

THE FOREIGN SOVEREIGN IMMUNITIES ACT AND ANTITRUST: A HOLLOW PROMISE

Donald E. deKieffer*

I. INTRODUCTION

The Foreign Sovereign Immunities Act of 1976¹ (FSIA) was initially hailed as a "wedge"² by which American plaintiffs, including the U.S. government, could challenge anticompetitive actions of foreign conspirators.³ To date, the FSIA has not fulfilled this promise, and seems unlikely to do so in the foreseeable future.

On its face, the FSIA appears to cut away jurisdictional and even substantive barriers to the international reach of the anti-

* B.A. University of Colorado, 1968; J.D. Georgetown University, 1971. Currently a partner in the law firm of deKieffer, Berg & Creskoff in Washington, D.C.

1. Pub. L. No. 94-583, § 4(a), 90 Stat. 2891 (1976), 28 U.S.C. §§ 1602-1611.

2. Comment by Alexander Sierck, Director of Trade Policy, Antitrust Division, United States Department of Justice, at the Fifth Annual Fordham Corporate Law Institute in New York City (1979).

3. The purpose of the FSIA is to meet the needs which have arisen from the increasing participation of foreign state enterprises in every day commercial activities. H.R. REP. NO. 94-1487, 94th Cong., 2d Sess., reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6605. It would serve this purpose by the accomplishment of four objectives. (1) It would codify the so-called "restrictive" theory of sovereign immunity, by which the immunity of a foreign state is restricted to suits involving a foreign state's public acts (*jure imperii*) and does not extend to suits based on its commercial or private acts (*jure gestionis*). (2) It would help to ensure that this restrictive theory of immunity is applied in litigation before U.S. courts. "At present, this is not always the case." [1976] USCCAN at 6605-06. The State Department is often enlisted by the foreign governmental defendant to urge its claim of immunity before the U.S. court.

A principle purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds; . . . [t]he Department of State would be freed from "foreign political pressures" . . .

Id. at 6606. (3) It would provide a statutory procedure for service of process and personal jurisdiction. (4) It would provide American judgment creditors with some means of enforcement which had not previously existed in U.S. courts. *Id.*

Although the House Report accompanying the FSIA did not state that it had as one of its specific objectives the restriction of sovereign immunity in antitrust cases, the cases decided and which are cited in the discussion *infra* have so applied the FSIA. See *id.* at 6616-6621 (explaining the general exceptions to foreign state jurisdictional immunity listed in § 1605 of the FSIA).

trust laws. The FSIA⁴ codified what had developed in practice over the years as a distinction between government or public acts of sovereignty and purely commercial acts in which the "sovereign had descended to the level of an entrepreneur."⁵

Thus, the FSIA apparently would permit extension of our antitrust laws to:

- (1) Reach acts committed by foreign government-owned companies, or even foreign private companies acting at the behest of their governments which, had they occurred in the United States, would have been illegal;
- (2) Prohibit the "fruits" of such illegal acts committed abroad from entering the United States; and
- (3) Reach even conspiracies which involve no U.S. citizens and commercial enterprises located entirely outside the U.S.

It is evident, however, that American antitrust plaintiffs

4. Key sections include:

(A) Section 1603. Definitions. For purpose of this chapter—

- (a) A "foreign state" . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
- (b) An "agency or instrumentality of a foreign state" means any entity—
 - (1) which is a separate legal person, corporate or otherwise, and
 - (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof. . . .

. . . .
(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the *nature* of the conduct or particular transaction or act, rather than by reference to its *purpose* (emphasis added).

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

(B) Section 1605. General exceptions to the jurisdictional immunity of a foreign state.

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

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

For general discussion of the FSIA, see *Interference With Contracts and Business in New York*, 18 HARV. INTL. L. J. 429 (1977).

5. See *Hunt v. Mobil Oil Corp.* 550 F.2d 68, 73 (2d Cir.), cert. denied, 434 U.S. 984 (1977).

would not find sufficient support in the FSIA to overcome various substantive defenses, given the present state of United States law and policy and the cases brought thus far under it.

Although the United States has been moving toward expanding the extra-territorial jurisdiction of its antitrust laws in certain circumstances,⁶ it is unlikely that a court would be willing to reach even the most egregious foreign conspiracies for legal, practical and foreign policy considerations.

Relevant U.S. laws include Sections 1 and 2 of the Sherman Act,⁷ Section 4 of the Clayton Act,⁸ the Robinson-Patman Act,⁹ the Wilson Tariff Act,¹⁰ and Section 5 of the Federal Trade Commission Act.¹¹ All these laws apply to restraints of trade affecting U.S. interstate and foreign commerce once personal jurisdiction is achieved. While effective antitrust relief from the government's point of view requires more than a remedy against the goods,¹² this would not be a relevant concern for private plaintiffs.¹³

II. DEFENSES TO AN ACTION BROUGHT AGAINST FOREIGN DEFENDANTS

Even given the fact that a violation of U.S. antitrust law is not made exempt simply by reason of its foreign origin,¹⁴ and assuming direct and substantial effects upon U.S. commerce to satisfy the Sherman Act's jurisdictional requirements,¹⁵ plaintiffs

6. The extraterritorial jurisdiction of the antitrust laws requires only that the foreign-based contract, combination or conspiracy have substantial and direct effects on the import or export trade of the United States. See note 15 *infra* and cases cited therein.

7. 15 U.S.C. §§ 1, 2 (1976).

8. 15 U.S.C. § 15 (1976).

9. 15 U.S.C. §§ 13, 21a (1976).

10. 15 U.S.C. § 8 (1976). This Act has rarely been used by the government, because its sanctions are limited (violation of § 8 is a misdemeanor and the fine is \$5,000) and the exclusion of goods pursuant to a successful prosecution reduces domestic supply and thus increases prices to consumers. See W. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* 498-543 (2d ed. 1973) (collecting cases under the Wilson Tariff Act).

11. 15 U.S.C. § 45 (1976) amending 15 U.S.C. § 45 (1970).

12. See BAKER, *Antitrust Remedies Against Government-Inspired Boycotts, Shortages and Squeezes: Wandering on the Road to Mecca*, 61 CORNELL L. REV. 911, 915 & n. 29 (1976).

13. See 15 U.S.C. §§ 6, 15 (sections of Clayton Act giving private citizens right to sue against the goods involved or for treble damages, respectively).

14. See, e.g., *United States v. Sisal Sales Corp.*, 274 U.S. 268, 275-276 (1927); *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 704 (1962).

15. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). See also *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927); *United States v. Aluminum Co.*

still would have to overcome the defenses of act of state, sovereign immunity and foreign compulsion. The most significant problem is that anticompetitive behavior initiated abroad might have been suggested, directed, approved or ordered by a foreign sovereign.

If government-directed behavior occurs in the foreign sovereign's territory (as distinguished from behavior occurring within U.S. territory which is clearly reachable by U.S. antitrust laws), there appears to be very little a public or private plaintiff can do about it.¹⁶ This is a classic case of "sovereign compulsion;" a corollary¹⁷ to the "act of state" doctrine dictating that U.S. law will not interfere, through judicial scrutiny, with a sovereign's acts in its own territory.¹⁸ Several cases support the theory that corporate conduct "compelled" by a foreign sovereign is also protected from antitrust liability as though it were an act of the state itself.¹⁹

of America, 148 F.2d 416, 440-45 (2d Cir. 1945); *United States v. Watchmakers of Switzerland Information Center, Inc.*, [1963] TRADE CASES (CCH) ¶ 70,600 (1962), *modified* [1965] TRADE CASES (CCH) ¶ 71,352, RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965) (hereinafter cited as RESTATEMENT), L. SULLIVAN, ANTITRUST 714-717 (1977). Professor Sullivan notes that

the *Alcoa* case is particularly important in showing the scope of the Act. In all other cases cited [above], one or more of the defendants was an American firm and some conduct involved in the violation took place in America. In *Alcoa*, however, the court held the Sherman Act forbade conduct engaged in by foreign firms outside of the territorial limits of America where the conduct was intended to and did affect American imports.

Id. at 715, n.3.

16. 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 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.

Baker, supra note 9, at 917 n.6. He notes that *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) is still viable precedent to support this principle. *Id.*

17. *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 606 (9th Cir. 1976).

18. The leading modern statement of the doctrine appears in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

19. *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298 (D. Del. 1970) (refusal by defendants to sell Venezuelan crude oil to plaintiff not actionable restraint of trade because Venezuelan government imposed boycott on plaintiff); see *United States v. The Watchmakers of Switzerland Information Center, Inc.*, [1963] TRADE CASES (CCH) ¶ 70,600 (1962), *order modified*, [1965] TRADE CASES (CCH) ¶ 71,352 (although not the case here, court noted if "the defendant's activities had been required by Swiss law, this court could indeed do nothing."). Mere approval or permission by the foreign sovereign does not constitute compulsion. See text notes 39-62, *infra*, and accompanying text.

Some debate has arisen recently regarding what constitutes both a "state" act and the proper framework for analyzing the sovereign compulsion defense. In *Timberlane Lumber Co. v. Bank of America*,²⁰ while the court found a decree of a Honduran court not to constitute a sovereign act,²¹ section 40 of the Restatement (Second) of Foreign Relations Law of the United States²² did provide a framework to determine whether to interfere with such an act where the court had determined that a full-fledged act of state was involved and a conflict between the laws of two sovereigns had occurred.²³ This balancing-of-interests or comity analysis has been greeted with approval by at least two commentators.²⁴

20. 549 F.2d 597 (9th Cir. 1976).

21. The court quoted language from RESTATEMENT § 41's Comment d.—Nature of Act of State:

An 'act of state' as the term is used in this Title involves the public interests of a state as a state, as distinct from its interest in providing the means of adjudicating disputes or claims that arise within its territory. . . . A judgment of a court may be an act of state. Usually it is not, because it involves the interests of private litigants or because court adjudication is not the usual way in which the state exercises its jurisdiction to give effect to public interests.

22. Some of the factors to be considered, according to RESTATEMENT § 40, are the vital national interests of each of the states, the extent of the hardship on a defendant caused by inconsistent enforcement, where the activity takes place, the nationality of the defendant, and the effectiveness of enforcement attempted by a distant government. See notes 64-64, *infra*, and accompanying text.

23. *Timberlane*, 549 F.2d at 614 & n. 31.

24. See Remarks of John H. Shenefield, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, "The Extra-Territorial Impact of U.S. Antitrust Laws: Causes and Consequences" (Dep't. of Justice Release, Aug. 9, 1978) (remarks to ABA Section of International Law, 1978 ABA Annual Meeting); American Society of International Law *Proceeding of the 72nd Annual Meeting 109, 118 (1978)* (hereinafter cited as *ASIL Proceedings*) (remarks of Douglas E. Rosenthal, Chief, Foreign Commerce Section, Antitrust Division, U.S. Department of Justice).

Comity in practice may be observed in the statement of British jurist Lord Denning, Master of the Rolls, in a recent case. In response to a request from U.S. District Court Judge Robert R. Merhige, Jr. for evidence to be used in a U.S. trial involving alleged antitrust violations, obtainable only from witnesses residing in England, Lord Denning characterized his actions accommodating Judge Merhige's request in terms of the gold rule:

. . . Federal Judge Merhige . . . makes it clear that the letters rogatory are concerned with material that is required not merely for pre-trial procedure (as it is called in the United States of America) but for evidence and documents for actual use at the trial. . . . It is our duty and our pleasure to do all we can to assist that court, just as we would expect the United States court to help us in like circumstances. "Do unto others as you would be done by."

Westinghouse Elec. Corp. Uranium Contracts Litigation, M.D.L. Docket No. 232, [1977] 3 W.L.R. 430, 434-36 (C.A.) quoted in Merhige, *The Westinghouse Uranium Case: Problems Encountered in Seeking Foreign Discovery and Evidence*, 13 INTL. LAW. 19, 22 (1979).

This framework, however, only approaches the underlying question. The critical step is to determine precisely what factors will tip the scales in favor of reaching an act of a foreign sovereign. Several cases are helpful. In *Hunt v. Mobil Oil Corp.*,²⁵ the court refused to allow an antitrust suit to proceed against the seven major oil companies which alleged the companies' conspiratorial actions led to the expropriation of plaintiff's assets in Libya. Although the complainant was careful to avoid naming Libya as a defendant or to suggest that the sovereign was a co-conspirator, the court agreed with defendants that the damage to plaintiffs was caused by the expropriation—an act of the sovereign—and not by the conspiracy. The court determined that it was barred by the act of state doctrine from examining the issues further.²⁶

In *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*²⁷ the court accepted an act of state defense even though the plaintiff alleged the defendant had induced the sovereign to act,²⁸ but in *Alfred Dunhill of London, Inc. v. Republic of Cuba*,²⁹ four Justices would have extended the commercial exception to sovereign immunity from jurisdiction to reach the "purely" commercial acts of governments and thus would have eliminated the act of state doctrine as a defense to those actions.³⁰

As noted by Professor Eleanor Fox of the New York University School of Law,³¹ the act of state is an infrequent component of antitrust suits. The acts of private parties compelled by states appear in these suits more often, but few cases have adjudicated directly the sovereign compulsion defense. Two of these cases

25. 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

26. 550 F.2d at 72-73.

27. 331 F. Supp. 92 (D.C. Cal. 1971), *aff'd* 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1971) (following classical definition of act of state doctrine stated in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)).

28. 331 F. Supp. 92, 110.

29. 425 U.S. 682 (1976).

30. *Id.* at 695. Because a majority did not join in this portion of the opinion, it is an open question whether the present Court would consider taking the commercial exception this far, given the current Court's conservative new "antitrust majority" which has been limiting antitrust remedies by insisting upon tougher factual standards of proof. See Baker, *supra* note 9, at 914 & n. 15 (citing *U.S. v. Marine Bancorp.*, 418 U.S. 602, 642 (1974) (White, J. dissenting; referring to Justice Stewart and the four Nixon appointees—Burger, C.J., Blackmun, Powell and Rehnquist, JJ.—as the new "antitrust majority."))

31. See *ASIL Proceedings*, *supra* note 24, at 98.

stand as valid precedent for the defense. In *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*,³² regulatory authorities in Venezuela ordered a boycott against plaintiff denying it supplies of crude oil. One reason apparently was the presence in plaintiff's company of a person disliked by the Venezuelan government. The court reasoned by analogy from *Parker v. Brown*,³³ which held that compliance with a state regulatory program does not subject one to antitrust liability, and found genuine sovereign compulsion a complete defense.³⁴ The court also relied upon *United States v. The Watchmakers of Switerland Information Center, Inc.*,³⁵ for this proposition. The Justice Department's suggestions to the contrary notwithstanding, there seems to be no reason to doubt that courts will follow these cases in similar circumstances.

The one avenue of hope in that direction—the FSIA—has yielded little consolation. It is important to note the FSIA is only *jurisdictional* and does not affect directly the substantive defenses of sovereign compulsion and act of state.³⁶ Commentators have discussed the concept of extending the commercial test to the act of state/sovereign compulsion defense. For example, if a state cannot hide behind its sovereignty when doing commercial activities to avoid a court's jurisdiction, the issue is whether the state should by indirection be able to foil the court's power by setting up that same sovereignty as a substantive defense to the action. At least one commentator supports the unlikelihood of its success.³⁷

32. 307 F. Supp. 1291 (D. Del. 1970).

33. 317 U.S. 341 (1943).

34. 307 F. Supp. at 1297, 1298. It should be noted that the Justice Department in its *Antitrust Guide For International Operations*, reprinted in [1977] ANTITRUST & TRADE REG. REP. (BNA) (No. 799) at E-14 ("Case K") argues that *Maracaibo* was wrongly decided. When questioned about this at the ASIL meeting, however, Mr. Rosenthal (Chief, Foreign Commerce Section, Antitrust Division, U.S. Department of Justice) attempted to explain the meaning of Case K by stating that a distinction possibly could be drawn between the private and governmental acts; but that further clarification is needed. *ASIL Proceedings*, *supra* note 24, at 112.

35. [1963] TRADE CASES (CCH) ¶ 70,600 (1962), *modified*, [1965] TRADE CASES (CCH) ¶ 71,352.

36. See Von Kalinowski, *Antitrust Laws and Trade Regulation*, Sept. 1977 ANTITRUST & TRADE REG. REP. (BNA). Moreover, the difficulty in establishing any firm guidelines as to what belongs in the "purely commercial" category appears to be enormous, for political rather than simply logical or conceptual reasons. See remarks of Mark R. Joelson, *ASIL Proceedings*, *supra* note 24, at 100-01.

37. Compare Note, *Sherman Act Jurisdiction and the Acts of Foreign Sovereigns*, 77

Cases which were based upon or involved the FSIA have indicated that the FSIA will not prove to be a useful tool for undercutting the compulsion defense or limiting the act of state doctrine, and the circumstances in which the FSIA is employed will involve relatively noncontroversial contract or tort settings.³⁸

COLUM. L. REV. 1247, 1254-55 (1977) and Schwartz, *The Anti-Foreign Compulsion Act: Proposed Legislation*, 12 INT'L LAW. 649, 651-2 (1978) (both arguing that Congress did not intend to remove the sovereign compulsion defense by enacting the FSIA because of the difficulty in creating a true "commercial-political" distinction in antitrust matters) with Note, *International Law—Act of State Doctrine—Foreign Sovereign Immunities Act of 1976—Alfred Dunhill of London, Inc. v. Republic of Cuba*, 18 B.C. IND. & COM. L. REV. 318, 340-48 (1977) (possibility exists of convincing the Supreme Court to extend *Dunhill* and the logic of the FSIA to limit the act of state and related defenses) and 12 J. INT'L L. & ECON. 487 (1978) (if "purely commercial" context could be established, the *Timberlane* comity analysis, § 40 of the RESTATEMENT and the FSIA taken together might overcome the act of state defense). The Note in 77 COLUM. L. REV. 1247 is persuasive:

Although one might argue that an anticompetitive economic conspiracy is "commercial" within the meaning of the FSIA, it seems unlikely that the courts would ever allow such a suit to be brought against a foreign sovereign defendant. No case has, as yet, gone that far. From the cases denying the sovereign immunity defense to foreign governments, it would appear that the purpose served by the restrictive theory is to open the courts in situations where the law is relatively non-controversial, and where, in effect, an arbiter is needed to determine the facts and grant an appropriate remedy. Most of the cases have involved ordinary tort and contract claims arising from the sale and delivery of goods. The legal precepts involved have been those of virtually universal acceptance. To enforce rights grounded in non-controversial laws against sovereign defendants does not involve the imposition of alien ideological doctrine, with concomitant risks to the smooth conduct of foreign relations.

By contrast, to assert that sovereign activity violating peculiarly American standards of proper business conduct is "commercial" within the meaning of the FSIA would be to impose economic assumptions which are by no means universally shared by foreign governments. One need only imagine the potential for embarrassment of a class action on behalf of all United States petroleum consumers against the OPEC nations alleging that the 1973 oil embargo constituted a group boycott in violation of Section 1 of the Sherman Act. Given the basic purpose of sovereign immunity, as stated both in recent judicial decisions and under the FSIA—prevention of judicial interference with international relations—and given the grave risk of interference posed by antitrust actions, it would seem that Congress did not intend the FSIA to permit such suits against foreign governments. (Citations omitted).

77 COLUM. L. REV. at 1254-55.

38. See, e.g., *National American Corp. v. Federal Republic of Nigeria*, 448 F. Supp. 622 (S.D.N.Y. 1978) (contract; denying immunity to state trading company for liability on cement contract); *Yessenin-Volpin v. Novostni Press Agency*, 443 F. Supp. 849 (S.D.N.Y. 1978) (tort; a state entity may do acts which at times subject it to jurisdiction, but here TASS held immune in libel action); *Edlow Intern. Co. v. Nuklearna Electrarna Krsko*, 441 F. Supp. 827 (S.D.N.Y. 1977) (action to recover broker's fees; Yugoslavian nuclear power plant's "worker's organization" not an agency of the state for FSIA purposes in action by Bermuda corporation to recover broker's fees on uranium sale contract); compare *Carey v. National*

III. BEHAVIOR APPROVED OR SUGGESTED BY FOREIGN GOVERNMENT

A more difficult question is presented, and different results may be reached, when the behavior complained of has not been compelled by a foreign sovereign, but rather is associated with the mere approval of or a suggestion by the sovereign to the private party.³⁹ In addition, the degree of ownership or control of foreign corporations by foreign governments may be important for two reasons. First, a foreign corporation wholly or partly owned by a foreign sovereign may constitute a "foreign state or instrumentality" for jurisdictional purposes.⁴⁰ On the other hand, sovereign ownership or control may constitute indicia of the political nature of the foreign entity's activities.

The historical development of these concepts can be traced to 1927. In *United States v. Sisal Sales Corp.*⁴¹ a conspiracy was formed in the United States for the purpose of monopolizing sales to the United States of a raw material used in the making of rope. In aid of this conspiracy the private party enlisted the assistance of the Mexican government to impose discriminatory taxes on rival sellers and to recognize the conspirators as exclusive traders. The Supreme Court ruled that mere governmental approval of a conspiracy for the purpose of monopolizing sales to the United States was not protected simply because of a foreign sovereign's limited involvement.⁴²

Oil Corp., 453 F. Supp. 1097 (S.D.N.Y. 1978) (corporation created and wholly owned by Libya immune for acts arising out of nationalization which resulted in contract termination); *Gitler v. German Information Center*, 95 Misc. 2d 788, 408 N.Y.S.2d 600 (Sup. Ct. 1978) (action to recover compensation for services rendered in employment; agency immune because work meant to foster cultural relations was "diplomatic" activity). See also Brower, Bristline and Loomis, *The Foreign Sovereign Immunities Act of 1976 in Practice*, 73 AMER. J. INT'L L. 200 (1979) (collecting cases, at 213-14) [hereinafter cited as Brower, Bristline and Loomis].

39. It has been argued that even this distinction—"compulsion" is different from the mere "suggestion" of a foreign sovereign—is essentially meaningless:

[I have] often heard it said by foreign lawyers that the American case law and the Justice Department's insistence on compulsion, as opposed to encouragement or approval, is really a naive distinction and that in fact if a foreign sovereign suggests that it might be a nice thing for you to raise prices in honor of his birthday, then that in effect means 'we hereby direct you.'

ASIL PROCEEDINGS at 117 (comment of unidentified speaker).

40. See definitional sections of FSIA § 1603(a) & (b), *supra* note 4.

41. 274 U.S. 268 (1927).

42. *Id.* at 594. *Sisal* was cited with approval by the Supreme Court in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 705 & n. 13 (1962).

A district court in New York in 1929 significantly extended the concept in denying immunity to defendants in *United States v. Deutsches Kalisyndicat Gesellschaft*.⁴³ Although the Ambassador of France was not a defendant in the case, he filed a motion to dismiss on behalf of certain incorporated defendants. In this suit brought by the United States to enjoin violations of our antitrust laws, the French Ambassador wrote to the Secretary of State to inform him that one of the defendant corporations was an organization which was controlled by the Republic of France in the administration of certain mines. The letter also stated the proceeds of these mines went into the revenue of France and were applied to governmental purposes. The corporate defendant was organized by the French government to act as its sales agent and eleven-fifteenth's of its capital stock was owned by the government. Its governing board, on which sat a delegate from each of several French ministries of government, controlled the corporation for the benefit of the French government. The French Ambassador stated that he considered the action in effect a suit against the Republic of France.⁴⁴ Apparently relying heavily upon the fact that the State Department did not make any suggestion to the court that it should dismiss the suit, the French Ambassador's letter notwithstanding, the court held the commercial activities of the defendant corporations were subject to suit in U.S. courts.⁴⁵

This case seemingly goes further than most courts would be willing to go under similar circumstances today. Although legally well reasoned, one cannot help but conclude that the silence of the State Department in this matter was the persuasive factor for the court.⁴⁶ It should be noted this case was cited with approval as late

43. 31 F.2d 199 (S.D.N.Y. 1929) [hereinafter cited as *Deutsches*.]

44. *Id.* at 200.

45. *Id.* at 202-03.

46. Although enactment of the FSIA in 1976 was intended to make jurisdictional decisions of a matter of a court's discretion rather than that of the Department of State, some question remains as to the degree to which the influence of the Department of State has, in fact, been exercised. Despite protestations that it would in the future restrict itself to amicus curiae briefs, the Department responded to a request for diplomatic assistance in conjunction with the *Novosti Press Agency* case [*Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849 (1978)] by stating that it "concurs in the position taken by the attorneys for Novosti" regarding the retroactivity of the Act's application; and the court referred to and substantially accepted this statement. The Department, however, did decline to render an opinion on the merits of the claim to immunity. It remains to be seen whether sue-

as 1949 in *McGrath v. Manufacturers Trust Co.*⁴⁷

A more recent case discussing the nature of a "corporate agent" of a foreign sovereign was *In Re Investigation of World Arrangement*.⁴⁸ This case involved several corporate defendants in a massive antitrust suit alleging a world cartel of petroleum markets. One of the defendants, Anglo-Iranian Oil Company, was held to be "indistinguishable from the Government of Great Britain."⁴⁹ The situation was remarkably similar to *Deutsches* which the court cited. In *World Arrangements*, a letter was also written by a high diplomatic official stating that the corporate defendant's refusal to tender documents to the U.S. court was done under instructions of the sovereign acting "in the British public interest, including the economic, strategic and political interest" of the foreign sovereign.⁵⁰ This letter, sent by the British Foreign Secretary to the State Department, was forwarded without comment to the court by the State Department. In comparing *Deutsches* the court claimed that in *Deutsches* the French corporation was involved in a commercial venture "entirely divorced from any governmental function."⁵¹ In this case the oil obtained by Anglo-Iranian provided Great Britain with fuel for its naval defense fleet. The court found this dispositive. It is curious, however, that the court in *World Arrangements* did not notice that the State Department's failure to comment upon a similar letter in *Deutsches* was taken by that court as an indication that immunity was to be denied. The same failure to comment by the State Department was taken in *World Arrangements* to mean the opposite.⁵² The critical difference was that in *Deutsches* the State Department simply remained silent, but in this case the State Department actually delivered the diplomatic note in question to the court. The court also observed that the British government controlled the corporation by reason of its ownership of the

ceeding administrations will resist the importunings of foreign governments and whether the courts will, or lawfully can, ignore express desires of the State Department premised on the authority of the executive branch's constitutional primacy in foreign affairs.

Brower, Bistline & Loomis, *supra* note 38 (citations omitted).

47. 338 U.S. 241, 250 n. 12 (1949).

48. 13 F.R.D. 280 (D.C.D.C. 1952).

49. *Id.* at 291.

50. *Id.* at 289.

51. *Id.* at 291.

52. *Id.* at 290.

greater portion of the voting stock and considered it significant that the British government acquired its interest in the company "to insure a proper supply of petroleum, crude oil and other products for the British Fleet."⁵³

The Supreme Court addressed these issues in a somewhat different context in *Continental Ore Co. v. Union Carbide and Carbon Corp.*⁵⁴ In that instance the Canadian government had made a private corporation its exclusive agent for the purchases of vanadium, a metal used in steel production. The Canadian corporation, apparently not carrying out any particular directive, policy or activity of the Canadian government, conspired with an American affiliate to exclude American competitors from Canadian markets. Noting there was no indication that the Canadian government or any of its officials "approved or would have approved"⁵⁵ of the efforts to monopolize the market, the Court ruled the corporation's activities could not be considered governmental acts. The defendants argued their discriminatory purchasing policies were permitted by Canadian law. The Court dismissed this contention as not controlling, stating "there is nothing to indicate that such law in any way compelled discriminatory purchasing, and it is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme."⁵⁶

The important distinction between an act merely permitted by foreign law and that required by foreign law or by specific decree of a foreign government was made clear in the *Swiss Watch* case.⁵⁷ In that case the court stated:

It is clear that these private agreements were then recognized as facts of economic and industrial life by [the Swiss] government. Nonetheless that the Swiss may, as a practical matter, *approve* of the effects of this private activity cannot convert what is essentially a vulnerable private conspiracy into an unassail-

53. *Id.*

54. 370 U.S. 690 (1962).

55. *Id.* at 706. No court or commentator has suggested the Supreme Court meant to imply that if the Canadian government merely had "approved" of the monopolistic behavior in issue, then sovereign immunity would have attached to defendants' actions. Rather, the Court here seems to be saying that official approval would have been one of several indicia to be considered in determining whether to grant immunity.

56. *Id.* at 707.

57. *United States v. The Watchmakers of Switzerland Information Center, Inc.*, [1963] TRADE CASES (CCH) ¶ 70,600 (1962), *modified* [1965] TRADE CASES (CCH) ¶ 71,352.

able system resulting from foreign governmental mandate. In the absence of direct foreign governmental action *compelling* the defendants' activities, a United States court may exercise its jurisdiction as to the acts and contracts abroad, if, as in the case at bar, such acts and contracts have a substantial and material effect upon our foreign and domestic commerce.⁵⁸

More recently this distinction was discussed in *Linseman v. The World Hockey Association*.⁵⁹ In that case a nineteen year old amateur hockey player brought suit challenging certain World Hockey Association (WHA) age regulations. The WHA refused to let Linseman play in Canada because he was underage and claimed it was "compelled" by the Canadian government's acceptance of the age regulation. In ruling that the WHA could not successfully assert that its exclusion of Linseman was the result of a Canadian governmental "act of state," the court observed that the Canadian government merely "endorsed" the age rule rather than compelled defendant to abide by the rule.⁶⁰

Although courts have used different formulae to explain their results, the underlying rationales seem to be grounded in the same general considerations. One commentator has suggested that foreign compulsion and related defenses really are a special case of the comity analysis already mentioned.⁶¹ Under this approach the difference between mere approval of, or suggestions from, the sovereign and outright compulsion is a difference in degree rather than in kind. That is, *actual* compulsion by the sovereign would indicate its overriding interest in the matter and would place the situation closer to that end of the spectrum where U.S. courts would not interfere with the offending act. Mere suggestions or approval would tend to show that the matter was of lesser importance to the sovereign and its involvement would therefore be given less weight. Judge Choy in *Timberlane*⁶² adopted a detailed set of factors that courts should consider in balancing the competing of the foreign sovereign on one hand and U.S. economic interests on the other.

Section 40 of the Restatement (Second) of Foreign Relations

58. [1963] TRADE CASES (CCH) ¶ 70,600 (1962) at 77,456-7 (citing *Continental Ore Co.*) (emphasis added).

59. 439 F. Supp. 1315 (D.C. Conn. 1977).

60. *Id.* at 1324.

61. See *ASIL Proceedings*, *supra* note 24, at 117 (remarks of Douglas Rosenthal).

62. 549 F.2d 597 (9th Cir. 1976).

Law of the United States⁶³ outlines a series of considerations a court should take into account before it acts. Judge Choy refined the traditional balancing-of-interests analysis by listing a series of "variables" the court also should consider.⁶⁴ Then, although without discussing the relationship of these factors, Judge Choy determined that a declaration of the foreign court did not constitute a sovereign act of sufficient weight to cut off jurisdiction of antitrust matters. The *Timberlane* court did note that at least some of the defendants were foreign citizens and that most of the activity took place in Honduras, but it also observed that the conspiracy may have been directed from San Francisco and that the most direct economic effect was probably on Honduras. The court concluded, however, that there had been no indication of any conflict with the law or the policy of the Honduran government by allowing the suit to go forward and decided the U.S. interest outweighed whatever negligible interests of Honduras were involved.⁶⁵

It appears that the commercial-political dichotomy contained in the FSIA is not particularly helpful because the economic policy-oriented activity of a state-owned company could be so politically important to the sovereign that no U.S. court would be willing to decide that the interests of private plaintiffs outweigh the interests of American foreign policy. For this reason, a U.S. plaintiff would have to allege both substantial harm and overriding U.S. interests to overcome the interest asserted by a

63. RESTATEMENT § 40 states that a court should act in the light of such factors as: (a) vital national interests 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. See *Timberlane*, 549 F.2d at 614 n. 31.

64. Judge Choy, citing BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 446 (1958), identifies these variables as:

(a) the relative significance to the violations charged of conduct within the United States as compared with conduct abroad; (b) the extent to which there is explicit purpose to harm or affect American consumers or Americans' business opportunities; (c) the relative seriousness of effects on the United States compared with those abroad; (d) the nationality or allegiance of the parties or in the case of business associations, their corporate location, and the fairness of applying our law to them; (e) the degree of conflict with foreign laws and policies; and (f) the extent to which conflict can be avoided without serious impairment of the interests of the United States or the foreign country.

See also *Timberlane*, 549 F.2d at 541 n.31.

65. *Timberlane*. 549 F.2d at 615.

foreign sovereign, whether compelled, suggested, or approved. The commercial-political distinction contained in the FSIA can therefore be characterized as an attempt to isolate one factor for courts in their balancing of interests.

At least one alternative in analyzing this problem is to employ the commercial-political distinction in the FSIA's *jurisdictional* context *only*. A court could treat acts containing elements of both as at least susceptible of jurisdiction; the political component (compulsion, suggestion, approval) later could be raised as a substantive defense. The problem with this approach, however, lies in the FSIA itself. If an act is so purely "commercial" that a court is willing to grant jurisdiction under the FSIA, it may be interpreted that the court already has determined *at the outset* the absence of the political component.⁶⁶ In other words, if an act is purely commercial, then it would seem almost by definition not to have the political component. Yet at the moment a weighing of the degree of political involvement is undertaken, one departs from the plain language of the FSIA.

Under what circumstances, or in which kinds of activities, have the courts found that the absence of political sensitivity is sufficient to allow jurisdiction and to overcome the sovereignty defenses on the merits? A review of cases brought under the FSIA reveals the limited inroads courts have made in this area.

IV. FSIA DEFINITIONAL FRAMEWORK

Two questions must be answered in the context of an action under the FSIA. First, is the entity plaintiff seeks to sue a "foreign state" or an "agency or instrumentality" thereof?⁶⁷ Second, if the entity so qualifies, is the entity, be it a corporation, "corporate agency" or state agency, nonetheless engaged in activity of a commercial nature?

Several cases demonstrate the interplay of these two considerations. In *Edlow International Co. v. Nuklearna Electrarna Krsko*,⁶⁸ plaintiff sought to prove that a Yugoslav "worker's organization" was a foreign state, apparently because no basis other than the FSIA could have provided the court with jurisdic-

66. From plaintiff's point of view, this appears to require it to make its entire case immediately on the jurisdictional issue, even though various sovereignty defenses have been characterized as substantive. See generally Von Kalinowski, *supra* note 36.

67. See FSIA §§ 1603(a) & (b), *supra* note 2.

68. 441 F. Supp. 827, 831 (S.D.N.Y. 1977).

tion.⁶⁹ The court did not find the entity an agency, instrumentality, or foreign state for purposes of *in personam* jurisdiction and dismissed the suit. One commentator surmises that, had the suit not been dismissed on the ground that no suable entity for FSIA purposes existed, then the Yugoslav organization, which was being sued for broker's fees on a sale of nuclear fuel, "almost certainly would have been held not immune."⁷⁰ That case can be compared with *Yessinin-Volpin v. Novosti Press Agency*,⁷¹ in which the court held the Soviet Novosti press agency was a "foreign state" under the FSIA and emphasized its state ownership in granting immunity on a charge of defamation. The court found the FSIA particularly ill-suited to socialist entities but applied it nonetheless.⁷² In *Carey v. National Oil Corp.*,⁷³ the Libyan National Oil Company was found to be a foreign state and held immune in the setting of an expropriation of plaintiff's property. Finally (and although the case is of limited significance because only entitlement to removal from state to federal court was in issue rather than immunity), *Herzberger v. Compania de Acero del Pacifico, S.A.*⁷⁴ apparently held that a foreign corporation will be a foreign state if ultimate ownership of at least 50% of its control is in state hands regardless of the interposition of an intermediate corporate vehicle.

V. CONCLUSION

It is clear that the FSIA has not, and indeed *cannot*, fulfill the hopes of its sponsors. Even when it has been "successfully" used, the FSIA has not been able to overcome any of the traditional substantive defenses used by foreign companies to insulate themselves from antitrust scrutiny. Foreign compulsion, sovereign immunity, and an act of state remain impregnable bastions to American plaintiffs injured by the effects of offshore conspiracies.⁷⁵

69. See Brower, Bristline & Loomis, *supra* note 38, at 202-03 & n. 21.

70. *Id.* at 203.

71. 443 F. Supp. 849 (S.D.N.Y. 1978).

72. *Id.* at 852.

73. 453 F. Supp. 1097 (S.D.N.Y. 1978).

74. 78 Civ. 2451 (S.D.N.Y. Aug. 17, 1978).

75. The problem has not gone entirely unnoticed by Congress. One recent legislative proposal would establish a Presidential Commission to study the international application of antitrust laws and the defenses of immunity, act of state and compulsion. See S. 1010, 96th Cong., 1st Sess. (1979). Earlier proposals have contemplated abolishing the compulsion defense entirely. See, e.g., H.R. 8115, 8739 & 9925, 95th Cong., 1st Sess. (1977) (bills died in committee).