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The Anti-Foreign Compulsion Act

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Proposed Legislation

An "Anti-Foreign Compulsion Act" has been introduced in Congress to prevent raising as a defense in a proceeding for a violation of a law of the United States that a "person was under compulsion by a foreign state to act, or fail to act, in violation of such law."[1] The Act is short and it appears in three identical bills, H.R. 8155, 8739 and 9225. The bills have been referred to the Subcommittee on Criminal Justice of the House Judiciary Committee.

According to the statement in the Congressional Record upon the introduction of H.R. 8155, the Act is intended to close a "loophole" and to prevent the use of the defense by American corporations allegedly compelled to join a foreign cartel.

In addition, the legislation was described as intended to protect the civil liberties of American citizens in personal as well as commercial situations. However, requirements not to deal with persons of a certain race, creed or color have not been considered enforceable.[2] The public policy expressed in the Civil Rights Act of 1964[3] should prevent a court from enforcing such contracts. In any event, enforceability of contracts usually would not be an issue in a proceeding for violation of a law of the United States.

The Defense of Sovereign Compulsion

Only one case has ever presented the defense of sovereign compulsion in the form directly addressed by the proposed Act, *Interamerican Refining Cor-*

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[1]Congressional Record, July 1, 1977, at E4242 (H.R. 8155).

[2]*See* Glus v. G.C. Murphy Co., 329 F. Supp. 563 (D.C. Pa. 1971); Hairston v. McLean Trucking Co., 520 F.2d 226 (4th Cir. 1975); Chastang v. Flynn & Emrich Co., 365 F. Supp. 957, *supplemented* 381 F. Supp. 1348 (D.C. Md. 1973); Export Administration Act of 1969, *as amended by* Export Administration Amendments of 1977, Pub. L. No. 95-52, § 201(a), 91 Stat 235 (to be codified in 50 App. U.S.C. §§ 2403-1a (1970).

[3]28 U.S.C. § 1445, 42 U.S.C. §§ 1971, 1975a-1975d, 2000a to 2000h-6 (1970).

poration v. Texaco Maracaibo Inc.[4] In that case, an American plaintiff had brought an action for violation of the Sherman Act[5] seeking treble damages under Section 4 of the Clayton Act.[6] A boycott by the defendant American corporations was alleged. The plaintiff had a bonded oil refinery in Bayonne, New Jersey, and sold its output as ships' fuel free of United States tariffs and restrictions on oil imports. The principal stockholders of the plaintiff were persona non grata to the Venezuelan government.

One of the defendants, Amoco Trading Company, purchased crude oil from the other defendants and sold it to the plaintiff. The other defendants were producers of Venezuelan crude oil.

The Venezuelan government regulated foreign companies' concessions to produce crude oil in Venezuela. It had called the defendant crude oil producers into the Ministry of Mines and Hydrocarbons and told them not to allow any more Venezuelan oil to reach the plaintiff. There appeared to be two reasons for this demand. The first was the personal or political differences between the persons in control of the plaintiff and the persons in control of the Venezuelan government. Plaintiff's two controlling principals both had histories of political activity in Venezuela. The other reason was the Venezuelan government's desire to prevent Venezuelan crude oil from being shipped to markets such as Canada and Europe that were not its usual outlets. The low price at which the plaintiff made its sales may have been the reason the oil it sold was shipped to these markets.

The Minister of Mines and Hydrocarbons had been quoted in the Venezuelan press as saying, "an end will be put to it."[7] The Venezuelan authorities also had expressed concern that the plaintiff might violate United States import laws and declared that the Venezuelan government opposed any sales to a bonded refinery in New York Harbor.

In rejecting the complaint, the court distinguished prior cases where defendants' acts may have been empowered by a government, but the acts were not directed by a government.[8] It also distinguished cases where the conspirators were aided by foreign legislation and foreign government acts, but the conspiracy was instigated and began in the United States (such as the *Sisal Sales* case).[9] The court said there was nothing in the record to indicate that the foreign government's order had been procured by the defendants or that the defendants had acted voluntarily pursuant to a delegation of authority to con-

[4]307 F. Supp. 1291 (D.Del. 1970).
[5]15 U.S.C. §§ 1-2 (1970).
[6]15 U.S.C. § 15 (1970).
[7]*Id.* at 1295 citing *El Nacional,* February 12, 1960 at 1.
[8]Continental Ore Company v. Union Carbide Corp., 370 U.S. 690 (1962).
[9]United States v. Sisal Sales Corp., 274 U.S. 268 (1927).

trol the oil industry. It was the court's position that no precedent was required —certainly not that of consent decrees—to acknowledge that sovereignty includes the right to regulate commerce within a nation.[10] In its opinion it described *Watchmakers of Switzerland* as holding that: "[A] collective agreement could form a conspiracy notwithstanding that it was permitted by the laws of Switzerland but 'if, of course, the defendants' activities had been required by Swiss law, this court could indeed do nothing.'"[11]

And, it added:

> When a nation compels a trade practice, firms there have no choice but to obey. Acts of business become effectively acts of the sovereign. The Sherman Act does not confer jurisdiction on United States courts over acts of foreign sovereigns. By its terms, it forbids only anticompetitive practices of persons and corporations.[12]

The court declined to inquire as to the authority of the Venezuelan Ministry of Mines and Hydrocarbons;[13] instead, it said: "[T]he Supreme Court held that it could not explore the validity under Cuban law of acts of expropriation . . . . Plaintiff's attempt to limit Sabbatino[14] to expropriation decrees finds no support either in the holding or the rationale of that case."

The Sovereign Immunity Defense

Sovereign immunity is now governed, under United States domestic law, by Chapter 97 of Title 28 of the U.S. Code, entitled "Jurisdictional Immunities of Foreign States." Under these provisions, a foreign state is immune from the jurisdiction of the courts of the United States and of the states of the United States, except as otherwise provided.[15] A general exception to immunity applies when an action is based upon a commercial activity.[16]

For want of any better method of determination as to when an act is "commercial" and when it is "governmental," perhaps the most likely test to be applied by the courts will be what United States laws permit our government to do. Under the Export Administration Act of 1969[17] and the implementing regulations of the U.S. Department of Commerce,[18] a license is required to permit the export of goods or technical data from the United States. Even

[10] *Id.* at 1297-98. Defendants relied on dicta in *Continental Ore, supra,* and in United States v. Watchmakers of Switzerland Information Center, Inc., 1963 Trade Cas. Par. 70,600 (S.D.N.Y.).
[11] 307 F. Supp. at 1297, n.16 (quoting 1963 Trade Cas. at 77,456).
[12] *Id.* at 1298 and n.18 (citing Parker v. Brown, 317 U.S. 341 (1943)), discussed at p. 13 *infra.*
[13] *Id.* at 1298, 1299.
[14] Banco National de Cuba v. Sabbatino, 376 U.S. 398 (1964).
[15] 28 U.S.C. § 1604 (1970).
[16] 28 U.S.C. § 1605 (1970).
[17] 50 App. U.S.C. §§ 2401-2413 (1940).
[18] 15 C.F.R. §§ 370.1-399.9 (1977).

more apposite to *Interamerican,* authorization is required prior to any *reexport* to another country of U.S. source goods or technical data from a country to which they have been lawfully exported.[19] The Department of Commerce often requires foreign consignees or purchasers of U.S. source goods or technical data to agree to limit the countries where they will resell them.[20] In addition, foreign firms or individuals can be prohibited from acting as purchasers directly or indirectly of products exported from the United States.[21]

The Antitrust Division of the Department of Justice has expressed the view that the *Interamerican* case was wrongly decided.[22] At least one of the defendants, Amoco, was not engaged in business in Venezuela. Nevertheless, the actions as distinct from the representations of the United States government would support the view that the United States should recognize the defense of sovereign compulsion when it relates to exports from a foreign country that are subject to control by a foreign state acting in a noncommercial capacity. Moreover, such controls do not infringe any fundamental position of the United States against restraints on the locations where or purchasers to whom buyers may resell: under United States law sellers may lawfully impose such vertical restrictions in contracts with buyers, unless (as is true with any contract that is not a per se violation of the antitrust laws) the contracts would be an unreasonable restraint of trade.[23]

Act of State Doctrine

The act of state doctrine 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 in the exercise of governmental authority.[24]

The first antitrust decision of the Supreme Court concerning the act of state doctrine was the oft-cited *American Banana Co. v. United Fruit Company.*[25] In that case, the plaintiff alleged that his business had been destroyed by acts of the Costa Rican government that occurred at the defendant's instigation and that were in furtherance of a Sherman Act conspiracy. The court found acts outside the United States to be beyond its jurisdiction. Subsequent cases

[19]15 C.F.R. § 347.1 (1977).
[20]15 C.F.R. § 375.2 (1977).
[21]15 C.F.R. § 387.10 and 388.1 (1977).
[22]ANTITRUST DIVISION, U.S. DEP'T. OF JUSTICE, ANTITRUST GUIDE FOR INT'L OPERATIONS 52 (Case "K") (1977).
[23]Continental TV Inc. v. GTE Sylvania, Inc., 45 U.S.L.W. 4828 (June 23, 1977). *But cf.:* Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (boycott of retailer by manufacturers, wholesalers and another retailer a per se violation of the antitrust laws).
[24]Alfred Dunhill of London v. Republic of Cuba, 425 U.S. 682 (1976).
[25]313 U.S. 347 (1909).

have not upheld this position. In the *Sisal Sales* case referred to above, the acts of the foreign sovereign were of assistance to the American conspirators, but the Supreme Court made it clear that American courts had jurisdiction.[26]

A recent case construing the act of state doctrine is *Hunt v. Mobil Oil Corp.*[27] There, the plaintiff had taken great care to avoid describing the government of Libya as a coconspirator and to minimize that government's role in the events by which the alleged conspiracy was claimed to have damaged the plaintiff. But the court held that it would be impossible to separate questions of motivation from questions as to the validity of the seizure of the plaintiff's property. It considered the expropriation to be a sovereign public act that was removed from judicial scrutiny as an act of state.

On the other hand, in the *Timberland Lumber* case, the Circuit Court of Appeals for the Ninth Circuit did not believe that the act of state doctrine applied to the application by foreign courts and their agents of foreign laws concerning security interests and the protection against diminution of properties that served as collateral.[28] In that case the foreign judicial proceedings had been initiated by a private party, and not by a foreign government. The Ninth Circuit found no indication that the foreign court action reflected any official government policy of Honduras that the plaintiff's efforts to mill lumber in Honduras and export it to the United States should be restrained. The plaintiff had not named a foreign government or its officer as a defendant or coconspirator and did not challenge foreign government policy or sovereignty in any fashion that appeared on its face, according to the court, to hold any threat to relations between the foreign government and the United States. Therefore, under these circumstances, the act of state doctrine was not found to require dismissal of the action.

Perhaps a classic illustration of the application of the act of state doctrine was presented by *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*[29] The ruler of Sharjah, one of the Trucial States in the Persian Gulf, was allegedly persuaded by the defendant to extend his state's boundaries and thereby oust the plaintiff from its offshore oil concession which had been granted by another sovereign, Umm al Qaywayn. The courts refused to examine the defendant's alleged encouragement to the ruler to take the action that he did.

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[26]274 U.S. 268.

[27]550 F.2d 68 (3d Cir. 1977), *petition for cert. filed,* 46 U.S.L.W. 3081 (April 12, 1977) (No. 76-1403).

[28]Timberland Lumber Co. v. Bank of America, 549 F.2d 597 (1976).

[29]331 F. Supp. 92 (C.D. Cal. 1971), *aff'd per curiam,* 461 F.2d 1261 (9th Cir. 1972), *cert. denied,* 409 U.S. 1950 (1972).

The act of state doctrine has been held to preclude court scrutiny of the alleged instigation by defendants of the Brazilian government's denial of import licenses. The grant of import licenses was described by the court as an aspect of the control of foreign trade that involves a decision by a government acting within its own territory.[30]

It may be said that the Congress has recognized lack of sovereign compulsion as a significant factor in determining the presence or absence of a violation of United States law. Following successful efforts by the State Department to pressure foreign steel producers into a "voluntary import quota" to cover exports to the United States, an action was brought by Consumers' Union alleging that the quota agreements were unlawful. The District Court held that the President lacked the power to given assurances that foreign voluntary agreements would be exempt from the antitrust laws. The plaintiff stipulated to the dismissal of its antitrust claim. Therefore, upon review the Court of Appeals held the lower court's views on the antitrust laws to be without judicial force or effect and inappropriate for pursuit upon appeal.[31] Subsequently, there was enacted an exemption from the Federal Trade Commission Act,[32] the Antitrust Laws as defined in 15 U.S.C. 44, and any similar state laws for "negotiating, entering into, participating or implementing an arrangement providing for the *voluntary* [emphasis supplied] limitation on exports of steel to the United States."[33] (The exemption ceased to be effective January 1, 1975.)

In a case involving an executive agreement between the governments of the United States and Canada under which the Canadian government committed itself not to authorize the export of potatoes to the United States, except for seed potatoes, the Supreme Court found it unnecessary to pass on the question of the governments' authority to enter into the agreement.[34] The agreement was implemented by provisions in contracts for potatoes between American buyers and Canadian sellers to limit the use of the potatoes. When the United States government sought to recover damages from an American purchaser who resold Canadian potatoes to persons who allegedly used them for food, the court held that the facts did not disclose a lack of good faith effort on the part of the purchaser to limit the use of the potatoes.[35]

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[30]Bokkelen v. Grumman Aerospace Corp., 423 F. Supp. 329, 333 (E.D.N.Y. 1977) (quoting Alfred Dunhill of London v. Republic of Cuba, 425 U.S. at 697).

[31]Consumers Union v. Rogers, 352 F. Supp. 1319, 1323, (D.C.C. 1973), *aff'd in part sub nom.* Consumers Union v. Kissinger, 506 F.2d 136, 140, 141 (D.C.C. 1974).

[32]7 U.S.C. § 60010, 15 U.S.C. §§ 41-58 (1970).

[33]19 U.S.C. § 2485 (1970).

[34]United States v. Capps, 348 U.S. 296 (1955). The agreement consisted of an exchange of notes between the Acting Secretary of State and the Canadian Ambassador (1948) at 335-37.

[35]*Id.* at 304.

A few years later, the Supreme Court held that a default judgment should not be entered automatically against a defendant who refuses to produce documents in accordance with a pretrial order when the production would violate foreign law.

> It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for non-production, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign. . . . [Petitioner] does not claim that Swiss laws protecting banking records should here be enforced. It explicitly recognizes that it is subject to procedural rules of the United States courts in this litigation and has made full efforts to follow these rules. It asserts no immunity from them. It asserts only its *inability* to comply because of foreign law.[36]

Of course, in document production cases the immediate issues are not alleged violations of United States law, but the authority of courts and the duties of the parties before them.[37] However, an individual who had solicited business in the United States for a foreign bank was required to testify before a grand jury pursuant to a subpoena served on him in the United States, notwithstanding that his act of testifying would be a violation of the law of the foreign state where the bank was established, the Cayman Islands.[38] The Fifth Circuit Court of Appeals did not discuss the principle of sovereign compulsion as a defense that the Cayman courts might recognize if the Cayman authorities were to bring proceedings against Mr. Field.

Under state law, it has been held that a New York court acting in equity can require parties to take actions notwithstanding foreign law when all interested parties are present before the court. On a motion to dismiss, the court found that the defendant could be required to carry out the terms of a trust requiring a conveyance in a foreign country and could be precluded by a New York court from seeking to have the trust annulled by the Ottoman courts.[39]

From time to time, United States courts, in decrees resulting from litigated decisions, have expressly provided that defendants are not to be required to take actions pursuant to the decrees that would violate foreign law.[40]

Notwithstanding the position of the Antitrust Division of the United States

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[36]Société Internationale v. Rogers, 357 U.S. 197, 211, 212 (1958).

[37]*See generally,* 7 TEXAS INT'L L.J. 506 (1972); 34 MO. L. REV. 135 (1970); 1 N.Y.U.J. INT'L & POLITICS 302 (1968); 31 U. CHI. L. REV. 701 (1964); 37 N.Y.U. L. REV. 294 (1962); 14 VIR. J. OF INT' L 747 (1974).

[38]*In re* Grand Jury Proceedings, 532 F.2d 404 (5th Cir. 1976).

[39]Smyrna Theater Co. v. Missir, 198 App. Div. 181, 189 N.Y.S. 4 (1921). *See* Johnson v. Dunbar, 114 N.Y.S.2d 845, 850 (N.Y. Sup. Ct. 1952), *aff'd*, 282 App. Div. 720, 122 N.Y.S.2d 222 (1953), *aff'd*, 306 N.Y. 697, 117 N.E.2d 801 (1954); *Cf.*, Steele v. Bulova Watch Co., 344 U.S. 281 (1952) (trademark misuse).

[40]United States v. Imperial Chemical Industries, 105 F. Supp. 215 (S.D.N.Y. 1952); United States v. Holophane Co., 119 F. Supp. 114, Par. XI (S.D. Ohio 1954), *aff'd per curiam*, 352 U.S. 903 (1956) (Par. XI by an equally divided court).

Department of Justice that the defense of sovereign compulsion should not be allowed as a defense for acts taken within the United States,[41] the Department has made provision for that defense in consent decrees by providing that acts compelled by a foreign sovereign shall not violate the decrees.[42]

The Department of Justice has been asked if it would object to a foreign subsidiary of a United States company concluding a contract with a foreign government for research in the electronics field under which the subsidiary would undertake not to export the patent without the consent of the appropriate Minister of the foreign government. The United States company was subject to a consent decree in the United States applicable to its foreign subsidiaries. When the Canadian Department of Justice notified the United States of the proposed contract, the U.S. Department of Justice determined that an amendment of the consent decree was unnecessary. The basis for its determination was that patents arising out of the foreign project could not be developed before the relevant provision of the consent decree expired. Apparently, the Department of Justice took no objection to the proposed contractual restraint against exports to the United States.[43]

Duress

The defense of sovereign compulsion might be considered a form of the common law defense of "duress." When a civil action is brought by the United States government alleging a violation of United States law, the doctrine of business duress might be applicable. Thus, where a seller in possession of a herd of cattle refused to deliver them unless the purchaser made an additional payment not required by the sales contract, and the purchaser paid to prevent damage to the herd from lack of proper food and shelter, the additional payment was held to have been paid under duress and could be recovered.[44] When the State of Missouri required a railroad to pay a fee for a certificate authorizing the railroad to issue bonds secured by a mortgage, and the state's requirement was unconstitutional, the railroad could recover the payment. In an opinion by Justice Holmes, the Supreme Court held: "Were it otherwise, as conduct under duress involves a choice, it always would be

[41] ANTITRUST GUIDE FOR INT'L OPERATIONS, *supra* note 22, at 5.

[42] United States v. Standard Oil Co., (N.J.), 1969 Trade Cas. Par. 72,742 at 86,647-48 (S.D.N.Y.); United States v. Gulf Oil Corp., 1969 Trade Cas. Par. 72,743 at 86,656 (S.D.N.Y.).

[43] OECD: Report on the Operation of the 1967 Council Recommendation Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade [C. (67) 53 (final)] During the Period 1967-1975, reported in XXII The Antitrust Bulletin at 459, 464, and in Annex I to the Report, "Case 3," at 467.

[44] Lonergan v. Buford, 148 U.S. 588 (1892).

possible for a state to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary."[45]

Applicability of Antitrust Law to Governmental Acts

In *Parker v. Brown,* the Supreme Court held a state of the United States not subject to suit under the Sherman Act, but said "A state does not give immunity to those who would violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."[46] Subsequently, in *Cantor v. Detroit Edison Co.,*[47] the court held an electric utility open to attack under the Sherman Act for providing light bulbs without additional charge to those to whom it sold electricity, despite the fact that this practice was included in tariffs approved by a regulatory commission of the State of Michigan.

Thereafter, in a case attacking prohibitions against advertising by members of the Bar, the court discussed its decision in *Cantor.* It said that *Cantor* would have been an entirely different case if the claim had been directed against a public official or public agency. The court emphasized that Michigan had no independent regulatory interest in the market for light bulbs.

> There was no suggestion that the bulb program was justified by flaws in the competitive market or was a response to health or safety concerns. And an exemption for the program was not essential to the State's regulation of electric utilities. In contrast, the regulation of the activities of the Bar is at the core of the State's power to protect the public.
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> . . . [T]he light bulb program in Cantor was instigated by the utility with only the acquiescence of the State regulatory commission. The State's incorporation of the program into the tariff reflected its conclusion that the utility was authorized to employ the practice if it so desired. The situation now before us is entirely different. The disciplinary rules reflect a clear articulation of the State's policy with regard to professional behavior . . . we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active.[48]

The Supreme Court would seem to distinguish the availability *vel non* of an exemption for acts compelled by a state government of the United States on the basis of the forcefulness with which the state government enforces its commands, and to distinguish between adjudicative or administrative acts and political acts.

The Supreme Court's distinctions are consonant with the description of an act of state as referring to "the public interests of a state as a state, as distinct

[45]Union Pacific Railroad Co. v. Public Service Commission of Missouri, 248 U.S. 67, 70 (1918).
[46]317 U.S. at 351.
[47]428 U.S. 579 (1976).
[48]Bates v. State Bar of Ariz., 45 U.S.L.W. 4895, 4898 (June 27, 1977).

from its interest in providing the means of adjudicating disputes or claims."[49]

Contract, Combination or Conspiracy

Acquiescence by retailers in the resale prices specified by their wholesalers (the wholesalers acting at the behest of the manufacturer) is sufficient to constitute a "combination" within the meaning of the Sherman Act. The threat of termination or of a refusal to do business is sufficient to create a combination once the retailer unwillingly complies.[50]

Similarly, a newspaper delivery contractor's conformity to the advertised price for retail sales of newspapers constitutes a combination within the meaning of the Sherman Act when he had received a customer list as part of a program to make him conform and undertook to deliver papers at the suggested price.[51]

In the motion picture industry, a complex of illegal practices that, according to some of the defendants, were fathered by large exhibitors and forced on these defendants was held not to excuse or help the defendants: "For acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one."[52]

The Supreme Court upheld dismissal of a complaint under the Sherman Act alleging that a large supply of oil was made available at a low price to induce Cities Service to breach its contract with the complainant.[53] The court said that it had been demonstrated that for the defendant to enter into any deal with the complainant "for Iranian oil would have involved it in a variety of unpleasant consequences sufficient to deter it from making any such deal."[54] But the plaintiff did not raise the issue of an acquiescing party becoming a member of an illegal combination until it was before the Supreme Court; for this reason the court declined to pass upon the contention that Cities Service became a co-conspirator by acquiescing because of threats in an illegal scheme conceived and carried out by others for their own benefit.[55]

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[49]THE RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 41, Comment d. *Nature of Act of State,* (1965).

[50]United States v. Parke Davis & Co., 362 U.S. 29 (1960).

[51]Albrecht v. The Herald Co., 390 U.S. 145, 149-150 (1968).

[52]United States v. Paramount Pictures, Inc., 334 U.S. 140, 161. *Accord,* United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 723 ("There is more here than mere acquiescence . . . whether this conspiracy and combination was achieved by agreement or by acquiescence of the wholesalers coupled with assistance in effectuating its purpose is immaterial").

[53]First National Bank v. Cities Service Co., 391 U.S. 253 (1968).

[54]*Loc. cit.*

[55]*Ibid.*, 391 U.S. 280 n.16.

Significance of *Brunswick v. Pueblo Bowl-O-Mat*

Brunswick was sued under Section 4 of the Clayton Act[56] for violations of Section 7 of the Clayton Act.[57] Brunswick manufactured bowling alley equipment and was a much larger company than those companies that generally operated bowling centers. Had Brunswick not acquired a bowling center in violation of Section 7, the center would have gone out of business and the plaintiff's income from operation of a competing center would have increased. Brunswick only questioned in its petition for certiorari the availability of antitrust damages where the sole injury alleged is that a competitor was continued in business, thereby denying respondent an anticipated increase in market share. On this, the Supreme Court declared:

> Every merger of two existing entities into one, whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some persons. But Congress has not condemned mergers on that account; it has condemned them only when they may produce anticompetitive effects. Yet under the Court of Appeals' holdng, once a merger is found to violate Sec. 7, all dislocations caused by the merger are actionable, regardless of whether those dislocations have anything to do with the reason the merger was condemned. This holding would make Sec. 4 recovery entirely fortuitous, and would authorize damages for losses which are of no concern for the antitrust laws . . . it is quite clear that if respondents were injured, it was not "by reason of anything forbidden in the antitrust laws": while respondents' loss occurred "by reason of" the unlawful acquisitions, it did not occur "by reason of" that which made the acquisition unlawful.
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> . . . Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.[58]

Thus the Supreme Court considered the purposes of the antitrust laws and the acts at which they were directed, and excluded their application to acts at which they were not directed. The antitrust laws should not be applied to "combinations" compelled by foreign sovereigns in regard to acts that United States law considers legitimate for regulation by the foreign sovereign. The practical standard of legitimacy is a comparison with combinations and acts that the United States Government might require and that have effects or require actions outside the United States.

The analysis by the Department of Justice of the law in the competitive impact statement in the *Bechtel* case took a somewhat different approach. The Department considered the defense inapplicable to acts within the United

[56] 45 U.S.L.W. 4138 (Jan. 25, 1977); 15 U.S.C. § 15 (1970).

[57] 15 U.S.C. § 18 (1970).

[58] *Id.*, U.S.L.W. 4140-41 (quoting § 4 of the Clayton Act (15 U.S.C. §15): "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . .").

States contrary to conflicting United States laws expressing a sovereign and public interest.[59] But the *Brunswick* decision had come down; and the activity addressed in *Bechtel* was procurement by an American contractor and not the management of assets located in, or exported from, a foreign country.

Despite the concern of members of Congress about a uranium cartel,[60] should the Canadian government require a Canadian subsidiary of a United States corporation to participate in a cartel and attend meetings in third countries, the Sherman Act could not prevent it. If there is a Canadian law under which a Canadian subsidiary can be ordered to participate in a cartel, the subsidiary's refusal to comply might lead to appointment of a receiver for the subsidiary. Its officers and directors might be criminally prosecuted and they might be enjoined to cause the subsidiary to comply. But an American parent company could be only a volunteer if it participated in the cartel when sovereign compulsion was directed to the subsidiary.

Compliance with government orders to charge a specified price, whether for milk, tobacco, peanuts, or for manufactured or mined products, should not mean joining in a combination that violates antitrust law. Failure of the United States to observe international comity can be expected to be followed by actions in foreign countries alleging that combinations compelled by United States law violate foreign countries' antitrust laws. Were such combinations considered to violate the antitrust laws of many importing countries, much international trade would come to a standstill. The trade could not be transferred from privately owned companies to government owned agencies because the activities involved would be "commercial," and governments would not have sovereign immunity in conducting them.

Should the Supreme Court hold that the antitrust laws are not intended to apply to acts that are compelled by foreign governments, the defense of sovereign compulsion would be replaced by the argument that the government had failed to establish any act within the scope of the antitrust laws, i.e., that the government had failed to prove a commercial combination, agreement, or conspiracy, the kind of combination, agreement or conspiracy at which the antitrust laws are directed.

[59]United States v. Bechtel Corp. *et al,* proposed final judgment and competitive impact statement, 42 Fed. Reg. 3716 at 3719-3720 (1977).

[60]Wall Street Journal, October 31, 1977 at 15, col. 6, October 17, 1977 at 6, col. 1.