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Michael K. Sweig

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> I am also . . . disappointed in the [Supreme] Court's declaration that the acts of a sovereign state . . . are beyond the reach of international law in the courts of this country. However clearly established that law may be, a sovereign may violate it with impunity, except insofar as the political branches of the government may provide a remedy . . . . [N]ot only are the courts powerless to question acts of state proscribed by international law but they are likewise powerless to refuse to adjudicate the claim founded upon a foreign law; they must render judgment and thereby validate the lawless act . . . . No other civilized country has found such a rigid rule necessary for the survival of the executive branch of its government . . . and no other judiciary is apparently so incompetent to ascertain and apply international law.**

I. Scenario

Suppose nearly one hundred foreign manufacturers participate in a decade-long conspiracy to drive United States stereo manufacturers out of business. The conspiracy is effectuated by selling stereos at artificially high prices abroad to finance and implement an agreement to carve up the domestic market and sell the same stereos at artificially low prices in the United States. Ultimately an American manufacturer sues the foreign manufacturers, alleging that various aspects of the conspiracy violate Sections 1 and 2 of the Sher-

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* Associate with Altheimer & Gray, Chicago, Illinois. B.A. 1980 University of California; J.D. 1986 DePaul University College of Law. Sweig, *Do Lawyers Play While Victims Pay When Corporations Discharge Toxic Tort Liability in Bankruptcy?*, 35 DEPAUL L. REV. 161 (1985); Sweig, *Guidelines for Consumer Debt Collection Under the 1986 Amendment to the FAIS Debt Collection Practices Act*, COM. L. BULL. (Feb. 1987), *reprinted in* 21 NEW ENG. L.R. 1 (Spring 1987).

** Banco Nacional De Cuba v. Sabbatino, 376 U.S. 398, 439-40 (1964) (White, J., dissenting).

man Act,[1] Section 2a of the Robinson-Patman Act,[2] Section 7 of the Clayton Act,[3] Section 73 of the Wilson Tariff Act,[4] and the Antidumping Act of 1916.[5]

Defendants move for summary judgment and raise sovereign compulsion as an absolute defense to antitrust liability. Defendants argue that their foreign government compelled the plan. In support of their motion, defendants submit a formal statement to the District Court from the defendants own government. The court, however, finds it unclear whether in fact the foreign sovereign has compelled the plan because it is signed by lower level government employees. The court denies defendants' summary judgment motion and rules that the plan is a crucial piece of conspiracy evidence on the antitrust claims.

II. Introduction

American courts have long recognized that anticompetitive private conduct that is compelled by a private sovereign and conclusively proved by an official pronouncement of a foreign nation does not violate American antitrust laws.[6] In *Timberlane Lumber Co. v.*

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1. 15 U.S.C. § 1 (1982). "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . ."; 15 U.S.C. § 2 (1982). "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ."

2. Section 2 of the Clayton Act was amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13 (a)(1970). "It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . ."

3. 15 U.S.C. § 18 (1982).

4. 15 U.S.C. § 8 (1982).

> Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy, illegal, and void . . . made by or between . . . persons or corporations . . . engaged in importing any article from any foreign country in to the United States (which) is intended to operate in restraint of lawful trade, or free competition . . . or to increase the market price in any part of the United States of any article or articles imported or intended to be imported in the United States, or of any manufacture into which such imported article enters or is intended to enter . . . .

5. 15 U.S.C. § 72 (1982).

> It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported . . . .

6. *See, e.g.*, United States v. Pink, 315 U.S. 203, 218-21 (1942); The Claveresk, 264 F. 276, 280 (2d Cir. 1920); Banca de Espana v. Federal Reserve Bank of New York, 114 F.2d 438, 438-44 (2d Cir. 1940); Agency of Canadian Car & Foundry Co. v. American Can Co., 258 F. 363, 368-69 (2d Cir. 1919); D'Angelo v. Petroleos Mexicanos, 422 F. Supp. 1280, 1283-85 (D. Del. 1976), *aff'd mem.*, 564 F.2d 89 (3d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 110 (C.D. Cal.

Bank of America,[7] the primary recent case regarding extra-territorial jurisdiction in foreign antitrust litigation, the court observed that "corporate conduct . . . compelled by a foreign sovereign is protected from antitrust liability, as if it were an act of the state itself."[8] This limiting doctrine is known as sovereign compulsion. The defense theoretically applies when foreign law or executive authority requires or directs the acts or contracts in question, when foreign executive authority acquiesces in such acts or contracts, or when foreign law does not prohibit such acts or contracts. To date, courts have applied the doctrine based primarily on notions of international comity[9] and "fairness" to antitrust defendants who must obey the mandates of a foreign sovereign. Only one private foreign antitrust defendant, however, has ever applied this defense successfully.[10]

A similar limiting doctrine is sovereign immunity, which at common law was an absolute defense to the jurisdiction of another state.[11] Common law courts analyzed whether a defendant was a foreign sovereign or its agent. Sovereign immunity is now codified by the Foreign Sovereign Immunities Act of 1976 (FSIA),[12] which prevents courts from adjudicating cases against foreign sovereigns or their instrumentalities. FSIA also contains a limitation, codified as the "commercial activities" exception.[13] The exception subjects a

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1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972); United States v. Melekh, 190 F. Supp. 67, 87 (S.D.N.Y. 1960).

7. 549 F.2d 597 (9th Cir. 1976). *Timberlane* is the major case construing the "effects" test, which the Ninth Circuit stated is "by itself . . . incomplete because it fail[s] to consider other nations' interest." *Id.* at 611-12. The court therefore proposed a three-prong test: (1) whether the challenged conduct has an effect on American foreign commerce; (2) whether the challenged conduct violates the Sherman Act; and (3) whether comity and fairness justify extra-territorial application of United States antitrust law. *Id.* at 615. Of course, these three factors must be weighed.

Since *Timberlane*, other Circuit Courts have developed their own version of the "effects" test. *See, e.g., In re* Uranium Antitrust Litig., 617 F.2d 1248, 1253-56 (7th Cir. 1980) (subject matter jurisdiction determined under *Alcoa*, but court should consider additional factors not set out in *Timberlane*); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979) (affirming *Alcoa* but stating that *Timberlane* factors should be balanced "against our nation's legitimate interest in regulating anticompetitive activity"); *but see* Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 884 (5th Cir. 1982) (opposing discretionary jurisdiction and holding that courts should not apply antitrust law if it "would violate principles of comity, conflicts of law, or international law"); National Bank of Canada v. Interbank Card Ass'n, 666 F.2d 6 (2d Cir. 1981) (concerned that court using *Timberlane* might exercise jurisdiction on effects too minor on United States commerce).

8. *Timberlane*, 549 F.2d at 606.

9. Comity shifts the analysis of a lawsuit away from the competing arguments advanced by the parties to the nations represented by the parties and their respective laws. To a great extent, comity is a matter more of politics than law, and indeed, a judical device for refusing to grant jurisdiction over a particular case (or at least a handy tool for exercising jurisdiction but refraining from ruling on the merits). As such, the notion of international comity is well-suited to aid the executive branch in the implementation of foreign affairs and policy.

10. *See* Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (1970).

11. *See* Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812).

12. 28 U.S.C. §§ 1602-1611 (1982).

13. *Id.* § 1605 (a)(2).

foreign sovereign or its instrumentality to American jurisdiction when the commercial activity has a direct effect in the United States. Commercial activity is "determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[14]

This Article suggests that FSIA and its commercial activities exception adequately answer questions that pre-FSIA courts had used the sovereign compulsion doctrine to solve. Recent Supreme Court case law indicates that application of the sovereign compulsion defense in foreign antitrust litigation requires the precise analysis required and already provided for by the commercial activities exception to FSIA.

III. Matsushita Electric Industrial Co. v. Zenith Radio Corp.

The above scenario closely parallels the facts in *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*[15] and has tremendous implications for United States trade policy. In 1974, Zenith Radio Corporation and National Union Electric Corporation (collectively, plaintiff) sued numerous American and Japanese consumer electronic product manufacturers (defendants). Plaintiff alleged an illegal conspiracy to drive American producers out of the American consumer electronic product market.[16]

At summary judgment in the district court, defendants asserted, inter alia, the sovereign compulsion defense, claiming immunity from antitrust liability because the Japanese Ministry of International Trade and Industry (MITI) allegedly had required them to enter into the challenged pricing and market allocation agreements.[17] The Third Circuit Court of Appeals unanimously vacated the grant of summary judgment on the antitrust (and other) claims. The court held that a statement signed by three low level MITI employees that had been sent to the district court clerk in support of defendants' foreign compulsion defense was a key piece of conspiracy evidence.[18]

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14. *Id.* § 1603(d).

15. 494 F. Supp. 1190 (E.D. Pa. 1980); Zenith Radio Corporation v. Matsushita Electric Industrial Co., 513 F. Supp. 1100 (E.D. Pa. 1981) (memorandum opinion and orders granting summary judgment), *aff'd in part, rev'd in part*, 723 F.2d 238 (3d Cir. 1983) (memorandum opinion and order vacating grant of summary judgment), *rev'd*, 54 U.S.L.W. 4319 (U.S. Mar. 25, 1986) (reversing and remanding order vacating grant of summary judgment).

16. The scheme included an alleged plan to fix and maintain artificially high prices for defendants' products sold in Japan while concurrently fixing and maintaining low prices for the same products in the American market.

17. The "check price" agreements were formal written agreements entered into by defendants which established minimum prices for their products that were exported to the United States. The "five-company rule" was a market allocation agreement by which defendants agreed to sell directly to only five customers (dealers or distributors) in the United States, including each manufacturer's own American sales subsidiary. Brief of the United States as Amicus Curiae at 4, *Zenith*, 513 F. Supp. 1100 (E.D. Pa. 1981).

18. The Third Circuit had observed that defendants need not have asserted the foreign

The Third Circuit refused to give dispositive weight to this document[19] and remanded the case for trial.

Defendants petitioned the United States Supreme Court for a writ of certiorari. The Court granted certiorari to determine whether the Third Circuit applied proper standards in evaluating the district court's grant of summary judgment for defendants,[20] and whether defendants could be held liable under the antitrust laws for a conspiracy partially compelled by a foreign sovereign.

The Court vacated the Third Circuit's summary judgment ruling and refused to address the sovereign compulsion issue, thereby

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compulsion defense, since the challenged agreements and MITI Statement were proffered as conspiracy evidence, rather than an independent basis for antitrust liability.

19. The letter to the Clerk of the United States District Court and text of the MITI Statement are reprinted in Appendix, at 1-7. Brief for Matsushita Electrical Industrial Co., Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 723 F.2d 238 app. at 1-7 (3d Cir. 1983).

20. The Supreme Court granted certiorari in *Zenith* primarily to review summary judgment standards, particularly in antitrust cases. In its five-four decision, the Court held that the Third Circuit applied existing summary judgment standards improperly and in derogation of the principles advanced in the Court's earlier decisions. *See, e.g.*, Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984); First National Bank of Arizona v. Cities Services Co., 391 U.S. 253 (1968); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962). It is curious that the Court's view of *Monsanto* appears in the *Zenith* opinion. *Monsanto* was decided on appeal from a jury trial; *Zenith* was appealed from a grant of summary judgment. Thus, as Justice White's dissent articulates, the majority only "muddies the waters," 54 U.S.L.W. at 4325, and "makes confusing and inconsistent statements about the appropriate standard for granting summary judgment." *Id.* at 4326. If summary judgment ever was truly a pretrial proceeding, it remains so now only in form. After *Zenith*, summary judgment is as much a trial as a trial itself. *See, e.g.*, American Floral Services v. Florists Transworld Delivery Serv. and Teleflora, 633 F. Supp 201 (N.D. Ill. 1986)(Shadur, J.)(memorandum opinion and order denying motion to vacate grant of summary judgments in favor of defendants); ("Now *Matsushita* [citations omitted] makes plain" that Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1972) (advising sparing use of summary judgment in antitrust cases) is only a "caveat . . . and not an inexorable mandate").

In fact, *Zenith* kills traditional standards for inferring an "agreement" among competitors sufficient to satisfy the "contract, combination, or conspiracy" requirement in Section 1 of the Sherman Act. Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939) was the cornerstone of the conscious parallelism doctrine, and in many cases (especially in foreign antitrust suits) permitted a tenacious plaintiff the luxury of a trial on its conspiracy allegations in the absence of direct evidence. *Interstate Circuit* stated as follows:

> It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of . . . commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.

Id. at 226-27; *accord* United States v. Masonite, 316 U.S. 265, 275 (1942).

Under the *Zenith* facts, plaintiff seemingly satisfied the *Interstate Circuit* requirements. Each manufacturer accepted MITI's check price agreements and abided by the five-company rule, despite their statutory right to withdraw from the cartel. All knew their competitors were similarly cooperating, and no individual manufacturer could effectively charge higher prices in the American market with any hopes of gaining significant market share while doing so. After *Zenith*, however, a plaintiff must show as a matter of law, that a jury would find it more probable than not that defendants intended and did conspire to injure the plaintiff. *Zenith* teaches that a plaintiff must proffer evidence at summary judgment that excludes the inference of independent action and makes such inference clearly implausible.

substantially changing traditional requirements for inferring an agreement among competitors in the absence of direct evidence. Having found that plaintiffs could not have suffered a cognizable injury in the American market from any action that raised prices in Japan,[21] the Court held that if defendants were liable at all, they would be "liable for conduct that is distinct from the check price agreements. The sovereign compulsion question . . . thus is not presented."[22]

The dissent, however, explained that plaintiffs were harmed, regardless of whether defendants' engaged in predation in the United States market. First, high Japanese prices retarded consumption in Japan and forced excessive exporting of the same products to the United States market, which subsequently depressed domestic wholesale prices.[23] Second, the dissent recognized that defendants exchanged proprietary information with the intention of avoiding competition between themselves in the American market. The defendants' "restrictions on intragroup competition caused [plaintiffs] to lose business that they would not have lost had [defendants] competed with one another."[24] Accordingly, with the conclusion that plaintiffs could not have been injured, the majority's observation that "the sovereign compulsion question . . . is not presented here" is tenuous at best. The question was clearly presented — defendants may not have asserted the defense in good faith, but the MITI Statement obviously ranks as the type of official pronouncement that foreign antitrust defendants traditionally have asserted to support immunity from American antitrust law.

Proponents of the sovereign compulsion defense might argue that the consequence of the Third Circuit Court of Appeals decision[25] (had it been affirmed with a decision or even dicta on the sovereign compulsion issue) would itself dissuade foreign manufacturers from engaging in fierce price competition in the United States out of fear of incurring treble antitrust damages. Based on sovereign compulsion, proponents would argue that American courts should give

21. 54 U.S.L.W. at 4325. The Court's statement is at first blush ambiguous. Plaintiff accused the defendants of charging artificially high prices in Japan to finance predation (low prices) in America. This passage in the opinion does not imply that defendants charged above market prices in America, but that predation could have resulted only from the Japanese manufacturers efforts in charging super-competitive prices in Japan. Thus, United States consumers would have benefitted from the conduct of the Japanese due to the forced increase in low priced exports to the United States, which the Court concluded torpedoed plaintiff's damage argument.

22. *Id.* at 4325.

23. 54 U.S.L.W. at 4325-28. This observation is not ivory tower economic analysis. Rather, the dissent analyzed ad nauseum the admissible reports of plaintiff's expert, Dr. Harold Podwin, to reach this conclusion. *See id.* at nn. 3 & 4.

24. *Id.* at 4326-27.

25. 723 F.2d 238 (3d Cir. 1983); 723 F.2d 319 (3d Cir. 1983).

dispositive weight to a statement submitted to an American court, especially when the statement indicates explicitly that the foreign sovereign compelled the challenged conduct.

In light of *Zenith* and FSIA, it is questionable whether the sovereign compulsion defense remains viable or necessary when foreign commerce and American antitrust laws collide. Perhaps before the enactment of FSIA, sovereign compulsion fairly met the needs of courts loathe to insult or offend the executive branch or foreign sovereigns. Today, however, with scholarly, journalistic, and business commentary replete with tales of the American trade deficit and domination of American markets by foreign producers, traditional notions of international comity and "fairness" must be re-examined, as must the traditional and normative distinctions between commercial and purely governmental activity.

IV. May the United States as a State Deal with Acts or Agreements Outside Its Borders?

A. Act of State Doctrine and the Banana *Proposition*

Early case law involving the act of state doctrine established the ability of the United States to deal with acts or agreements outside its borders. Classic act of state doctrine prevents American courts from judging the governmental acts of a foreign country, especially those that occur within that country's own territory. The seminal act of state case is *Underhill v. Hernandez*,[26] which held that "[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done *within it's own territory*."[27] In theory and application, the act of state doctrine preserves the separation of powers. The doctrine separates the courts and prevents them from interfering in foreign affairs conducted by the executive branch.

American Banana Co. v. United Fruit Co.[28] was the first antitrust case that involved an extra-territorial question.[29] Justice Holmes stated that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[30] Justice Holmes firmly established the *Banana* proposition: United States laws have

26. 168 U.S. 250 (1897).
27. *Id.* at 250 (emphasis added).
28. 213 U.S. 347, 357-58 (1909).
29. Though the act of state doctrine began with *Underhill*, *American Banana* was the first antitrust case to apply the doctrine.
30. 213 U.S. at 356 (*citing* Slater v. Mexican Nat'l R.R. Co., 194 U.S. 120, 126 (1903)).

no application in foreign territory absent an effect upon United States foreign commerce. The plaintiff in *American Banana* charged that the defendant, to prevent export competition from Costa Rica and Panama, had secured long-term contracts with most of the fruit producers in that region by outbidding competitors and compelling producers to sell only on defendants' terms.[31]

The Court found the challenged acts those of a foreign government. Justice Holmes found the acts of the Panamanian government and of the Costa Rican officials and soldiers to be those of the defendant, since the defendants instigated those acts. *American Banana* indicated that liability under the Sherman Act was unsupported solely on the influencing of officials or legislation in a foreign country. However, even the *Banana* proposition implicitly recognizes that parties who exceed this point and use acts of a foreign government to effect an illegal conspiracy may not successfully avail themselves of the sovereign compulsion defense or any other form of antitrust immunity.

American Banana thus carved an exception to the prohibition against monopolies in "trade or commerce . . . with foreign nations."[32] While the Sherman Act expresses no such exception, the Supreme Court held that, on grounds of international comity, acts of a foreign sovereign committed abroad or acts directed by a foreign sovereign were not subject to the Sherman Act. As a corollary, the Court held that to influence a foreign executive or successfully lobby for legislative action is also beyond the Sherman Act.[33] The *Banana* proposition, however, does not suggest that a competitor's use of a foreign sovereign's mandate to effect an illegal conspiracy is immune from antitrust liability in the United States, and this caveat is firmly rooted in subsequent cases.

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31. *Id.* at 353-55.

32. *See* 15 U.S.C. §§ 1-2, *supra* note 1.

33. Today the Noerr-Pennington doctrine probably would protect such activity. *See* Eastern Railroad President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 187 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965) (Sherman Act not applicable to essentially political or economic conduct). It is questionable whether Noerr-Pennington applies in foreign commerce, and whether American industry would violate the Sherman Act by lobbying a foreign government to enact restraints of trade. In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, for example, the court held that respondent's role as the Canadian government's purchasing agent was protected commercial activity under Noerr-Pennington. However, Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 108 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972) expressly questioned whether Noerr-Pennington would protect attempts to influence foreign legislation. *See also* Export Trading Company Act of 1982, 15 U.S.C. §§ 4011-4021 (1982) (lobbying exempt from antitrust laws) and Webb Pomerene Act, 15 U.S.C. §§ 61-66 (1982) (provides limited exception from Sherman Act for associations formed solely to engage in export trade).

B. *The Progeny of* American Banana

The antitrust violations alleged in the progeny of *American Banana* resemble the alleged conspiracy in *Zenith*. In *United States v. Sisal Sales Corp.*,[34] the defendant obtained discriminatory legislation in Mexico, and thereby became the sole sisal purchaser in the country.[35] Defendants argued their conduct was legal under *American Banana*. The Supreme Court, however, distinguished *American Banana*, stating as follows:

> [T]he fundamental object was control of both importation and sale of sisal and complete monopoly of both internal and external trade and commerce. . . . 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.[36]

The *Banana* proposition relied upon the general rule that acts are adjudged as legal or illegal according to the law of the place where they are done. Subsequent cases, however, indicate the contrary when plaintiffs prove adverse effects upon United States commerce. Assuming such effects, the sovereign compulsion defense can be supported, if at all, only by acts that are required by foreign law, but not when such acts are used with the intent of effecting illegal anticompetitive results.

The Supreme Court considered the question of the effect of foreign law on the legality of actions abroad in 1962. *Continental Ore Co. v. Union Carbide & Chemical Co.*[37] concerned acts in Canada of the Canadian subsidiary of a United States company. The decision expressly reaffirmed *Sisal*. In *Continental Ore Co.*, the plaintiff brought a private treble damage antitrust case under Sections 1 and 2 of the Sherman Act. Plaintiff contended that the defendants had excluded it from the Canadian vanadium market during World War II. Plaintiff's charged that such exclusion occurred due to the actions of the Canadian subsidiary of Union Carbide, Electro Met of Canada. The Canadian government had appointed Electro Met as the exclusive wartime agent to purchase and allocate vanadium for Canadian industries.

Plaintiff proffered evidence at trial to prove that Electro Met of Canada refused to purchase from plaintiff pursuant to the conspiracy with the other defendants and thereby eliminated plaintiff from the Canadian market. Thus, the market left open was divided between

34. 274 U.S. 268 (1927).
35. Sisal is a hemp derivative used to produce rope.
36. 274 U.S. at 276.
37. 370 U.S. 690 (1962).

Union Carbide and Vanadium Corp. of America. The district court excluded this evidence.

The Court of Appeals for the Ninth Circuit agreed with the district court that, assuming the allegations were true, plaintiff was not entitled to recover from defendants for the alleged destruction of its Canadian business. The court noted that no vanadium could be imported into Canada by anyone other than the Canadian government's agent, Electro Met. Furthermore, Electro Met had refused to do business with the plaintiff. The court reasoned as follows:

> [E]ven if we assume that [Electro Met] acted for the purpose of entrenching the monopoly position of the defendants in the United States, it was acting as an arm of the Canadian Government, and we do not see how such efforts as appellants claim[ed] defendants took to persuade and influence the Canadian Government through its agents are within the purview of the Sherman Act.[38]

Similar to the Third Circuit's decision in *Zenith* (which relied on *Continental Ore Co.*), the Supreme Court unanimously reversed, holding that the plaintiff's proof was relevant evidence of a violation of the Sherman Act and should have been presented to the jury. The Court carefully noted that the plaintiff did not question the validity of any action by the Canadian government or its Metals Controller. Furthermore, the Court found no indication that the Canadian Controller or any other Canadian approved government official "approved or would have approved of joint efforts to monopolize the production and sale of vanadium or directed that purchases from Continental be stopped."[39]

Thus, in *Continental Ore*, Justice White found *Sisal* to be a strong analogy. He stated that no question was raised as to any action of the Canadian government and concluded that "[a]s in *Sisal*, the conspiracy was laid in the United States, was effectuated both here and abroad, and respondents are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government."[40]

United States v. Watchmakers of Switzerland Information Center, Inc.[41] further distinguished acts that a foreign government encouraged from acts that a foreign government required. *Watchmakers* involved cartel arrangements by the Swiss watch industry.

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38. 289 F.2d 86, 94 (9th Cir. 1961).

39. 370 U.S. at 702, 706 n. 11.

40. *Id.* at 706. This analysis seems to apply precisely to the conspiracy alleged in *Zenith*. However, in its analysis of summary judgment standards in *Zenith*, the Supreme Court ruled the other way, even though the alleged conspiracy in *Zenith* also occurred partly in the United States.

41. 1963 Trade Cas.(CCH) ¶ 70,600, at 77, 414-457 (S.D.N.Y. 1962).

The court found that beginning in 1931, four American watchmakers had conspired with five Swiss defendants to eliminate competition in the United States import and export business and in the production and sale in the United States of watches, watch parts, and watchmaking machinery. The Swiss defendants included a Swiss manufacturers' trade association, Federation Suisse des Assocations de Fabricants d'Horlogerie (FH) and a Swiss holding corporation that owned the stock of Swiss companies that made watch parts (Ebauches). A primary means of effectuating the conspiracy was an arrangement entered into in Switzerland termed the "Collective Convention."[42] This arrangement was designed to prevent the development and growth of competitive watch industries outside Switzerland, particularly inside America. The Collective Convention required its participants not to export watch parts from Switzerland except under certain restrictions and conditions, not to furnish watchmaking machinery or technical assistance outside Switzerland except with restrictions, not to deal in or allow affiliates to trade watches manufactured by nonmembers, and not to export from Switzerland various types of uncased movements.

Defendants had agreed to limit the export of watches and watch parts to the United States. They further agreed not to sell watch parts for manufacturing purposes and to blacklist United States sellers of Swiss watches not conforming with their sales to FH and Ebauches. The American defendants actively participated in the conspiracy through individual contracts that restricted the volume of watches produced in the United States and limited the United States export of domestically produced watches and the re-export of Swiss watches. The court further found that "[t]he United States watch industry was the Swiss watch industry's biggest competitor, and the restrictions of the Convention have obviously had a crippling effect in this country, and were so intended."[43]

Defendants in *Watchmakers* argued that the agreements were executed and took effect in Switzerland, in accord with Swiss law (and therefore beyond the reach of United States law). Defendants further contended that their actions were actually those of the Swiss government. The court rejected both arguments and reasoned that foreign law must be mandatory to constitute a justification. Aside from any requirements of foreign law, "a United States court may exercise its jurisdiction as to acts and contracts abroad, if, as in the

42. *Id.* at 77,425. Like *Continental Ore Co.*, the *Watchmakers* conspiracy parallels the cartel in *Zenith* and JMEA's apparent intent to restrain competition in America.

43. *Id.* at 77,457. Like the Swiss watch industry, the Japanese consumer electronic producers' largest competitors were the Americans. For a review of authority interpreting subsequent case law regarding the intended effects of anticompetitive conduct, see *infra* note 70 and accompanying text.

case at bar, such acts and contracts have a substantial and material effect upon our foreign and domestic commerce."[44]

The court observed as follows:

> It is clear that these private agreements were then recognized as facts of economic and industrial life by that nation's government. Nonetheless, the fact that the Swiss Government may, as a practical matter, approve of the effects of the private activity cannot convert . . . a vulnerable private conspiracy into an unassailable system resulting from governmental mandate.[45]

The district court in *Watchmakers* concluded that only "direct foreign government action compelling the defendants' activities" could prevent a United States court from exercising its jurisdiction.[46] Mere approval of some of defendants' activities by a foreign government would not shield them from liability. *Watchmakers* relied upon the "mandatory" rule, but did not find a *requirement* of foreign law in the case. The court stated that the agreements were formulated privately without any compulsion from the Swiss government.

However, the court ultimately indicated that it would defer to some extent to the sovereignty of the Swiss government. The final judgment in the case (though not intended to permit a repeat of the events that had engendered the original litigation) stated that nothing therein would "limit or circumscribe the sovereign right and power" of the Swiss government or its ability to contract for or effect regulation of its own watch industry.[47]

The foregoing case law engendered the theoretical development of the sovereign compulsion doctrine. Sovereign compulsion, as the doctrine developed at common law, fairly met the needs of courts reluctant to intrude on the province of the executive branch. Congress, however, effectively ended this quandry a decade ago with the enactment of FSIA.

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44. *Id.*

45. *Id.* at 77,456-57. This warning foreshadows Zenith's complaint that the Japanese used the MITI Statement and its provisions as an "industrial bludgeon." *See infra* note 63 and accompanying text.

46. *Id.* at 77,457. This passage illustrates the connection between the act of state doctrine and sovereign compulsion. For general discussion of act of state and sovereign compulsion, see R. FALK, THE AFTERMATH OF SABBATINO (1965); B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST (1979); Dunfee & Friedman, *The Extra-Territorial Application of the United States Antitrust Laws: A Proposal for an Interim Solution*, 45 OHIO ST. L.J. 883 (1984); Fugate, *Antitrust Jurisdiction and Foreign Sovereignty*, 49 VA. L. REV. 925 (1963); Waller, *Redefining the Foreign Compulsion Defense in U.S. Antitrust Law: The Japanese Auto Restraints and Beyond*, 14 LAW & POL'Y. INT'L BUS. 747 (1982); Comment, *Foreign Government Compulsion as a Defense in United States Antitrust Law*, 7 VA. J. INT'L L. 685 (1976).

47. United States v. Watchmakers of Switzerland Info. Center, Inc., *judgment modified*, 1965 Trade Cas. (CCH) ¶ 71,352, 80,490, at 80,491 (S.D.N.Y. 1965).

C. *The Foreign Sovereign Immunities Act of 1976 (FSIA)*

In 1976, Congress enacted the Foreign Sovereign Immunities Act (FSIA)[48] with four intended objectives: (1) to codify the "restrictive principle of sovereign immunity"; (2) to insure that the restrictive principal of immunity is applied in litigation before United States courts; (3) to provide a statutory procedure for making service upon and obtaining in personam jurisdiction over a foreign state; and (4) to help plaintiffs enforce and collect judgments against foreign sovereigns.[49] FSIA provides that foreign states are not immune from suits based on commercial acts, and further provides that the "nature" of the underlying act is determinative while its "purpose" is irrelevant.[50]

FSIA states, in relevant part, as follows:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case:
>
> > (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 the commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with the commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.[51]

FSIA Section 1603(d) defines commercial activity as "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[52]

The pertinent part of Section 1606 provides as follows:

> As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; . . . .[53]

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48. Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-11(1982)).

49. H.R. REP. No. 1487, 94th Cong., 2d Sess. 7-8, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6605-06, [hereinafter HOUSE REPORT].

50. 28 U.S.C. § 1605(a)(2)(1982).

51. *Id.* § 1605(a)(1982).

52. *Id.* § 1603(d)(1982).

53. *Id.* § 1606(1982).

The foregoing FSIA provisions provide an adequate basis for courts and litigants to resolve the problems that the sovereign compulsion doctrine theoretically was intended to solve.

D. Sovereign Compulsion Doctrine

Timberlane Lumber Co. v. Bank of America[54] highlighted the necessity of an effect on United States commerce. Thus, the sovereign compulsion defense has been described as a corollary to the act of state doctrine,[55] which "precludes the courts of this country from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory."[56] Sovereign compulsion differs, however, from the state action doctrine, which applies to domestic antitrust disputes. The state action doctrine reflects the view that, although the Sherman Act is the law, Congress did not intend by silence in the Sherman Act to prohibit action of a state that may restrain competition.[57] However, sovereign compulsion resembles the state action doctrine to the extent that American antitrust laws do not apply to private conduct compelled by state governments.[58]

Thus, unlike *Watchmakers, Interamerican Refining Corporation v. Texaco Maracaibo, Inc.*[59] found, in 1970, that an alleged boycott actually resulted from genuine foreign sovereign compulsion. *Interamerican* is the only reported case ever to uphold assertion of this defense. Plaintiff, Interamerican (a U.S. company), planned to process low cost Venezuelan crude oil in a bonded refinery in New Jersey that it had leased from another company, and to export products or to sell them as ship's bunker in New York Harbor, thereby avoiding United States oil import quotas and tariff restrictions. After several shipments, the Venezuelan government instructed two defendant oil companies (subsidiaries of Monsanto and Texaco) that held oil concessions in Venezuela to curtail Venezuelan oil shipments to Interamerican. Prior sales had been made through an intermediate trading company, the Amoco Trading Corporation. All the involved companies were American. After the government's action, the

54. 549 F.2d 597 (9th Cir. 1976); *see supra* notes 7 - 14 and accompanying text.

55. *See, e.g.*, Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 697 (1976); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964); Ricaud v. American Metal Co., 246 U.S. 304, 310 (1918); Oetjen v. Central Leather Co., 246 U.S. 297, 302-03 (1918); Underhill v. Hernandez, 168 U.S. 250, 252 (1897); International Ass'n of Machinists & Aerospace Workers (IAM) v. Organization of Petroleum Exporting Countries (OPEC), 649 F.2d 1354, 1358-59 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); Hunt v. Mobil Oil Corp., 550 F.2d 68, 77 (2d Cir. 1979), *cert. denied*, 434 U.S. 984 (1977).

56. *Banco Nacional de Cuba*, 376 U.S. at 401.

57. *See* Parker v. Brown, 317 U.S. 341, 351 (1943).

58. *See, e.g.*, Hoover v. Ronwin, 104 S. Ct. 3564 (1984); Bates v. State Bar, 433 U.S. 350 (1977).

59. 307 F. Supp. 1291 (D. Del. 1970).

two suppliers refused to sell to Amoco for resale to Interamerican. Other Venezuelan oil suppliers also refused to trade with Amoco. The court held that sovereign compulsion was an absolute defense to Interamerican's boycott allegations.

Though it is arguable that the conduct in *Interamerican* was beyond the mandates of the Venezuelan government, it is noteworthy that the government completely controlled exported oil. Thus, the court stated that "[a]nticompetitive practices compelled by foreign nations are not restraints of commerce, as commerce is understood in the Sherman Act, because refusal to comply would put an end to commerce."[60]

Successful application of the sovereign compulsion defense in *Interamerican* signified judicial acceptance that anticompetitive conduct compelled by a foreign sovereign engenders foreign policy concerns that are the traditional province of the executive branch. One of the fundamental characteristics of national sovereignty is the conduct of foreign relations, including foreign economic and trade relations.[61] Any foreign government, like the United States government, may exercise its sovereignty according to its own law and policy, especially when this exercise involves only the control of a sovereign's nationals' activities within its own territory and regarding its own export trade.

The larger problem, however, is that sovereign compulsion creates a legal license for foreign competitors to ignore American antitrust laws, and may be used as a veil, or as in *Zenith*, a "false issue" and "industrial bludgeon"[62] in subsequent litigation. It is exceedingly difficult to prove that a foreign sovereign did not intend to cause an adverse effect on American commerce by promulgating restraints of trade that would otherwise subject it or its nationals to American antitrust liability.

Practically speaking, foreign competitors may do under the aegis of their governments what the Sherman Act makes illegal to do on their own. One of the evils that inheres in the sovereign compulsion defense is that it penalizes antitrust plaintiffs for the defendant's antitrust violations. To date, neither a plaintiff's innocence nor the actual damages suffered as a consequence of a defendant's illegal conduct has ever been the paramount consideration in foreign anti-

60. *Id.* at 1298 (citing BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD (1925)).

61. This raises a separation of powers argument that is beyond the scope of this Article, but well-characterized by Justice Sutherland in United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936), in which he stated that the President is the "sole organ" of the United States in international relations. *See also* Defense Production Act of 1950, Pub. L. No. 774, ch. 932, § 708, 64 Stat. 798, 818-19 (1950) (permitting President to grant business antitrust immunity).

62. Brief in Opposition to the Petition for Writ of Certiorari at 24.

trust cases. In application, sovereign compulsion creates an unfair windfall for antitrust defendants at the expense of plaintiffs.

Zenith apprised the Supreme Court of this exact problem:

> Significant portions of [defendants'] conduct were not dealt with in the [MITI] note . . . MITI did not direct [defendants] to fix prices in Japan, to dump, to commit customs fraud by filing false U.S. Customs invoices, to lie about their prices to the U.S. Treasury Department . . . , to lie to MITI about their true prices, to collude with one another to continue to conceal their prices and to continue their dumping campaign, or to transform aspects of their export arrangements into an industrial bludgeon to be jointly wielded in the United States. The note itself describes an unwritten "direction" of uncertain content and scope by persons unknown on a date or dates unknown to persons unknown at places unknown with legal effect, if any, unspecified. Moreover, the course of conduct involved did not occur wholly within the territorial boundaries of Japan . . . [Defendants'] unconditional ability to withdraw from the formal cartel arrangements, a right protected by Japanese statute, the absence of any sanction for non-compliance, the absence of any formal decree, the absence of any statement of any Japanese legal officer as to the legal effect, if any, of the "direction," the existence of an unexercised legal right to review of any "direction" which if exercised would have resulted in invalidation of any "direction" — a fact at least showing [a] lack of reliance on the alleged "direction" — the fact that MITI's so-called "administrative guidance" is not even a defense to charges under the *Japanese* antimonopoly laws, and defendants' total failure to conform their conduct to the "direction," all combine to deprive the [MITI] note of any remaining significance whatever.[63]

Defendants' unconditional ability to withdraw from the formal cartel is particularly noteworthy. The "withdrawal" provision of the first agreement provided the absolute ability to withdraw upon thirty days' notice. In fact, Japanese law permitted exporters to withdraw from export arrangements when such withdrawal was not otherwise restricted.[64] As Zenith's counsel told the Supreme Court, "It is undisputed that no Japanese manufacturer or exporter was required to belong to the [cartel]."[65] That defendants dispute this in their briefs

63. *Id.* at 24-26.

64. *Id.* at 25 n.17 (citing Export and Import Trading Act, Pub. L. No. 299, 5 August 1952, § 5-bis(v)).

65. *Id.* at 24 n.17. Despite the express Japanese withdrawal statute, the United States argued as amicus curiae in *Zenith* that the repeated use of the words "determined," "directed," "supervision," "mandated," and "enter into" clearly supported defendant's sovereign compulsion defense. *See* Brief for the United States as Amicus Curiae at 15-19. *See also* Brief of the Government of Japan as Amicus Curiae in Support of the Petition for a Writ of Certiorari ("directing" and "effecting" export control agreements); Petition For A Writ of Certiorari

itself highlights the problematic nature of the doctrine and the defenses.

Third Circuit dicta also highlights the problems with the sovereign compulsion defense:

> [I]t cannot be said with any degree of certainty that the minimum prices . . . were in fact determined by the Japanese Government. It is possible to conclude that the government merely provided an umbrella under which the defendants gained an exemption from Japanese antitrust law, and fixed their own export prices. Second, there is abundant evidence suggesting that many defendants departed from the agreed upon minimums and took steps to conceal their departure from MITI. Third, there is no record evidence suggesting that the five-company rule originated with the Japanese Government. Finally, the evidence about price stabilization in the Japanese home market suggests unequivocally that this activity violated the laws of Japan.[66]

Thus, the Third Circuit concluded that "a summary judgment . . . on the defense of sovereign compulsion would be improper."[67] The court further stated that any significance of the MITI note must be analyzed in conjunction with the surrounding circumstances, namely, the nature of the challenged conduct and the alleged government mandate.[68]

Executive concerns for not offending foreign sovereigns are outdated in the current world economy. Specialization and the division of world labor markets require congressional recognition that today's world economy is as much an integrated unit as the American economy when Congress enacted the Sherman Act. The analysis in a case in which a foreign antitrust defendant raises sovereign compulsion as an absolute defense should focus on whether a state-prescribed program is really a surrogate for competition or instead collusive private conduct hidden behind state regulation. And this analysis can be done under the currently existing FSIA provisions. In contrast, the sovereign compulsion doctrine currently exempts foreign competitors or American businesses in foreign nations who can pressure their governments into mandating arrangements that are primed to attack American competitors and violate American antitrust laws.

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to the United States Court of Appeals for the Third Circuit at 20 (reference to the Japanese Government's "official pronouncement attesting to the mandatory nature and governmental character" of the MITI statement).

66. 723 F.2d at 315.

67. *Id.*

68. *See id.*

V. When Is Challenged Conduct Private or Governmental?

The statutory requirement provisions in *Zenith* present an ideal model for distinguishing private and governmental action when defendants raise the question of antitrust immunity. Defendants in *Zenith* quite plainly had a choice: they could have withdrawn from the cartel at any time. The existence of choice, alternative, and a direct effect within the United States[69] should forever bury sovereign compulsion after *Zenith* and FSIA.

Initially, a plaintiff must ask under FSIA whether the challenged conduct has had a direct effect within the United States.[70] If

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69. 28 U.S.C. § 1605(a)(2)(1982).

70. Though the "trade or commerce . . . with foreign nations" clause in the Sherman Act reached the Supreme Court in *American Banana*, in which it was interpreted as not covering conduct beyond American borders, extra-territorial application of the antitrust laws did not emerge until post-World War II economic activity and clearly established the United States as the dominant power in international trade. United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416 (2d Cir. 1945) set out the first test. Judge Hand wrote in *Alcoa* that the Sherman Act applied to foreign conduct when challenged activities are "intended to affect imports or exports, [and] . . . [are] shown actually to have had some effect on them." *Id.* at 444. This is the "intended effects" test, which requires a plaintiff to show that the impact of foreign conduct on United States commerce is direct, substantial, and reasonably foreseeable.

Judge Hand's notion is well documented in the law reviews and in case law, though some cases have begged the intent and foreseeability questions while still upholding antitrust challenges to foreign conduct. *See, e.g.*, Fleischmann Distilling Corp. v. Distillers Co. Ltd., 395 F. Supp. 221, 226-27 (S.D.N.Y. 1975) (intent to cause material and adverse effect on interstate or foreign commerce presume the natural consequence of actions); Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc., 383 F. Supp. 586, 587, *modifying* 375 F. Supp. 610 (E.D. Pa. 1974) ("The territorial restraint imposed by Anheuser-Busch in violation of the Sherman Act directly affected the flow of foreign commerce out of this country"). Other courts have simply held that effects need only be direct and substantial. *See, e.g.*, Dominicus Americana Bohio v. Gulf W. Indus., 473 F. Supp. 680, 687 (S.D.N.Y. 1979); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 102-03 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972) (quoting J. VON KALINOWSKI, ANTITRUST AND TRADE REGULATION SECTION 5.01, at 5.502 (1969)). *Timberlane Lumber Co.*, however, held merely that "it is probably unnecessary for that effect to be both substantial and direct, so long as it is not de minimis." 549 F.2d at 610-11. Now, however, the Reagan Administration proposed to make the test more rigorous and less favorable to private antitrust plaintiffs. *See* "Foreign Trade Antitrust Improvements Act of 1986," *reprinted in*, News Highlights: Antitrust, *Administration Unveils Reform Package Aimed At Revised Import Relief*, 3:9 Int'l Trade Rep. (BNA) 268. The bill proposes to add a new § 21(a)(4). The amendment would require courts to assess "the relative significance and foreseeability of the effect of the conduct on the United States as compared with the effects abroad." This is more than a semantic change from the language of the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6(a)(1982), which looks to the "direct, substantial and reasonably foreseeable" effects of challenged conduct. There is only one reported decision that relies on this statute. *See* Eurim-Pharm GmgH v. Pfizer, Inc., 593 F.Supp. 1102, 1107 (S.D.N.Y. 1984) (finding no jurisdiction for lack of any alleged facts "demonstrating a causal connection between defendant's conduct in Europe and the price increase in the United States"). In effect, it would be a Congressionally mandated return to Lochnerism to force the judiciary to assess the "relative significance" of challenged conduct. The Administration's bill fails to specify how a party would prove such an amorphous concept.

For earlier treatment of the subject, see generally, W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS § 2.10, at 67 (3d ed. 1982); Blechman, *Antitrust Jurisdiction, Discovery and Enforcement in the International Sphere: An Appraisal of American Developments and Foreign Reactions*, 49 ANTITRUST L.J. 1197, 1198-99 (1980); Kintner & Griffin, *Jurisdiction Over Foreign Commerce Under the Sherman Antitrust Act*, 18 B.C. IND. & COMM. L.

there has been no direct effect, a plaintiff will have a basic *Timberlane* and *Banana* problem. As previously stated, the *Banana* proposition relied upon the general rule that acts are adjudged as legal or illegal according to the law of the place where they are done. This is not true, however, when adverse effects upon United States commerce are proven.

Regardless of compulsory language contained in an official pronouncement of a foreign government, the question would still revert back to the foreign sovereign's own law: does a statutory right to withdraw or avoid the "requirements" of foreign governmental trade regulations preempt the regulations ultimate enforceability? Under this analysis, if the answer is affirmative, a foreign antitrust defendant would be barred from asserting an immunity defense for failure to avail itself of its own statutory alternative to avoiding antitrust liability for private commercial activity. If the answer is negative, a defendant need only assert FSIA as its defense, that is, it should lay blame at the hands of its own government. In circumstances in which a defendant is caught without a statutory alternative, the analysis is simpler; FSIA is an absolute defense absent commercial activity.

To the extent this analysis resembles the sovereign compulsion defense, FSIA absorbs whatever independent judicial application may have remained of the defense after the enactment of FSIA. The concept is the same; the law, however, is now codified. The Supreme Court's silence on sovereign compulsion in *Zenith* is unfortunate; dicta or a footnote would have been a welcome first spade in the dirt for a doctrine that Congress effectively buried a decade ago. Essentially, sovereign compulsion is the American equivalent of official foreign import restraints or restrictions, either of which would be defensible under FSIA. In short, FSIA serves the purposes of both plaintiffs and defendants in foreign antitrust litigation. FSIA is an absolute defense, or the commercial activities exception will preserve a plaintiff's claim for punitive damages against an "agent or instrumentality" of the foreign sovereign who is engaged in commercial activity. Thus, the definition of commercial activity is of paramount importance.

Many courts have drawn the distinction between public and commercial acts of a foreign sovereign to apply sovereign immunity, sovereign compulsion, and the act of state doctrines.[71] All are helpful

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REV. 199, 206 (1977).

71. *See, e.g.*, Alfred Dunhill of London, Inc. v. The Republic of Cuba, 425 U.S. 682, 697 (1976) (distinguishing between public and commercial acts of a foreign government on act of state grounds and "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 . . ."); United States v. Deuthsches Kalisyndikat Gesellschaft, 31 F.2d 199, 203 (S.D.N.Y.

as definitions, but none seem to establish a normative standard. Though articulated long ago, Chief Justice Marshall articulated what remains a rather clear test in *Bank of the United States v. Planters' Bank of Georgia.*[72] Chief Justice Marshall stated as follows: "[W]hen a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen."[73]

In fact, Congress and the courts seem to have been somewhat true to Chief Justice Marshall's observation, and appear to have been narrowing the scope of the sovereign compulsion defense all along. According to FSIA's legislative history, even a contract to buy military provisions would be a commercial act.[74] In *Outboard Marine Corp. v. Pezetel,*[75] a Delaware district court granted the plaintiff a trial on its antitrust claims against Pezetel, a Polish golf cart exporter, despite the fact that Pezetel was an instrumentality of the Polish government — a state controlled economy. The court held that under FSIA, a nation is subject to the antitrust laws when engaged in commercial activity. Assuming arguendo that Pezetel was the government in this case, the court evidently characterized its acts by reference to the commercial transaction itself, rather than by reference to its purpose.[76] *Outboard Marine* essentially employed the analysis that the dissent and Third Circuit decision in *Zenith* demand. As the Third Circuit noted, the MITI Statement should have been analyzed in conjunction with the surrounding circumstances, namely, with reference to the transactions sanctioned by MITI, not with reference to their purpose. The Third Circuit in *Zenith* was doing no more than applying the restrictive theory of immunity, the same theory that FSIA was enacted to accommodate.

VI. Conclusion

In defense of the sovereign compulsion doctrine, critics of the application of American antitrust law to foreign commerce lament the political irony when private foreign companies comply with the

1929) (on sovereign immunity theory the court stated that "[a] foreign sovereign cannot authorize his agents to violate the law in a foreign jurisdiction, or to perform any sovereign or governmental functions without the domain of another sovereign, without his consent. He . . . cannot claim as a matter of comity or otherwise that the act of the alleged agent in such case is the act of the sovereign, and that a suit against the agent is in fact a suit against the sovereign"); Interamerican v. Texaco Maracaibo, 307 F.Supp. 1291 (D.Del. 1970) (only case to uphold defendant's acts on grounds of genuine sovereign compulsion).

72. 22 U.S. (9 Wheat.) 904 (1824).
73. *Id.* at 907.
74. HOUSE REPORT, *supra* note 49, at 16.
75. 461 F. Supp. 384 (D. Del. 1978).
76. *Id.* at 395.

trade policies of their own and perhaps the United States government. However, sovereign compulsion will not help foreign firms involved in voluntary compliance with official pronouncements of their own government. In light of FSIA, there is truly no chance that legal challenges to foreign companies will unfairly subject them to United States antitrust liability. FSIA is an American pronouncement of Congressional intent to apply antitrust law to foreign commerce. Sovereign compulsion is a pre-FSIA judicial device and response that courts had applied predominantly to avoid intrusion on the domain of executive branch in international relations. FSIA expressly eliminated that possibility; now Congress should expressly eliminate the sovereign compulsion doctrine.