, e.g.*, L. CARROLL, ALICE IN WONDERLAND 91 (Pan Books 1947): "The Queen had only one way of settling all difficulties, great or small. 'Off with his head!' she said without even looking round." *See generally id.* 8.

[91] An interesting early example occurred when the following issue was raised: Does the doctrine of laches bar an equitable claim by a foreign government whose only interest was as a commercial lessor of property (a mineral spring) located in the United States? French Republic v. Saratoga Vichy Spring Co., 191 U.S. 427 (1903). The Supreme Court drew a distinction between "prosecution of a private and proprietary instead of a public or governmental right . . . ." *Id.* at 438. It also suggested that the French Government was suing for the use and benefit of its lessee, and in both situations its tardy suit could be barred by laches. *Id.*

[92] 13 F.R.D. 280, 288-91 (D.D.C. 1952).

pany as "indistinguishable from the Government of Great Britain"[93] and hence cloaked with sovereign immunity. Emphasizing the historic purpose of the company in supplying fuel for the Royal Navy and Air Force, the court sought to distinguish a "public purpose" from a purely "commercial" one.[94] The second case, *United States v. Deutsches Kalisyndikat*,[95] upheld service upon a trading company in which the French Government owned sixty-nine percent of the stock. The court stressed that the company carried out purely commercial transactions for private parties and noted that "the French courts do not extend immunity to commercial enterprises owned or controlled by a sovereign state . . . ."[96] The third case, *In re Grand Jury Investigation of the Shipping Industry*,[97] withheld decision on the status of a shipping line owned by the Philippine Government. A few cases applying *Parker v. Brown* also make the distinction between "commercial" and "governmental" activities.[98]

The more helpful decisions on governmental "commercial" activities involve sovereign immunity outside the antitrust area. An important case is the Second Circuit's 1964 *Victory Transport* decision,[99] which involved an alleged breach of a shipping charter by a Spanish government agency engaged in shipping wheat. Taking note of "the increasing entry of governments into what had previously been regarded as private pursuits,"[100] the Second Circuit

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[93] *Id.* at 291.

[94] This case may well be wrongly decided on its facts, since it seems clear that the Anglo-Iranian Oil Company was run as an entirely separate enterprise and not as an arm of the government of the United Kingdom. Moreover, it does not take account of the United States's shift in position that year from a blanket doctrine of sovereign immunity, to the application of a restrictive theory in order that "commercial" activities of foreign states might still be subject to the United States law. *See* Letter from Acting Legal Adviser Tate of the Department of State to Attorney General Perlman, 26 DEP'T STATE BULL. 984 (1952). The United States continues to adhere to that theory. *See generally*, Brief for the United States as Amicus Curiae, Alfred Dunhill of London, Inc. v. Republic of Cuba, 96 S. Ct. 1854 (1976).

[95] 31 F.2d 199 (S.D.N.Y. 1929).

[96] *Id.* at 202.

[97] 186 F. Supp. 298, 318-20 (D.D.C. 1960).

[98] *See, e.g.*, Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). In that case the District of Columbia Armory Board (an unincorporated instrumentality of the District of Columbia government) was subjected to the antitrust laws for the "commercial" act of entering into a long-term, exclusionary stadium lease with the Washington Redskins football team. The Court of Appeals stressed that

> what Congress did not do is create the Board as an instrumentality to own and manage the only professional football team to be allowed to play in the stadium; hence, neither the Board nor the Redskins in this case are performing a function that a purely governmental agency itself could have performed.

Id. at 939.

[99] Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transports, 336 F.2d 354 (2d Cir. 1964).

[100] *Id.* at 357.

applied a

> restrictive theory of sovereign immunity [in order] . . . to try to accommodate the interest of individuals doing business with foreign governments in having their legal rights determined by the courts, with the interest of foreign governments in being free to perform certain political acts without undergoing the embarrassment or hindrance of defending the propriety of such acts before foreign courts.[101]

The court thus found that the charter of a ship to haul grain by a state instrumentality was an activity that would justify applying the "restrictive theory of sovereign immunity."[102] It put weight on both the nature of the activity and the "commercial" terms of the charter.[103]

Some of the same thinking can be found in *Alfred Dunhill of London, Inc. v. Republic of Cuba,*[104] which held that the Act of State doctrine would not protect a foreign sovereign's repudiation of a commercial debt[105] "arising out of the operation of a commercial business by one of its instrumentalities."[106] Relying primarily on older tax exemption cases,[107] the plurality opinion "drew a line . . . between the historically recognized governmental functions of a State and businesses engaged in by a State of the kind which theretofore had been pursued by private enterprise."[108] In reaching its conclusion that the Act of State doctrine did not apply to the com-

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[101] *Id.* at 360.

[102] *Id.* at 360-61.

[103] *Id.*

[104] 96 S. Ct. 1854 (1976). This is an extremely complicated case arising from the nationalization of traditional cigar suppliers by the Republic of Cuba. The Republic sued for payment on cigars delivered prior to nationalization; the American importers counterclaimed on certain post-nationalization transactions. Cuba sought to plead the "Act of State" defense (*see* text accompanying note 48 *supra*) to the latter obligations. The Supreme Court was closely divided on the issues. Justice White, writing for himself, Chief Justice Burger, and Justices Powell and Rehnquist, concluded that the Act of State doctrine did not protect the Republic of Cuba. *Id.* at 1861. Justice Stevens concurred (*id.* at 1871), thus providing a five member majority, Justice Marshall wrote a dissenting opinion for the remaining four members of the Court. *Id.*

[105] *Id.* at 1863.

[106] *Id.* at 1866.

[107] Parden v. Terminal Ry., 377 U.S. 184 (1964); California v. Taylor, 353 U.S. 553 (1957); New York v. United States, 326 U.S. 572 (1946); United States v. California, 297 U.S. 175 (1936); Ohio v. Helvering, 292 U.S. 360 (1934); and South Carolina v. United States, 199 U.S. 437 (1905) were cited by the Court at 96 S. Ct. 1854, 1862.

[108] 96 S. Ct. at 1862. It quoted earlier tax cases in support of its argument. The Court quoted Ohio v. Helvering, 292 U.S. 360, 369 (1934): "When a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto,* and takes on the character of a trader . . . ." 96 S. Ct. at 1862. It then asserted that "[i]t is thus a familiar concept that 'there is a constitutional line between the State as government and the State as trader . . . .' " *Id.* at 1862, *quoting* New York v. United States, 326 U.S. 572, 579 (1946).

mercial activity at issue, the plurality drew heavily on the restrictive doctrine of sovereign immunity.[109]

Both the *Victory Transport* and *Alfred Dunhill* cases use historical and traditional criteria to determine if an enterprise is "commercial" in nature. Another approach to the question is to ask: How important is the activity to the economy of the state imposing the restraint? Some would argue that any truly important economic activity is necessarily "political," since most countries today view the management of their own economies as a central mission of government. Without doubt, Saudi Arabia or Kuwait would regard production and pricing of oil as not only *a* political question, but *the* political question within their borders. Jamaica would take the same position regarding its massive bauxite reserves. This approach would label an activity "political" if the government involved regarded it as too important to be left to the market. Such an approach might not change the status of such activities as running an airline, a stadium, or a bank—these would still be "commercial"—but it might require that many other things we presently classify as "commercial," be reclassified as "political."

A determination under this test, that a foreign state-owned enterprise was not "commercial," need not be determinative of an American party's liability for voluntarily participating with the state-owned enterprise in conduct violating American antitrust law. The inquiry might focus, in part, on whether the American corporation had engaged in a "commercial" relationship with such a foreign state-owned enterprise, or whether the relationship was "sovereign." Here, the distinction between "contract" and "command" might prove vital.

III

Government-Created Antitrust Problems

Governmental interests—whether labeled "political," "commercial," or "mercantilist"—have created several related antitrust problems in recent years. The first arises when governments serve as cartel managers—seeking to restrict supply, raise prices, and generally control markets. The second problem occurs when a government seeks to get American commercial firms to boycott other American firms that the government disapproves of for "political" reasons. The third problem occurs when a government vests de facto monopoly power in private suppliers, normally by price regulation that creates a supply shortage. Private firms may run serious

[109] 96 S. Ct. at 1863-66.

antitrust risks in all of these situations. The recent "cartel" and "boycott" problems have generally had foreign origins. However, the "de facto monopoly" problem has arisen here largely as a result of federal price regulation which has created product shortages in oil and other key markets. Although the application of United States antitrust rules may be more limited in the foreign context,[110] antitrust analysis should follow the same broad lines at home and abroad.

A. *Risks Created by Government-Organized Cartels*

The biggest and most successful of the international producer cartels fully illustrates the problem in this area. The Organization of Petroleum Exporting Countries, after several years of unsuccessful efforts to raise international oil prices, struck gold in late 1973. The Arab oil boycott, organized for largely political reasons in the wake of the 1973 Arab-Israeli War, created an instant and very dramatic oil shortage throughout the industrialized world. Prices naturally rose quickly. OPEC exploited this situation by taking over as a cartel manager. Since then, it has sought to peg all oil prices to certain grades of light Arabian crude oil.[111] As a practical matter, the task has become increasingly difficult. High prices have lessened demand for oil thereby increasing the temptation for individual OPEC members to "cheat" on prices.[112] There has, of course, been profit in this whole arrangement for the international oil companies.[113] At the same time, OPEC's new-found muscle has produced political risks to these same companies, with producer states increasingly either nationalizing production facilities or demanding larger ownership

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[110] *See* Baker, *Antitrust and World Trade: Tempest in an International Teapot?*, 8 CORNELL INT'L L.J. 16 (1974). The United States antitrust interest falls into two areas: where there is a direct restraint on the American import market, and where there is a restraint on the export business opportunities for American firms. The rules apply to all within reach of our jurisdiction regardless of the origin of the restraints. If the parties intend to restrain our import competition, or American export opportunities, then the restraints will be reached. In my view, however, the law does not reach restraints practiced abroad for the purpose of restraining the trade of businesses and consumers in other countries, so long as there is no immediate or direct effect on United States import competition or competitive export opportunities for American firms.

[111] *See generally* prepared statement of G.T. Piercy, Senior Vice President and Director, Exxon Corp., *Hearings on Multinational Petroleum Companies and Foreign Policy Before the Subcomm. on Multinational Corporations of the Senate Foreign Relations Comm.*, 93rd Cong., 1st & 2d Sess., pt. 5, at 211-17 (1974) [hereinafter *Senate Multinational Hearings*]. *See also id.* at 288, 296 (charts).

[112] *See, e.g.*, Wall St. J., Nov. 19, 1975, at 19, col. 1. This is a normal problem for cartels. *See* P. AREEDA, ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES 290-93 (2d ed. 1974).

[113] *See, e.g.*, the fourfold increase in per barrel profits for Aramco between 1972 and 1974. *Senate Multinational Hearings*, *supra* note 111, pt. 7, at 177.

shares of producer companies.[114] In response, the international oil companies have sought to bargain jointly with OPEC member-states in order to avoid being picked off one by one.[115] As beneficiaries of the OPEC action, the companies also had to avoid the danger of becoming a private cartel dedicated to serving the interests of the OPEC governments.

The antitrust risks in such situations are obvious. It is hornbook law that private parties cannot manipulate product market prices, even for ostensibly good "political" purposes. Thus, in *Socony-Vacuum*[116] the major oil companies were successfully prosecuted for propping up midwestern "spot" market prices by collectively buying up "distress" gasoline before it reached the market. Even though performed with at least informal governmental encouragement, the companies' action was a per se violation. It is also hornbook law that if a group of competitors accepts a plan of a third party to restrain commerce, that group can be guilty of conspiracy to violate the antitrust laws. In the important *Interstate Circuit* case,[117] a group of suppliers was successfully prosecuted for accepting a major customer's invitation to raise the prices charged to that customer's smaller competitors. It is not clear that the initiator of such a conspiracy need itself be subject to the antitrust law, for *common acceptance* of the proposal by direct competitors formed the basis of the conspiracy. Thus, looking at an analogous area, a group of competing employers can at times be successfully prosecuted for accepting an anticompetitive plan put to them by an exempt labor union.[118] So long as the producers are in the role of parties obeying the commands of various sovereigns and are carrying out these commands abroad, they need not fear liability under the *Interstate Circuit* doctrine. However, to the extent that the oil companies become voluntary partners in implementing a cartelization scheme, they run the risk of having the whole arrangement treated as a private conspiracy. Antitrust law makes an appropriate distinction, clearly seen in the *Sisal Sales* and *Continental Ore* decisions, between deliberate or discretionary private acts, and those required by government.

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[114] *See, e.g., Senate Multinational Hearings, supra* note 111, pt. 5, at 229-31 (chronology of producer-country demands).

[115] *See generally* correspondence 1971-73 between John J. McCloy (attorney for the major oil companies) and the Antitrust Division of the Department of Justice, reprinted in *Senate Multinational Hearings, supra* note 111, pt. 6, at 223-70.

[116] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[117] Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939).

[118] *See* Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797 (1945). Liability depends on whether the union's proposal is an appropriate bargaining area. *See* Local 189 Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965); United Mine Workers v. Pennington, 381 U.S. 657 (1965).

Cooperation in order to present a "common bargaining front" in dealing with a government-sponsored cartel raises practical antitrust problems. Members of the bargaining group must cooperate on commercially sensitive matters, ranging from price and product availability, to broader issues of commercial strategy. Such efforts may necessarily affect product availability in various markets and may result in greater uniformity of commercial practice among those involved. Again, the analogy to the labor area seems persuasive. In the typical multi-employer bargaining situation, a group of employers join together to bargain with an exempt party, a labor union. Although such bargaining may threaten the competitive process, it is usually allowed out of a sense of equity in order to protect an ultimate consumer interest in not having the employers "picked off" one by one. The antitrust issue is most clearly focused where various employers establish mutual assistance pacts, in which they collectively agree to shut down the supply in the market. Such mutual assistance pacts are quite common in a number of fields[119]—including newspaper publishing in particular cities—yet they have passed unchallenged by the Government. The only such pact challenged on antitrust grounds was upheld.[120]

The type of problem involved in "mutual aid" efforts is well-illustrated by *Long Island Lighting Co. v. Standard Oil of California.*[121] The plaintiffs were two New York utilities that depended on Libyan sources for their low-sulphur oil requirements. The defendants were a group of oil companies operating in Libya and

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[119] *See* NLRB v. Truck Drivers Local 449, 353 U.S. 87, 95 nn.23, 24 (1957).

[120] Kennedy v. Long Island R.R., 211 F. Supp. 478 (1962), *aff'd,* 319 F.2d 366 (2d Cir.), *cert. denied,* 375 U.S. 830 (1963). This case may have been poorly pleaded by the plaintiff railway union which challenged a mutual assistance pact entered into by a number of railroads to deal with "whip-saw" strikes. The plaintiff focused on restraints on competition for labor—which the court held to be exempt—rather than on restrictions in the markets where the employers competed. The point at issue was an "insurance" scheme and hence it did not involve any lock-outs having direct market impact. The issue has been raised several times before the Civil Aeronautics Board. *See, e.g.,* Air Line Pilots Ass'n Int'l v. CAB, 502 F.2d 453 (D.C. Cir. 1974), *cert. denied,* 420 U.S. 972 (1975). Airline employees challenged the Civil Aeronautics Board's (CAB) approval of amendments to the airlines' Mutual Aid Pact. Under the Mutual Aid Pact, created in 1958, strike-bound companies received certain payments from other Pact members. Later amendments provided for "supplemental payments." Petitioners challenged the increase in supplemental payment rates, the higher ceiling on individual carrier liability, and the CAB's approval of a 1971 amendment authorizing participation of local carriers. By way of dicta, the court pointed out that the Federal Aviation Act, 49 U.S.C. § 1486(e)(1970), specifically exempted agreements approved by the CAB from operation of the antitrust laws. *Id.* at 457. In an earlier opinion concerning the Pact's validity, the CAB concluded that the Pact neither restrained trade nor lessened competition. *See id.* at 457 n.15 (1974).

[121] Long Island Lighting Co. v. Standard Oil Co., 521 F.2d 1269 (2d Cir. 1975), *cert. denied,* 423 U.S. 1073 (1976).

elsewhere in the Middle East. The defendants had refused to extract and ship Libyan oil in order both to counter Libyan threats to nationalize their oil operations, and to deter other Arab governments from making similar threats.[122] As a result of this collective action, the plaintiff utilities were deprived of the low-sulphur oil for which they had contracted.[123] They sued, alleging a group boycott under the Sherman Act. The complaint was dismissed on the ground that the boycott was directed at the governments involved, rather than at the plaintiffs, and therefore the plaintiffs (even if injured) lacked standing under the so-called "target area" doctrine of antitrust law.[124] The court did not reach a decision on the legal implications of the defendant's collective action. It did note, however, that the collective effort was aimed in part at strengthening the bargaining hand and staying power of those smaller producers who lacked substantial alternative reserves from outside of Libya.[125] The fact that the "targets" of the alleged "conspiracy" were sovereigns engaged in manipulating an international cartel reduced any practical risk that they could or would bring an antitrust suit against the oil companies' actions.[126]

The question of mutual assistance in joint bargaining efforts was considered by the Antitrust Division of the Department of Justice in business reviews that were given to the major oil companies prior to their negotiations with the OPEC cartel in 1971. The oil companies wanted to negotiate jointly and cooperate in other

[122] *Id.* at 1272-73.

[123] *Id.*

[124] *See, e.g.*, Billy Baxter, Inc. v. Coca Cola Co., 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971). In fact the plaintiffs were not the direct purchasers of the Libyan oil, but bought it from an intermediate company. This presented additional "target area" problems that did not turn out to be controlling. The Second Circuit has recognized that "any antitrust violation may produce ripple effects of injury quite far removed from the immediate target of the violation .... [E]ven parties whose injuries may be both immediate and foreseeable may lack standing to pursue a private remedy if that injury is indirect or incidental, or if their business is not in the target area of the allegedly illegal acts. Long Island Lighting Co. v. Standard Oil Co. 521 F.2d 1269, 1273-74 (1975), *cert. denied*, 423 U.S. 1073 (1976).

[125] 521 F.2d at 1272.

[126] The exact standing of foreign sovereigns who recover in United States courts for United States antitrust violations is an important issue at this time. *See* Note, *The Capacity of Foreign Sovereigns to Maintain Private Antitrust Actions*, 9 CORNELL INT'L L.J. 137 (1975). This is true even where the antitrust violation is clear on its face and takes place in the United States. Even if a foreign sovereign can recover in such circumstances, it by no means follows that foreign governments engaged in cartelizing should be able to sue American firms under the United States antitrust laws for overseas conduct of a "counter-cartel" nature. Although *in pari delicto* is not regarded as a defense to private antitrust suits in most instances (*see, e.g.*, Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968)), that line of cases seems to rest both on the thought that the plaintiff was to some extent the unwilling victim, and on the overriding interest in having the antitrust laws enforced by private plaintiffs. Neither consideration seems applicable to the cartel-creating sovereign.

ways in dealing with OPEC concerning contemplated price increases and the Libyan expropriation efforts at issue in the *Long Island Lighting* case.[127] The Department granted the business review request on a limited scale. In 1974 the Department explained its action:

> The Division felt, at that time, that the Libyan sharing agreement seemed to provide important protection for smaller oil companies operating in Libya which had no other alternative sources of crude oil. . . . These proposed actions raised novel antitrust issues, but our files indicate it was then believed that these actions were necessary as a countervailing force to the producer cartel with which the oil companies were confronted, and that these actions would more likely have a beneficial than an adverse effect on U.S. foreign commerce. It is important to recall that the stated intent of these proposed arrangements was to maintain oil prices at lower levels than would exist if the OPEC nations could negotiate with companies one-by-one; increasing the terms required for settlement with each negotiation.[128]

In 1973 the oil companies requested a further business review,[129] and the Antitrust Division conducted an extensive review of its own to assure that the companies had not gone beyond the limited approval given in the prior letter.[130] A new business review letter authorized the companies to engage in joint bargaining with OPEC in Vienna in 1973.[131] The Antitrust Division made clear that its approval was limited:

> our non-disapproval is in no way intended to sanction or authorize any joint oil company action which tends to reduce the supply of petroleum to the United States, such as joint agreements with OPEC concerning production levels or refinery construction, or joint agreements among oil companies to halt production or cease lifting oil in any country, to boycott oil from any country, or to chase so-called "hot oil."[132]

Cooperative bargaining among those dealing with a government-sponsored cartel should create no antitrust liability if done properly. The cooperating parties must show that they will direct their efforts only at the other side and that their cooperation will not have any unnecessarily broad impact on competition in the domestic

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[127] 521 F.2d 1269 (2d Cir. 1975).

[128] Testimony of Thomas E. Kauper, former Assistant Attorney General, Antitrust Division, Department of Justice, in *Senate Multinational Hearings, supra* note 111, pt. 9, at 45, 47.

[129] *Id.* at 47.

[130] *Id.* at 48.

[131] *Id.*

[132] *Id.*

market or on the export opportunities for American firms.[133] The cases will inevitably turn on their facts. What, in effect, was the purpose of the agreement? Was it unnecessarily broad? Did it touch on matters not absolutely necessary to the joint bargaining mutual assistance efforts? All these questions will be crucial.

A final antitrust problem arises when a group of firms dealing with a government or a government cartel uses improper means to influence the government (or the cartel) to take anticompetitive measures.[134] As a general rule, private firms may urge any government to take anticompetitive action. However, this principle—which also seems applicable in the international area[135]—is subject to some important qualifications. To start with, antitrust law may still apply if the government involved is engaged in "commercial" relations with the private firms, such as procurement of goods or services.[136] Second, antitrust liability may be appropriate where private firms cover up activities by lying, and thereby cause the government to take anticompetitive steps which it might not otherwise take. The general principle was developed in connection with frauds on the Patent Office,[137] but has much broader ramifications. It was applied to a collective attempt by oil producers to cause a government regulatory body to hold down new production in oil, where the producers filed false production forecasts with the government in order to accomplish the desired result.[138] In a business environment dominated by government cartels, private firms engaged in collective lying might well be subject to antitrust liability if their efforts succeeded in causing a government-dominated cartel or its member governments to restrict competitive imports into the United States or to restrict export opportunities for American firms abroad. This

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[133] *See* United States v. Minnesota Mining Co., 92 F. Supp. 947, 965 (D. Mass. 1950).

[134] United Mineworkers v. Pennington, 381 U.S. 657 (1965); Eastern R.R. President's Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

[135] *Cf.* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

[136] *See* Whitten v. Paddock Pool Builders, Inc., 424 F.2d 25, 33 (1st. Cir.), *cert. denied,* 400 U.S. 850 (1970); Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir.), *cert. denied,* 404 U.S. 1047 (1972). The issue seems analogous to that raised in *Victory Transport* and other sovereign immunity cases discussed in text accompanying notes 92-103 *supra.*

[137] See Walker Process Equip. Co. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965), which held that a patent holder who procures a patent by fraud may be sued for attempted monopoly or monopolization under § 2 of the Sherman Act, provided that the normal § 2 requirements of actual or threatened control of a relevant market can be established. *Walker Process* builds on Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806 (1945), which held that a party knowing of fraud on the patent office can be denied equitable patent law remedies for infringement.

[138] Woods Exploration & Prod. Co. v. Aluminum Co., 438 F.2d 1286 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972).

may be a factor in limiting the full range of options open to a group of private firms engaged in negotiating collectively with a cartel.

To summarize, a governmental cartel made up entirely of sovereign states is almost surely exempt from American antitrust laws. Nevertheless, if the "core" cartel is exempt, private companies are subject to antitrust liability if they implement and carry out voluntarily the desires of the cartel and if their actions have the necessary effect on American import or interstate trade. At the same time, private companies need reasonable latitude to develop a common front in negotiating with a cartel. They should be able to obtain the necessary flexibility under the "rule of reason." The practical question is: Are the private companies mere buyers from the cartel, or are they implementors or orchestrators of the cartel? As long as their relationships with the cartel remain very much an arms-length or involuntary affair, private firms should not face serious antitrust problems for most activities. The one key exception, already discussed, is where the government cartel seeks to compel the private firms to take action *within* the United States which would violate American antitrust law.[139]

B. *Risks Created by Government-Organized Political Boycotts*

Many of the same antitrust questions are raised by the government-organized political boycott, a similarity noted by the Justice Department in the *Bechtel Corporation* case.[140] Typically, Arab governments have refused to do business with "Zionist" firms. They maintain "blacklists" and a "Central Office for the Boycott of Israel" to police the boycott. The governments in turn have pressured private firms with which they deal not to patronize blacklisted firms. This boycott has become visible in manufacturing industries and in such service fields as securities underwriting and finance. It provides the basis for the Government's *Bechtel* case.

In fact, two separate but overlapping boycotts may form "the Arab boycott." The first boycott—which we might call the "core" boycott—involves Arab governments and state trading corporations. The governments and corporations directly agree among themselves: (*1*) to bar blacklisted firms from operating in their countries; (*2*) not to deal with blacklisted firms; and (*3*) to pressure others not to deal with "blacklisted" firms. The second boycott—which we might label "peripheral"—occurs when this "core" boycott combina-

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[139] *See* notes 46-52 *supra*.

[140] United States v. Bechtel Corp., C.A. No. 76-99 (N.D. Cal., filed Jan. 16, 1976). *See* notes 52-53 and accompanying text *supra*.

tion pressures one or more businesses into agreeing not to deal with blacklisted firms.

The "core" boycott seems clearly exempt from United States antitrust law since it involves "political" commands by foreign sovereigns within their own territory. On the other hand, the "peripheral" boycott may raise the type of significant antitrust risks revealed in the *Bechtel* case.

Commercial boycotts are severely dealt with under the Sherman Act.[141] Because they are inherently coercive and restrain individual company choice,[142] such boycotts are said to be illegal per se, without requiring proof that competition is actually harmed.[143] An important part of the anti-boycott rationale is that a systematic boycott becomes "an extra-governmental agency" that "trenches on the power of the national legislature."[144] If a purely private combination can produce this undersirable effect, so too can a foreign government-induced combination.

In fact, our courts have been somewhat ambivalent in applying boycott rules to political or ideological boycotts as opposed to economic ones. Two relatively recent court of appeals decisions illustrate this ambivalence. In one case, the Sixth Circuit struck down a collective plan of a local board of realtors not to show houses in "white" areas to black buyers, although the realtors did not benefit economically from the boycott.[145] In the second case, an educational association of non-profit colleges and schools refused to consider for accreditation a proprietary college, thereby depriving it of certain government funds and other benefits.[146] The association reasoned that profit-making educational institutions were bound to have

[141] *See* Fashion Originators Guild v. FTC, 312 U.S. 457 (1941) (blacklist of "style pirates"); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914) (blacklist of direct-dealing wholesalers).

[142] The basic per se rule applies only to collective boycotts, because Sherman Act § 1 only reaches multi-firm conduct. In fact, the courts have not applied the per se test where the collective refusal to deal was merely incidental to some legitimate joint activity, and was arguably necessary to carry it out. *See* Worthen Bank & Trust Co. v. National BankAmericard, Inc., 485 F.2d 119 (8th Cir. 1973), *cert. denied,* 415 U.S. 918 (1974) (bank credit card joint venture); E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178 (5th Cir. 1972), *cert. denied,* 409 U.S. 1109 (1973) (tour listings). *See also* Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925). Even if there is no collective refusal, an individual refusal to deal may be reached under Sherman Act § 2, if a firm holds a monopoly position, or might acquire one by these tactics. *See* Lorain Journal v. United States, 342 U.S. 143 (1951). *See* notes 162-63 and accompanying text *infra.*

[143] Klor's Inc. v. Broadway Hale Stores, Inc., 359 U.S. 207 (1959).

[144] Fashion Originators Guild v. FTC, 312 U.S. 457, 465 (1941).

[145] Bratcher v. Akron Area Bd. of Realtors, 381 F.2d 723 (6th Cir. 1967).

[146] Marjorie Webster Jr. Coll., Inc. v. Middle States Ass'n of Colls. & Secondary Schools, 432 F.2d 650 (D.C. Cir. 1970).

lower academic standards and hence could not be accredited. A divided District of Columbia Circuit held that this was essentially a matter of educational standards, not of economics.[147] The practical message seems to be that the political nature of the core Arab boycott may allow others to raise the political question as a defense to their own peripheral activities, but it is far from clear that such a defense will or should be allowed.

The *Bechtel* case illustrates some of the problems in this area. Bechtel Corporation and various majority-controlled subsidiaries are alleged to have conspired with various unnamed (and undefined) co-conspirators to implement in the United States[148] an agreement

> (a) To refuse to deal with Blacklisted Persons as Subcontractors in connection with Major Construction Projects in Arab League Countries; and
> (b) To Require Subcontractors to refuse to deal with Blacklisted Persons in connection with Major Construction Projects in Arab League Countries in which any defendant acted as a Prime Contractor.[149]

In furtherance of the conspiracy, the parties were alleged to have done various things—including "obtaining lists or other identification of Blacklisted Persons."[150] The Government alleged that the boycott had the effect of excluding blacklisted Americans from Arab projects, restricting American exports, and denying American subcontractors freedom of choice in dealing.

Bechtel is a suit limited to situations where boycott agreements involving essentially foreign parties are implemented by a firm (or firms) in the United States and have the effect of checking the flow of domestic trade and American export opportunities. In essence, as a matter of conspiracy law, the defendant, Bechtel, is treated as having become a member of the foreign conspiracy.[151] The boycott issue can, however, arise in a variety of ways where the American firms can themselves be said to have created a boycott in the United States.

The first type of situation would in essence be an *Interstate Circuit*

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[147] *Id.* at 658.

[148] Complaint in United States v. Bechtel Corp., C.A. No. 76-99 (N.D. Cal., filed Jan. 16, 1976), reprinted in ANTITRUST & TRADE REG. REP., No. 747, D-1 (Jan. 20, 1976).

[149] *Id.* at ¶ 21.

[150] *Id.* at ¶ 22.

[151] The Sherman Act requirement of a "contract, combination or conspiracy" has been found to be met even where coercion rather than consent was the basis for the "agreement." *See* United States v. Parke, Davis & Co., 362 U.S. 29, 41-42 (1960).

type conspiracy.[152] In other words, several American firms, operating in the United States and selling abroad, could each individually agree with an Arab government or state trading corporation not to deal with blacklisted firms *for any purposes*—each such firm knowing that exactly the same proposition is being put to its principal competitors. Here, a boycott agreement among the competitors might be implied, especially if the American competitors seem to have willingly accepted the Arab offer or profited by doing so.[153] A key element in finding such an agreement will be whether the action can be said to be interdependent in the sense that each firm's conduct depends on similar conduct by others.[154]

A second type of situation occurs where an Arab member of the core boycott deals in the United States with a group of American firms. For example, assume that the members of an American underwriting syndicate refuse to include in their group a New York firm blacklisted by the Arabs.[155] This might occur because the Arab issuer of the securities insisted on the issuer's traditional right to select the members of its underwriting syndicate. Alternatively, syndicate members might fear that if a blacklisted New York firm were included in a domestic underwriting, other issuers might refuse to deal with the syndicate members on future underwritings. The first case is at least close, since the boycott arguably comprises unilateral conduct by the Arab issuer. The second is clearly a boycott punishable under the Sherman Act section 1 per se rules.

A third type of situation occurs where American firms agree to take ancillary action that facilitates the overseas "core" boycott. For example, the firms might furnish the Arabs information about their suppliers, customers, or blacklisted firms. Such action is collective and makes the boycott effective, and might thus establish antitrust liability if it resulted in restraint of competition in American markets.

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[152] *See* notes 117-18 and accompanying text *supra.*

[153] It is interesting that in the landmark case of Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914), the extent of the horizontal "agreement" was fairly weak. In fact, the Court was willing to infer that the firms receiving the "blacklist" would operate in a concerted manner largely because it was in their economic interest as a group to do so. *Id.* at 608-09.

[154] *Compare* Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954), *with* Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939). *See* Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal,* 75 HARV. L. REV. 655 (1962).

[155] The membership of a syndicate will change with each offering. In essence, each offering is a "one shot" joint venture. *See* United States v. Morgan, 118 F. Supp. 621 (S.D.N.Y. 1953).

Boycott liability under American law is much more unlikely when the conduct takes place abroad and is directed at nationals of other countries. For example, suppose that a London underwriting group, composed of British and American firms, excluded a particular London firm blacklisted by Arabs from an underwriting for an Arab issuer. Here, there is no direct impact on American commerce and hence no basis for invoking United States law. This would follow even if the issuer for the particular underwriting were American since the restraint would fall on a British firm. If, on the other hand, the London boycott were directed at a blacklisted American issuer, then liability might theoretically be possible, since the action might restrain the importation of capital into America.

The practical boycott issues essentially involve peripheral involvement by American firms (or those refusing to deal with them) in a "core" boycott run by Arab governments. Direct application of United States law against the governments is not realistic. Any United States legal action is likely to be directed against activity at the periphery of the boycott.

C. *Risks of De Facto Monopoly Created by Government-Caused Shortages*

Governments can create monopoly power in different ways. The government can directly grant a monopoly, as in *Continental Ore.*[156] Government embargoes may create monopoly. Government price regulation may indirectly create monopoly power among suppliers if the regulated price is held below the normal market-clearing price. As a result of such regulation, some buyers, who would have left the market had the price been allowed to rise, stay in the market. Meanwhile, existing sellers who would have stayed in the market may drop out, and new entrants may stay out, depending in both cases on their effective alternatives and the duration of the price regulation.[157]

Price regulation creates an imbalance of demand, but some alternative for leveling that imbalance must be found. One means is by queuing. Long lines at the gasoline pumps in 1974 forced out those unwilling to put up with the queue—those whose demand function for time was above average. Another means is by rationing—formal or informal—according to some reasonable for-

[156] Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

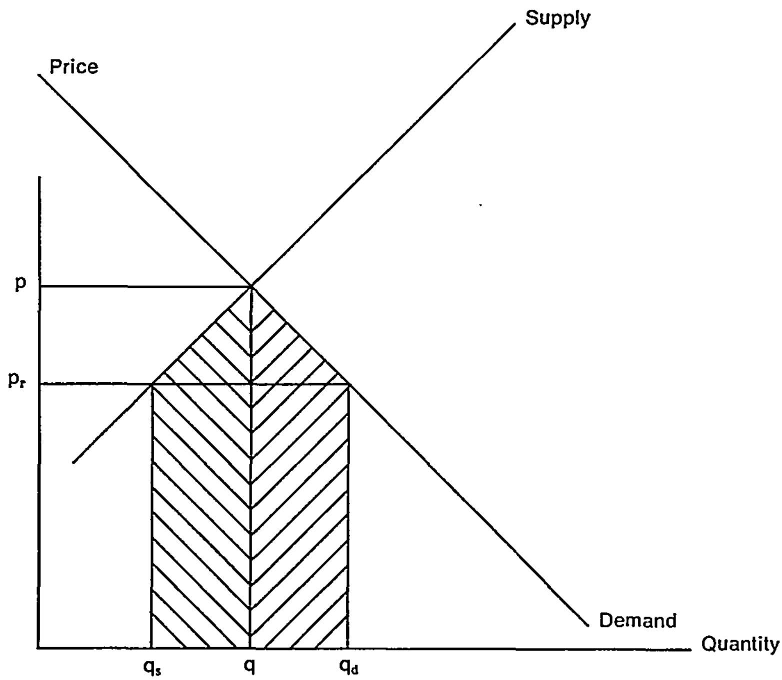
[157] The economic concepts are both simple and fundamental. Normal supply and demand schedules will cause an available quantity (q) to clear the market at an equilibrium price (p). However, government then decides that p is "too high" to be politically acceptable, so it imposes a lower regulated price (p_r). This will in turn call forth a demand for a higher quantity (q_d) which is by definition not available. Meanwhile, p_r will cause supply to contract to a lower quantity (q_s). As a result, there is a shortage of $q_d - q_s$.

mula. Still a third is arbitrary favoritism, based on friendship, under-the-table considerations, or other special factors.

As a practical matter, during 1973-74 many suppliers had to make affirmative decisions as to how to allocate production among their customers. Suppliers were turned into de facto monopolists vis-à-vis their traditional customers. During such a general supply shortage, the customers could not turn to new suppliers as they would in a competitive market. In other words, each supplier was dealing with customers who had few market choices. Thus, the supplier exercised effective monopoly power.

The use of this government-created monopoly power must be a matter of antitrust concern. Monopoly power may be used to favor one customer over others. It may be used to discipline price cutters and innovators. Integrated firms may use their power to gain advantages over unintegrated competitors. Suppliers may force customers to accept contract packages favoring the supplier. Such de facto grants of monopoly power raise serious issues.

This type of situation does not fit conveniently into the established antitrust learning because the type of "monopoly power"



In the long run the slopes of the Supply and Demand schedules tend to become less steep as customers and suppliers adjust more completely to conditions; therefore, the difference between q_d and q_s will become greater over time—making the total shortage problem more acute. *See generally* R. ECKHAUS, BASIC ECONOMICS 412-28 (1972).

created by price regulation is superficially quite different from that with which courts have generally been concerned in monopolization cases. Normally, courts have defined "monopoly power" as the power to "control the price and exclude competition in the market."[158] The market share of the alleged monopolist has usually been determinative in the leading cases.[159] Such power has normally been found where a competitor had over two-thirds of the relevant market.[160] Under traditional standards, a firm with the requisite market share that has maintained its position by means not honestly industrial has violated section 2 of the Sherman Act.

The traditional learning does not deal with monopoly power created by means other than control of an overwhelming share of the primary market. Yet the law is broad enough, and I believe flexible enough, to deal with other forms of monopoly power. Thus, for example, a firm with a very small part of a supply-short market may in fact have monopoly power, without regard to its actual percentage share. Where the evidence proves monopoly power, it is altogether appropriate to treat such a firm in exactly the same way as a traditional monopolist.

The practical implications of doing this are important. An ordinary businessman may refuse to deal with anyone for whatever reasons he wants.[161] A "monopolist" cannot do this.[162] In essence, the monopolist is made into a common carrier, subject to the duty of dealing with all on non-discriminatory terms.[163]

This principle has important implications in a supply-shortage situation. In such a situation, the "monopolist" does not have enough to go around and is barred by government from raising prices to reduce demand. This makes the "common carrier" duty to treat all customers equitably a particularly significant one, because, without it, the economy would be subjected to a regime of favoritism, distortion, and "under the table" deals. The monopolist must develop a rational, even-handed scheme of allocation known to

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[158] United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 380 (1956).

[159] *See* United States v. Grinnell Corp., 384 U.S. 563 (1966); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

[160] In United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945), Judge Learned Hand suggested that 90% would surely qualify as monopoly power, 64% might do so, and 30% clearly would not. *Id.* at 424.

[161] United States v. Colgate & Co., 250 U.S. 300 (1919).

[162] Lorain Journal v. United States, 342 U.S. 143 (1951); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927).

[163] The implications of this principle have been most fully developed in cases involving joint venture monopolies. *See* Associated Press v. United States, 326 U.S. 1 (1945); United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383 (1912).

those who are interested. Some basic due process is required.[164] In addition, antitrust law would place on the de facto monopolist the burden of showing that the allocation scheme was not unnecessarily restrictive.[165]

At least two types of allocation plans are possible. One plan would allocate resources on a "first come, first served" basis. This is the way common carriers have traditionally worked.[166] Of course, this would require that reasonable notice of the use of this approach be made available to all potential customers, so that there are no "insiders" with a preferred status. The obvious analogy is to the general requirement that common carriers operate on the basis of previously published tariffs.[167] After such notice, orders could be allocated in the order received.

The second possible approach would work reasonably well where continuing customer-supplier relationships existed. Here, resources would be allotted on a pro rata basis in accordance with traditional volumes of purchase. Each customer would receive a percentage of his historic use. This is generally the way that government rationing schemes have operated.[168] Because this method of allocation discriminates against new entrants in the business,[169] it works better for short-term shortages than long-term ones.

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[164] Interestingly, ideas of procedural due process were at the heart of one of the leading cases on access to an essential facility. *See* Silver v. New York Stock Exch. Inc., 373 U.S. 341 (1963).

[165] The "rule of reason" standard used in Sherman Act § 1 cases frequently focuses on the question of whether an action is unnecessarily restrictive. *See* Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).

[166] The common carrier's duty of serving all comers on nondiscriminatory terms means that such a carrier "is, in general, bound to take the goods of all who offer, *unless his complement for the trip is full* . . . ." Propeller Niagara v. Cordes, 62 U.S. (21 How.) 7, 22 (1858) (emphasis added). *See also* Mount Tom Motor Line, Inc. v. McKesson & Robbins, Inc., 325 Mass. 45, 47-48, 89 N.E. 2d 3, 5-6 (1949). Common carrier concepts have had very broad application beyond the haulage of freight and passengers by transportation firms. *See, e.g.*, Anderson v. Fidelity & Cas. Co., 228 N.Y. 475, 480, 127 N.E. 584, 585 (1920).

[167] *See, e.g.*, 47 U.S.C. § 203 (1970) (communications carriers); 49 U.S.C. § 6(7) (1970) (surface transportation carriers).

[168] The mandatory fuel allocation scheme used by the Federal Energy Administration (FEA) operates in this manner. *See generally* 10 C.F.R. § 211 (1976), especially § 211.10, which deals with allocation procedures for sellers, and the specific allocation formulas in §§ 211.67, (old oil), 211.83 (propane), 211.93 (butane and natural gas), 211.103 (motor gasoline), 211.123 (middle distillate), 211.143 (aviation fuel), 211.163 (residual fuel oil), 211.183 (naphthas), and 211.203 (other products). Here the Government applies very different percentage allocations to different classes of customers based on its judgment as to social importance. An unregulated seller would run serious (and appropriate) antitrust risks if it sought to do this. Instead, the unregulated seller must stick to across-the-board percentage allocations.

[169] The FEA mandatory fuel allocation regulations do seek to deal with this problem by creating special schemes for new suppliers (10 C.F.R. § 211.10(e) (1976)) and new wholesale buyers (10 C.F.R. § 211.12(e) (1976)).

The vertically-integrated supplier has special problems in a shortage situation. It cannot be permitted to use its temporary de facto monopoly to squeeze unintegrated customers out of the business. In the closely analogous *Alcoa* case,[170] the defendant was found to have used a monopoly at the supply level to force unintegrated fabricators out of the market.[171] What the defendant did was practice a "price squeeze" of holding its aluminum ingot price high in relation to its finished fabricated aluminum products, thus making it difficult, and in most cases impossible, for a non-integrated fabricating competitior to survive.[172] The assumption was that Alcoa "charged" its fabricating divisions the same price as it charged non-integrated fabricators. The same principles apply with even greater force where the monopoly defendant favored its own fabricating divisions on terms of dealing—or refused to deal with its non-integrated customers altogether.[173] Of course, where government regulation holds down prices in the primary market and thereby prevents a "price squeeze," the integrated monopolist has to look to other forms of "squeezes" to reach the same result. The *Alcoa* message seems clear: vertically-integrated firms must treat their own operations and non-integrated customers the same in times of shortage. For example, if each customer is to get only two-thirds of its prior supply, the same formula should be applied to the de facto monopolist's own customer operations. The gasoline crisis of 1973 illustrates this problem.[174] It was widely suspected that integrated major oil companies were using the crisis to foreclose independent

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[170] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

[171] *Id.* at 435-39.

[172] Judge Learned Hand, speaking for the court, held

> [t]hat it was unlawful to set the price of "sheet" so low and hold the price of ingot so high . . . provided, as we have held, that on this record the price of ingot must be regarded as higher than a "fair price."

148 F.2d at 438. Alcoa asserted that it "charged" its fabricating divisions the same price as it charged non-integrated fabrications. The court looked carefully at Alcoa's differing rates of return in reaching its conclusions. 148 F.2d at 436-37.

[173] This was exactly the fact situation at issue in Eastman Kodak v. Southern Photo Materials Co., 273 U.S. 359 (1927), which is the leading case for the proposition that a monopolist cannot refuse to deal. Eastman Kodak, which had a monopoly of photographic supplies at the time, bought various local photographic supply stores that competed with the plaintiff, Southern Photo Materials, and also unsuccessfully sought to acquire the plaintiff. Eastman Kodak then refused to deal with the plaintiff as a dealer—*i.e.*, at the normal dealers' discounts. This was held illegal.

[174] *See, e.g.*, Brennan Petroleum Prods. Co. v. Pasco Petroleum Co., 373 F. Supp. 1312 (D. Ariz. 1974), which involved allegations that a small integrated oil company had favored its own newly-built service stations over independent stations.

competition.[175] The Federal Energy Administration developed special regulations designed to ensure that this did not continue.[176]

Finally, the de facto monopoly situation can create special tie-in and reciprocity problems. If the de facto monopolist favors customers who buy other products from him, he is exploiting a shortage to benefit his other operations.[177] All that is required for a tie-in is that the seller be selling two products and use his monopoly power over one product to boost sales of the other by requiring the purchase of both as a condition of doing business,[178] thereby foreclosing competing sellers of the tie product from the market. As the Supreme Court has said, "tying agreements fare harshly under the laws forbidding restraints of trade"[179]—largely because the Court has found that they "serve hardly any purpose beyond the suppression of competition."[180] As a result, they are illegal per se under both the Clayton Act[181] and the Sherman Act.[182] But the courts have gone further and treated a situation involving economic pressure—as opposed to an absolute contractual requirement—as being an illegal tie-in between the two products.[183] The courts have also required progressively less showing of economic power in the tie-in area,[184]

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[175] This concern was reflected in the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 753(b)(1)(D) (Supp. IV, 1974), which specifically required FEA, under its allocation regulations, "to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers."

[176] *See* 10 C.F.R. § 211 (1975). These regulations on mandatory petroleum allocation provide a complex system of allocating available supply based on a formula tied to use during a prior base period. Special systems of priority are established (10 C.F.R. § 211.10 (1976)) as are rules for purchasers without a base period allocation (10 C.F.R. § 211.10 (d)(1976)).

[177] The problem is illustrated by Reeves v. Simon, 507 F.2d 455 (Temp. Emer. Ct. App. 1974), which arose under 10 C.F.R. § 210 (1975). The plaintiff, a gas station proprietor, split his allocation during the fuel shortage between the motoring public at large and his "regular customers." The latter were those who apparently bought other products from the defendant or had bought gasoline when it was not scarce. Plaintiff unsuccessfully challenged the validity of the regulation. Reeves' actions were characterized as a discrimination in violation of the regulation but it could well have been challenged as a tie-in—between short-supply gasoline and other products.

[178] *See, e.g.,* International Salt Co. v. United States, 332 U.S. 392 (1947).

[179] Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 606 (1953).

[180] Standard Oil Co. v. United States, 337 U.S. 293, 305-06 (1949).

[181] *Id.* at 306.

[182] Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5-7 (1958).

[183] Therefore, for example, situations where differential royalties are provided in a license, depending on whether the licensee accepts the tied product have been treated as a tie-in. *See, e.g.,* Oxford Varnish Corp. v. Ault & Wiborg Corp., 83 F.2d 764 (6th Cir. 1936). *See also* Advance Bus. Systems & Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969).

[184] For example, in Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969), the Supreme Court treated credit offered at favorable terms to purchasers of a product as creating a tie-in. I believe this trend has gone too far, with the result that the

with the result that much less "monopoly power" is required to establish a tie-in than is needed for Sherman Act section 2 purposes.[185] The shortage caused by price regulation would surely meet the tie-in test, even if it failed to meet the section 2 test.[186] In essence, a supplier in a shortage situation—who has real market power—could use the tie-in as a device for beating the price regulation scheme: by tying other products to the regulated one, he would earn a return from the tied product in excess of the market rate.[187]

Reciprocity practices would raise the same essential issues, and appear to be illegal if based on agreements. There are very few decided cases on reciprocity under the Sherman Act,[188] but in principle the courts seem to have been willing to recognize the analogy to tie-ins, and to view reciprocity as " 'an alien and irrelevant factor' . . . intruding into the choice among competing products . . . ."[189] Of course, the "normal" reciprocity case assumes the opposite of what we have here: that adequate supply is available and that prices are above the market level. Hence the allegation in such a case is that the *buyer* of such a product will favor the seller who buys other products

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Supreme Court may be finding monopoly power when competitive initiative is present. *See* Baker, *Another Look at Franchise Tie-ins after Texaco and Fortner*, 14 ANTITRUST BULL. 767, 773-76 (1969). However, the Supreme Court has just granted certiorari on a later stage of the *Fortner* litigation, and may have a chance to reconsider the issue. *See* United States Steel Corp. v. Fortner Enterprises, 523 F.2d 961 (6th Cir. 1975), *cert. granted*, 96 S. Ct. 1100 (1976).

[185] Congress in fact passed a special statutory tie-in rule for banks in 1970, partially as a result of these kinds of situations. Bank Holding Company Act Amendments of 1970, 12 U.S.C. § 1972 (1970). Banking institutions are subject to credit shortages from time to time as a result of deposit interest regulation (*e.g.*, 12 U.S.C. § 371a (1970) (prohibiting interest on demand deposits)), and are also subject to usury law ceilings on loans (*e.g.*, N.Y. Banking Law § 108 (McKinney 1971)). Congress was concerned about the effects of the monopoly power in part thus created, and therefore Congress enacted an absolutely flat prohibition on tying certain other financial services to bank loans.

[186] This is contrary to my argument at text accompanying notes 149-63 *supra*.

[187] *See* 10 C.F.R. § 210.62 (1976) (FEA General Allocation and Price Rule). This regulation mandates delivery during shortage "according to normal business practice" (*id.* § 210.62(a)), and it expressly outlaws "[a]ny practice which constitutes a means to obtain a price higher than is permitted by the regulations . . . . Such practices include, but are not limited to . . . commissions, kickbacks, retroactive increases . . . premiums, discounts, special privileges, tie-in agreements . . . ." (*id.* § 210.62(c)). *See generally* Reeves v. Simon, 507 F.2d 455 (Temp. Emer. Ct. App. 1974).

[188] *See* United States v. Airco, Inc., 386 F. Supp. 915 (S.D.N.Y. 1974); United States v. General Dynamics Corp., 258 F. Supp. 36 (S.D.N.Y. 1966); United States v. General Dynamics Corp., 246 F. Supp. 156 (S.D.N.Y. 1965). *General Dynamics* involved both a Clayton Act § 7 charge and a separate Sherman Act § 1 charge against the practice itself. *Airco* involved exclusively Sherman Act §§ 1-2 charges (which the Government lost on the record).

[189] FTC v. Consolidated Foods Corp., 380 U.S. 592, 594 (1965), *quoting* International Salt Co. v. United States, 332 U.S. 392, 396-97 (1947). *Consolidated Foods* was exclusively a Clayton Act § 7 challenge to a merger that would produce reciprocity.

from the buyer.[190] This analysis, however, can be turned around in the shortage situation created by regulated prices at below the market-clearing level. Here the reciprocity practice would be that the *seller* of the shortage item would simply favor buyers who sold him other shortage items on terms not otherwise available. Again, as with tie-ins, such a firm would be beating the price regulation scheme to its own advantage.[191] Although such a case would obviously be novel, it seems at least as sound in principle as the more traditional reciprocity cases brought during the past decade.

All of this suggests that de facto monopoly power created by price regulation does offer a range of special and interesting antitrust problems. Government's key role in creating the monopoly power makes the antitrust problem no easier. It is of course important here that government is commanding that prices be regulated, not that individual firms take advantage of the situation and favor themselves over others through special anticompetitive deals under the scheme. Price regulations may be fundamentally at odds with the fundamental antitrust goal of a free market, but antitrust law remains appropriate as a tool for dealing with the market power that government has unwittingly created.

CONCLUSION

In recent years, governments have not only created cartels and monopolies but also interesting and novel antitrust problems. The potential stakes for consumers and businessmen are large. The key challenge for businessmen and lawyers is to approach these problems in a careful and fact-oriented way. Antitrust law tends to respond to significant variations in fact situations; and therefore, careful analysis of effects and alternatives are often more important than mechanical parsing of old cases. Simplistic assumptions should be avoided at all cost—especially assumptions that the presence of a prince or a bureaucrat in the midst of some scheme necessarily eliminates any antitrust risk.

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[190] Thus, in FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965), the Supreme Court dealt with "[a] threatened withdrawal of orders if products . . . cease being bought, as well as a conditioning of future purchases on the receipt of orders for products . . . ." 380 U.S. at 594. The Supreme Court held that this is an anticompetitive practice. Such reciprocity "is one of the congeries of anticompetitive practices at which the antitrust laws are aimed. The practice results in 'an irrelevant or alien factor,' . . . intruding into the choice among competing products, creating at least 'a priority on the business at equal prices.'" *Id.* The reported Sherman Act § 1 cases challenging reciprocity also deal with allegations that the *buyer* has used his power to secure preferential sales of other products. *See* cases cited in note 174 *supra.*

[191] *See* note 187 *supra.*