

Foreign Application of the *Noerr-Pennington* Doctrine After *Coastal States Marketing v. Hunt*

I. INTRODUCTION

United States businesses operating abroad have long recognized that they can profit from lobbying foreign governments just as they can gain a competitive advantage from successfully petitioning Congress, the executive branch, numerous administrative agencies, and the courts. Domestic lobbying by American and foreign businesses and their trade associations can, when successful, have an adverse effect on competition. In some cases, this governmental petitioning is undertaken solely to achieve an anticompetitive effect. Although a demonstrable restraint of trade may result, such petitioning activity is immune from domestic antitrust liability under the Sherman Act¹ because of the judicially created exception to antitrust laws known as the *Noerr-Pennington* doctrine.²

When American businesses operating abroad jointly petition foreign governments for the purpose of gaining a competitive advantage, and a substantial anticompetitive effect on trade within the United States results, their antitrust liability is uncertain. If petitioning activities by United States corporations directed at foreign governments are treated the same as petitioning directed at a branch of the United States government, then the *Noerr-Pennington* doctrine would render foreign petitioning immune from antitrust liability. The Supreme Court has never addressed the issue, but two circuit courts have done so and have arrived at conflicting decisions.³

¹15 U.S.C. §§ 1-7 (1982).

²The doctrine takes its name from *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). See generally 1 P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶¶ 201-204 (1978) [hereinafter cited as AREEDA & TURNER]; J. ATWOOD & K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* § 8.12 (1981) [hereinafter cited as ATWOOD & BREWSTER]; 1 W. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* § 2.28 (3d ed. 1982) [hereinafter cited as FUGATE]; Costilo, *Antitrust's Newest Quagmire: The Noerr-Pennington Defense*, 66 MICH. L. REV. 333 (1968); Oppenheim, *Antitrust Immunity for Joint Efforts to Influence Adjudication Before Administrative Agencies and Courts—From Noerr-Pennington to Trucking Unlimited*, 29 WASH. & LEE L. REV. 209 (1972); Comment, *Antitrust Immunity: Recent Exceptions to the Noerr-Pennington Defense*, 12 B.C. IND. & COM. L. REV. 1133 (1971); Note, *Corporate Lobbyists Abroad: The Extraterritorial Application of Noerr-Pennington Antitrust Immunity*, 61 CALIF. L. REV. 1254 (1973) [hereinafter cited as Note, *Corporate Lobbyists Abroad*]; Note, *Antitrust: The Brakes Fail on the Noerr Doctrine*, 57 CALIF. L. REV. 518 (1969); Note, *Limiting The Antitrust Immunity For Concerted Attempts to Influence Courts and Adjudicatory Agencies: Analogies to Malicious Prosecution and Abuse of Process*, 86 HARV. L. REV. 715 (1973); Note, *Application of the Sherman Act to Attempts to Influence Government Action*, 81 HARV. L. REV. 847 (1968).

³Compare *Coastal States Mktg. v. Hunt*, 694 F.2d 1358 (5th Cir. 1983) (*Noerr-Pennington* does apply to foreign petitioning) with *Occidental Petroleum Corp. v. Buttes*

Their contradictory positions are the subject of this Note, which examines the rationales of the circuits in light of the development of the *Noerr-Pennington* doctrine.⁴ A brief discussion of the Sherman Act precedes an examination of this exception to the antitrust laws.⁵ This Note will demonstrate why the more recent view, that the *Noerr-Pennington* doctrine applies beyond the territorial confines of the United States, is the better view,⁶ and why the Justice Department's Antitrust Guide for International Operations should be expanded to explain how the *Noerr-Pennington* doctrine operates when applied abroad.⁷

II. THE SHERMAN ACT AND EXTRATERRITORIAL JURISDICTION

Individuals and businesses are prohibited from restraining or monopolizing trade in the United States by the Sherman Act,⁸ the first of the United States' antitrust laws.⁹ The Sherman Act was passed in 1890 and was aimed at eliminating the various monopolies and combinations in restraint of trade that threatened economic competition in the nineteenth century.¹⁰

Section 1 of the Act prohibits "[e]very 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."¹¹ Terms of crucial importance, such as "restraint" and "commerce," were undefined in the Act and were left to the courts to construe.¹² What was clear in Section 1 was that individual conduct was not prohibited; a violation required two or more persons in order to find the contract, combination, or conspiracy that was prohibited.¹³

Unlike the first section, Section 2 of the Sherman Act reaches the conduct of individuals and is directed towards "[e]very 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"¹⁴ Section 1 and Section 2 are complementary in that the former is directed at the means of anticompetitive conduct—combinations in restraint of trade—

Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir. 1972) (*Noerr-Pennington* does not apply to foreign petitioning).

⁴See *infra* notes 181-266 and accompanying text.

⁵See *infra* notes 8-34 and accompanying text.

⁶See *infra* notes 267-89 and accompanying text.

⁷See *infra* note 290 and accompanying text.

⁸15 U.S.C. §§ 1,2 (1982).

⁹J. TOWNSEND, EXTRATERRITORIAL ANTITRUST: THE SHERMAN ANTITRUST ACT AND U.S. BUSINESS ABROAD 26-27 (1980) [hereinafter cited as TOWNSEND].

¹⁰*Id.* at 29.

¹¹15 U.S.C. § 1 (1982).

¹²TOWNSEND, *supra* note 9, at 34.

¹³*Id.*

¹⁴15 U.S.C. § 2 (1982).

while the latter prohibits the goal of such conduct—monopolization.¹⁵ Violations of Section 2 take three forms: monopolizations, attempts to monopolize, and conspiracy to monopolize. As a general rule, Section 2 is violated when one person or a combination of persons possesses monopoly power, or attempts to gain monopoly power, and has the intent and purpose to exercise that power.¹⁶

The broad statutory language of the Sherman Act has acquired more precise definition in the courts over the last ninety years. Certain types

¹⁵Standard Oil Co. v. United States, 221 U.S. 1, 61-62, (1911); see J. VAN CISE, UNDERSTANDING THE ANTITRUST LAWS 26 (1963).

¹⁶TOWNSEND, *supra* note 9, at 35. More specifically, it is important to note that Section 2, by its terms, does not prohibit monopolies “in the concrete.” Standard Oil Co. v. United States, 221 U.S. 1, 62 (1911). Rather, Section 2 prohibits the act of “monopolization,” which requires that the defendant (1) have monopoly power (2) in the relevant market (3) with the intent or purpose of exercising such power.

Monopoly power exists when the defendant has obtained “control of price or competition.” United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 393 (1956). Such control would be present if the defendant were able to charge a higher price than would be set by competition or to exclude competitors from the market. The defendant need not have obtained monopoly power by means which would violate Section 1 of the Sherman Act in order to be held in violation of Section 2. *Standard Oil*, 221 U.S. at 61.

The relevant market in which the defendant possesses monopoly power has two components. The first is the product market. In defining the relevant product market in the *du Pont* case, the Supreme Court stated that one must make

an appraisal of the “cross-elasticity” of demand in the trade. . . . In considering what is the relevant [product] market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that “part of the trade or commerce,” monopolization of which may be illegal.

351 U.S. at 394-95 (footnote omitted).

The second component of the relevant market is the geographic market. The relevant geographic market may be broad or narrow: “[I]n addition to the principal national market, there may well be local markets of limited territorial area, or city markets, which in other litigation might be found in themselves to constitute, for purposes of the antitrust laws, definable, separate markets, wherein . . . prohibited monopolization . . . might be enjoined or punished.” United States v. Grinnell Corp., 236 F. Supp. 244, 253 (D.R.I. 1964), *aff’d except as to decree*, 384 U.S. 563 (1966).

The final element of monopolization is the intent or purpose to exercise the monopoly power. Specific intent to monopolize is not required, “for no monopolist monopolizes unconscious of what he is doing.” United States v. Aluminum Co. of America, 148 F.2d 416, 432 (2d Cir. 1945) (Hand, J.), *quoted in* American Tobacco Co. v. United States, 328 U.S. 781, 814 (1946). Rather, the intent to exercise monopoly power may be inferred from the conduct of the defendant in obtaining or maintaining monopoly power by practices that are an unreasonable restraint of trade, see *Standard Oil*, 221 U.S. at 70-77, or by other exclusionary practices that do not themselves rise to the level of a Section 1 violation, see *Aluminum Co. of America*, 148 F. Supp. at 431-32.

The standard formulation for attempts to monopolize is “the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it.” *American Tobacco*, 328 U.S. at 785 (quoting and approving jury instructions given in the district court).

of agreements have come to be regarded as illegal *per se* under Section 1 of the Act.¹⁷ These include agreements to allocate territories,¹⁸ agreements among competitors to fix the prices at which their products are sold,¹⁹ collective refusals to deal and group boycotts,²⁰ tying arrangements,²¹ and agreements to exclude competitors.²² The reason for the *per se* rule is that

[a]lthough [Section 1 of the Sherman Act] is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which "unreasonably" restrain competition.

However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.²³

Restraints that fall outside the *per se* rule are subject to a full factual inquiry to determine "whether they will have any significantly adverse effect on competition, what the justification for them is, and whether that justification could be achieved in a less anticompetitive way."²⁴ This inquiry is the "rule of reason" which has been a part of antitrust adjudication since 1911.²⁵

Actions to enforce the Sherman Act may be either criminal or civil. Violations of Sections 1 and 2 are, when prosecuted by the government,

¹⁷TOWNSEND, *supra* note 9, at 38.

¹⁸United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

¹⁹United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

²⁰Fashion Originators' Guild of America v. Federal Trade Comm'n, 312 U.S. 457 (1941).

²¹Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958).

²²International Salt Co. v. United States, 332 U.S. 392 (1947).

²³*Northern Pac. Ry. Co.*, 356 U.S. at 5 (citations omitted).

²⁴Department of Justice, Antitrust Division, *Antitrust Guide for International Operations*, (Jan. 26, 1977), reprinted in ANTITRUST & TRADE REG. REP. (BNA) No. 799, at E-1 (Feb. 1, 1977) [hereinafter cited as *Antitrust Guide for International Operations*].

²⁵The rule of reason test was first applied in *Standard Oil Co. v. United States*, 221 U.S. 1.

felonies.²⁶ Upon conviction, a corporate violator may be fined up to one million dollars; the maximum punishment for other persons is a fine of up to one hundred thousand dollars, or three years imprisonment, or both.²⁷

Section 4 of the Clayton Act²⁸ authorizes suit in the United States district courts by any person harmed in his business or property by an act in violation of the antitrust laws.²⁹ Section 4 also mandates the recovery of treble damages and the cost of litigation, including reasonable attorneys' fees.³⁰

Sections 1 and 2 of the Sherman Act prohibit joint restraints or the monopolizing of "trade or commerce . . . with foreign nations."³¹ The statutory language indicates that the antitrust law was drafted to reach international trade activities. Yet, the regulation of international business activity that occurred outside United States territory raised serious questions of jurisdiction. Originally, courts applied a territorial limitation to the application of United States antitrust laws, denying jurisdiction when the acts complained of occurred outside the borders of the United States.³² Eventually, courts turned from a strictly territorial view of jurisdiction to one that focused less on the place where the allegedly anticompetitive conduct occurred and more on the effects that conduct, outside United States territory, had on competition within the country. Professor Townsend has stated the modern general rule of the antitrust laws' foreign jurisdiction: "The law pertains extraterritorially only to activities, no matter where performed, that directly and substantially affect the foreign trade of the United States."³³ In the view of the Justice Department, "the U.S. antitrust laws should be applied to an overseas transaction when there is a substantial and foreseeable effect on the United States commerce; and, consistent with these ends, it should avoid unnecessary interference with the sovereign interests of foreign nations."³⁴

III. FOREIGN SOVEREIGN INVOLVEMENT AND ANTITRUST DEFENSES

The foreign sovereigns of nations in which United States corporations do business have become integrally involved in matters of international

²⁶15 U.S.C. §§ 1, 2 (1982).

²⁷*Id.*

²⁸15 U.S.C. § 15(a) (1982).

²⁹*Id.*

³⁰*Id.*

³¹15 U.S.C. §§ 1, 2 (1982).

³²TOWNSEND, *supra* note 9, at 42-43 (citing *American Banana Co. v. Unified Fruit Co.*, 213 U.S. 347, 356-57 (1909)).

³³TOWNSEND, *supra* note 9, at 85.

³⁴*Antitrust Guide for International Business Operations*, *supra* note 24, at E-2 to E-3 (footnote omitted).

trade.³⁵ Some do so by interfering directly in competitive markets to promote their domestic employment, to increase income, or to elevate the public welfare.³⁶ Occasionally, the official activities of foreign sovereigns have an adverse effect on commerce within the United States.³⁷ When a foreign sovereign's activities occur with the cooperation of, or in conjunction with, United States businesses operating abroad, the businesses involved may face antitrust consequences in United States courts. American courts have the power to determine liability for Sherman Act violations which have occurred abroad, provided that the activity complained of has a substantial effect on commerce in the United States.³⁸

The involvement of foreign sovereigns in international business complicates antitrust enforcement and litigation.³⁹ When American businesses have acted in conjunction with foreign governments to violate United States antitrust laws, it is likely that, as defendants, those businesses will challenge a United States court's exercise of jurisdiction through affirmative defenses, such as the doctrines of sovereign compulsion⁴⁰ and act-of-state.⁴¹ Both of these doctrines were originally developed in areas of the law other than antitrust; but today, both are used in antitrust litigation to defeat liability in some extraterritorial antitrust cases.⁴² In addition, defendants may call on consideration of comity to foreign governments to avoid inquiry into antitrust liability.⁴³ It is in this manner that the *Noerr-Pennington* doctrine is interjected into some extraterritorial antitrust litigation.

A. Sovereign Compulsion

Sovereign compulsion operates when the defendant's activities were performed pursuant to an official command of a foreign government.⁴⁴ For example, if the government of one nation prohibits businesses

³⁵See TOWNSEND, *supra* note 9, at 82-83.

³⁶D. Baker, *Sovereign Compulsion, The Noerr Doctrine and Government Cartelizing*, in SEVENTEENTH ANNUAL ADVANCED ANTITRUST LAW SEMINAR: INTERNATIONAL TRADE AND THE ANTITRUST LAWS, 95 (1977) [hereinafter cited as Baker].

³⁷*Id.* at 97.

³⁸See generally AREEDA & TURNER, *supra* note 2, ¶ 236. One example arises when foreign governments directly cartelize a world market as a political act, as in the case of OPEC, where the impact on the United States market is great. See Baker, *supra* note 36, at 107.

³⁹See generally AREEDA & TURNER, *supra* note 2, ¶ 235.

⁴⁰See Baker, *supra* note 36, at 98.

⁴¹See Graziano, *Foreign Governmental Compulsion as a Defense in United States Antitrust Law*, 7 VA. J. INT'L L. 100 (1967); Note, *The Development of the Defense of Foreign Compulsion*, 69 MICH. L. REV. 888 (1971).

⁴²See, e.g., *American Banana Co. v. United Fruit Co.*, 213 U.S. 347; *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970).

⁴³*Antitrust Guide for International Operations*, *supra* note 24, at E-3.

⁴⁴The doctrine, also known as "force majeure," generally exempts a private party from performing duties that it would normally be required to perform. The doctrine will not apply unless the government-compelled acts or omissions took place in the government's

operating in that country from exporting a scarce commodity to the United States, and the defendant complies with the order, he would not be liable for any resultant trade restraint within the United States.⁴⁵ The doctrine of sovereign compulsion would provide the defendant with protection even if he complied with the sovereign's mandate with an intent to restrain trade or eliminate competition in the United States.⁴⁶ The doctrine is premised on the respect for the sovereignty of foreign nations and the belief that businesses should not be held liable for conduct that was compelled by the sovereign of another country.⁴⁷ For the doctrine to apply, the foreign government's mandate must be compulsory, not merely permissive.⁴⁸

B. Act-of-State

The traditional statement of the act-of-state doctrine was made by Chief Justice Fuller of the Supreme Court in *Underhill v. Hernandez*:⁴⁹ "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."⁵⁰

The act-of-state doctrine, like that of sovereign compulsion, is based on the concept of sovereign immunity.⁵¹ The doctrine holds that United States courts will not examine the validity of the acts of a foreign sovereign, especially when those acts occur in the foreign territory. The act-of-state doctrine was premised on a belief in mutual respect between equal nations.⁵² This respect meant that one state would not interfere with the internal exercises of another's sovereign power. Whether foreign exercises of the governing power are invalid, or are the result of bad motivation, are questions to be determined within that other country.⁵³

Although United States courts have adhered to the act-of-state doctrine since the *Underhill* decision, the reasons for this adherence have

own territory. Baker, *supra* note 36, at 98; *see also*, FUGATE, *supra* note 2, § 2.27; ATWOOD & BREWSTER, *supra* note 2, § 8.14.

⁴⁵The example assumes that the defendant's compliance occurs in the foreign country.

⁴⁶Graziano, *supra* note 41, at 132. The author explains that irrespective of a private illegal intent, the anticompetitive actions would be directly attributable to the sovereign since commanded by him. *Id.*

⁴⁷*Id.*

⁴⁸*Id.* at 133-38. "Today it is clear that a businessman may do no more than what is required by foreign legislative mandate if he is to claim antitrust immunity." *Id.*

⁴⁹168 U.S. 250 (1897).

⁵⁰*Id.* at 252.

⁵¹Norton, *Reflections on the Act of State Doctrine, A Fifth Wheel in Conflict of Laws*, 10 Hous. L. Rev. 1, 2 (1972).

⁵²*See*, *Underhill v. Hernandez*, 168 U.S. 250 (1897), in which the Court explained that redress of grievances by reason of acts of a sovereign state must be achieved "through the means open to be availed of by sovereign powers as between themselves." *Id.* at 252.

⁵³*See American Banana*, 213 U.S. at 358.

changed. Originally based on sovereignty and comity, the doctrine was primarily used in expropriation cases.⁵⁴ Occasionally, it was applied in antitrust actions. One of the most significant of those early antitrust cases was *American Banana Co. v. United Fruit Co.*⁵⁵ There, the Supreme Court held that the complaint did not state a cause of action under the Sherman Act because the acts complained of occurred outside the United States and were legal under the laws of the country where they were committed.⁵⁶ Justice Holmes, writing for the majority, relied, in part, on the act-of-state doctrine: "[A] seizure by a state is not a thing that can be complained of elsewhere in the courts."⁵⁷ The Court stated that

it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law.⁵⁸

In effect, the Court held that successful petitioning of a foreign sovereign was protected from antitrust liability because it resulted in official governmental action that the American courts would not judge.

The act-of-state doctrine was applied somewhat mechanically in *American Banana*. Its application was modified and became more flexible after the Supreme Court decided *Banco Nacional de Cuba v. Sabbatino*⁵⁹ in 1964. In that case, Justice Harlan explained that neither international law, nor sovereignty, nor the United States Constitution mandated the act-of-state doctrine.⁶⁰ Instead, it was the constitutionally based concept of the separation of powers that required courts to decline from examining the validity of a foreign sovereign's acts.⁶¹ Such an inquiry could cause embarrassment if, for example, an American court held invalid an expropriation by a foreign state while the Executive was trying to soothe a volatile diplomatic situation with the same nation. Since the Constitution assigns foreign affairs to the political branches, the Court

⁵⁴See, e.g., *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918).

⁵⁵213 U.S. 347 (1909). For a review of the facts of this case, see *infra*, text accompanying notes 147-55.

⁵⁶*Id.* at 354-55.

⁵⁷*Id.* at 357-58 (citing *Underhill v. Hernandez*, 168 U.S. 250).

⁵⁸*Id.* at 358 (citation omitted).

⁵⁹376 U.S. 398 (1964).

⁶⁰*Id.* at 421, 423.

⁶¹*Id.* at 423.

in *Sabbatino* announced that it would not look into the validity of a seizure of American property in Cuba.⁶²

The important result of *Sabbatino's* shift in emphasis was the emergence of a much less rigid doctrine. A "balance of relevant considerations" was to be made before courts would hear cases involving the domestic effect of a foreign government's passage of legislation of rule.⁶³ If those considerations did not indicate a serious need to stay a court's exercise of jurisdiction, it would be possible to decide a case which in some way involved the act of another sovereign. In *Sabbatino*, the Supreme Court made it clear that the act-of-state doctrine was not jurisdictional.⁶⁴

In antitrust cases, the act-of-state defense is invoked in two ways: The first occurs when the plaintiff charges that one exercising the delegated power of a foreign sovereign participated in some anticompetitive activity that significantly affected United States commerce; the second occurs when the plaintiff alleges that the defendant induced a foreign sovereign to take official action that results in a restraint of trade in the United States.⁶⁵ The act-of-state doctrine has been a successful defense in several antitrust cases, but some exceptions have also developed.⁶⁶ For example, inducement that is illegal is not protected by the doctrine,⁶⁷ nor is inducement to take purely commercial action on the part of the foreign sovereign.⁶⁸ American courts have the power to hear cases which involve consideration of the official acts of foreign sovereigns and cases which involve attempts by private firms to persuade a foreign sovereign to enact legislation with an anticompetitive effect. Usually, American courts will allow

⁶²*Id.* at 433.

⁶³*Id.* at 428. The Court stated:

It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.

Id.

⁶⁴*Id.*

⁶⁵Hawk, *Act of State Doctrine, Noerr-Pennington Abroad, and Foreign Government Compulsion Defense*, 47 ANTITRUST L.J. 987, 992 (1978).

⁶⁶*See, e.g.*, *Bernstein v. N.V. Nederlandsche-Amerikaansche Stomvart-Maatschaapij*, 173 F.2d 71 (2d Cir. 1949); *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246 (2d Cir. 1947).

⁶⁷*See, e.g.*, *Dominicus Americana Bohio v. Gulf & W. Indus.*, 473 F. Supp. 680, 690 (S.D.N.Y. 1979).

⁶⁸*See, e.g.*, *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

the defense whenever the successful foreign petitioning which brought about the official act of a foreign government is at issue.

C. *The Noerr-Pennington Doctrine*

There are circumstances, however, where the antitrust defendant's conduct was not compelled by a foreign sovereign and was not taken in compliance with an official act of the foreign country.⁶⁹ One example is when the antitrust defendant has induced a foreign sovereign to take steps that adversely affect a business rival. For example, when Combination *A* persuades a foreign ruler to seize the property of Business *B*, nothing in Combination *A*'s conduct could be said to have been compelled or permitted by foreign actions. Assuming the effect of the seizure is that Business *B* is forced out of the export market, should Combination *A* be held liable for the restraint of trade in the United States caused in part at its instigation? The answer cannot be determined by resort to either the act-of-state doctrine or sovereign compulsion. It would appear that Combination *A* would be liable under the Sherman Act⁷⁰ unless the *Noerr-Pennington* doctrine is applied extraterritorially.

Since the development of the *Noerr-Pennington* doctrine in the 1960's,⁷¹ antitrust laws have given special treatment to those defendants who conspired to restrain or brought about restraints on commerce through attempts to influence state and federal legislative,⁷² administrative,⁷³ and judicial determinations.⁷⁴ Provided that their petitioning activity is not a sham,⁷⁵ antitrust defendants are immune from liability even if such activity has as its sole purpose a restraint of trade⁷⁶ or is part of a broader scheme⁷⁷ that violates the antitrust laws. Few commentators have examined the question whether the same immunity should extend to efforts to influence foreign governments.⁷⁸ An examination of the rationales underlying

⁶⁹Such conduct occurred in *United States v. Sisal Sales Co.*, 274 U.S. 268 (1927), discussed *infra*, notes 170-79 and accompanying text. A complete discussion of the case is located in Note, *Corporate Lobbyists Abroad*, *supra* note 2, at 1266-67.

⁷⁰15 U.S.C. §§ 1, 2 (1982).

⁷¹The doctrine was not entirely formulated during that decade, because it was not until 1972 that the Supreme Court ruled that the *Noerr-Pennington* doctrine also protected petitioning directed toward courts and adjudicatory agencies in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

⁷²*Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (Pennsylvania legislature petitioned).

⁷³*United Mine Workers v. Pennington*, 381 U.S. 657 (Secretary of Labor petitioned).

⁷⁴*California Motor Transport*, 404 U.S. 508 (State licensing boards and courts petitioned).

⁷⁵*Id.* at 511.

⁷⁶See *Alexander v. National Farmers Organization*, 1982-2 Trade Cas. (CCH) ¶64,914 (8th Cir. 1982).

⁷⁷381 U.S. at 670.

⁷⁸See, e.g., Davis, *Solicitation of Anticompetitive Action From Foreign Governments:*

ing the creation of the *Noerr-Pennington* doctrine is useful when considering whether foreign application of the doctrine is warranted.

IV. THE *Noerr-Pennington* DOCTRINE

A. Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.

The *Noerr-Pennington* doctrine was first defined in the Supreme Court's unanimous opinion in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*⁷⁹ The *Noerr* controversy developed out of the intensely competitive long-distance freight hauling business in the eastern United States after World War II.⁸⁰ When long-distance truckers began to compete directly with railroads in the profitable long-haul trade, twenty-four eastern railroads and their trade association hired a New York public relations firm to develop a publicity campaign designed to promote legislation and public opinion advantageous to the railroads.⁸¹ Forty-one Pennsylvania truckers and their trade association⁸² filed an antitrust suit in the United States District Court for the Eastern District of Pennsylvania, charging that the railroads and their public relations firm had conspired to restrain trade and monopolize the long-distance freight business in violation of Sections 1 and 2 of the Sherman Act.⁸³ The complaint alleged that the railroads hired Carl Byoir and Associates to conduct a publicity campaign "designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business, to create an atmosphere of distaste for the truckers among the general public, and to impair the relationships existing between the truckers and their customers."⁸⁴ The truckers charged that the sole motivation behind the campaign was "to injure the truckers and eventually to destroy them as competitors in the long-distance freight business."⁸⁵

The public relations method by which this objective was to be achieved was known as the "third-party technique," in which seemingly independent groups and individuals espoused the views of the railroads without disclosing that these apparently spontaneous comments were largely prepared by the railroads' public relations firm and paid for by the railroads.⁸⁶ The substantial efforts of Carl Byoir and Associates were

Should the Noerr-Pennington Doctrine Apply to Communications with Foreign Sovereigns?, 11 GA. J. INT'L COMP. L. 395 (1981) ; Note, *Corporate Lobbyists Abroad*, *supra* note 2.

⁷⁹365 U.S. 127 (1961).

⁸⁰*Id.* at 128.

⁸¹*Id.* at 129.

⁸²The trade association involved was the Pennsylvania Motor Truck Association. *Id.*

⁸³*Id.*

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶*Id.* at 130. The third-party technique and activities were described in comprehensive

proven successful when the Governor of Pennsylvania vetoed the Fair Truck Bill which would have permitted trucks to carry heavier loads on Pennsylvania roads.⁸⁷

The truckers won their treble damages antitrust suit in the district court.⁸⁸ The court found that (1) the railroads' publicity campaign had been malicious and fraudulent in its use of the third-party technique,⁸⁹ and (2) that the purpose of the publicity campaign had been to destroy the truckers' goodwill among the general public and their customers.⁹⁰ The railroads appealed and the Third Circuit Court of Appeals affirmed.⁹¹ The Supreme Court granted certiorari.⁹²

A unanimous Court, in an opinion written by Justice Black, reversed.⁹³ The Court based its holding on three grounds.⁹⁴ First, the Court looked to its holdings in *United States v. Rock Royal Co-op*⁹⁵ and *Parker v. Brown*⁹⁶ for the proposition that

where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out. . . . [U]nder our form of government the question whether a law . . . should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law itself does not violate some provision of the Constitution.⁹⁷

Building on that construction, the Court held that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly."⁹⁸ The

detail by the Pennsylvania district court. *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference*, 155 F. Supp. 768, 777-801 (E.D. Pa. 1957).

⁸⁷365 U.S. at 130.

⁸⁸*Noerr Motor Freight*, 155 F. Supp. 768.

⁸⁹*Id.* at 816.

⁹⁰*Id.*

⁹¹273 F.2d 218 (1959) (per curiam).

⁹²362 U.S. 947 (1960).

⁹³365 U.S. at 145.

⁹⁴The three grounds generally recognized are: (1) the essential dissimilarity between petitioning activity and traditional Sherman Act violations; (2) the absence of any indication that Congress intended the Sherman Act to regulate political activity; and (3) the first amendment right to petition. A fourth ground, a corollary to the second and third, is that a representative democracy requires an unrestricted flow of information from the people to the government. *See id.* at 136-38.

⁹⁵307 U.S. 533 (1939).

⁹⁶317 U.S. 341 (1943).

⁹⁷365 U.S. at 136 (footnote omitted).

⁹⁸*Id.*

Court pointed out the “essential dissimilarity” between the conduct complained of in *Noerr* and activities traditionally prohibited by the antitrust laws.⁹⁹ As a related point, the Court noted that a contrary holding would “substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade,”¹⁰⁰ and would raise serious constitutional questions.¹⁰¹ These considerations led the Court to hold that the Sherman Act did not apply to “mere solicitation of governmental action with respect to the passage and enforcement of laws.”¹⁰²

The final two grounds of the Court’s holding express distinct, but closely related, ideas. The second ground is that a representative democracy requires information to flow freely from the constituent to the representative.¹⁰³ The Court held that the Sherman Act would not operate to block governmental access to information possessed by businesses simply because that information might persuade the legislature or executive to enact anticompetitive laws.¹⁰⁴ The Court recognized that to hold activity such as the railroads’ publicity campaign violates the antitrust laws would “impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.”¹⁰⁵

The third ground embodied in the Court’s holding is a complement to the second. That is, not only must government have unrestricted access to the opinions and desires of the people, but the people also have a guaranteed right to express themselves to their representative in government:

[A] construction of the Sherman Act [that would forbid associations for the purpose of influencing the passage or enforcement of laws] would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.¹⁰⁶

While the Court specifically stated in a footnote to its opinion that its view of the Sherman Act rendered it unnecessary to decide the first amend-

⁹⁹*Id.* at 136. The Court listed examples of the kinds of agreements the Sherman Act traditionally prohibits, including price fixing, boycotts, and market division. *Id.*

¹⁰⁰*Id.* at 137.

¹⁰¹*Id.* at 138.

¹⁰²*Id.*

¹⁰³*Id.* at 137.

¹⁰⁴*Id.* The Court explained that Congress and the states are free to enact anticompetitive legislation without violating the Sherman Act. *Id.* n.17.

¹⁰⁵*Id.* at 137.

¹⁰⁶*Id.* at 138.

ment question,¹⁰⁷ later cases developed which relied heavily on the first amendment underpinning of *Noerr*.¹⁰⁸

Having determined that the Sherman Act did not apply to the "mere solicitation" of government action, the Court next discussed whether the railroads' anticompetitive purpose operated to take their activities outside the protection of the rule that political activity is beyond the scope of antitrust regulation.¹⁰⁹ The Court concluded that even if the railroads' sole purpose had been to destroy the truckers as competitors, such a purpose would be insufficient to transform otherwise lawful conduct into a violation of the Sherman Act.¹¹⁰ Anticompetitive intent prompting petitioning activity was held not to constitute an antitrust violation.¹¹¹

The Court also viewed the "third-party technique" as being clearly within the rule protecting political activity; and although the Court deplored the ethics of the technique, it remained outside the Sherman Act's reach.¹¹² Nevertheless, the Court warned that not all activity denominated as governmental petitioning would immunize actors from antitrust liability.¹¹³ The Court said: "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified."¹¹⁴ Although the "sham exception" did not come into play in *Noerr*, the Court's language provided the basis for its subsequent holding in *California Motor Transport Co. v. Trucking Unlimited*.¹¹⁵

¹⁰⁷*Id.* at 132 n.6. The Court noted: "The answer to the truckers' complaint also interposed a number of other defenses, including the contention that the activities complained of were constitutionally protected under the First Amendment Because of the view we take of the Sherman Act, we find it unnecessary to consider any of these other defenses." *Id.*

¹⁰⁸*See, e.g.,* First American Title Co. v. South Dakota Land Title Ass'n, 45 ANTITRUST & TRADE REG. REP. (BNA) 293 (8th Cir. 1983); United States v. Southern Motor Carriers Rate Conference, 1982-1 Trade Cas. (CCH) ¶64,659 (5th Cir. 1982); City of Kirkwood v. Union Elec. Co., 1982-1 Trade Cas. (CCH) ¶64,574 (8th Cir. 1982); International Travel Arrangers, Inc. v. Western Airlines, Inc., 623 F.2d 1255 (8th Cir. 1980), *cert. denied*, 449 U.S. 1063 (1981); *In re Airport Car Rental Antitrust Litig.*, 474 F. Supp. 1072 (N.D. Cal. 1979) (all interpreting the *Noerr-Pennington* doctrine as constitutionally based).

¹⁰⁹365 U.S. at 138-40.

¹¹⁰*Id.* at 138-39.

¹¹¹*Id.* at 140.

¹¹²*Id.* at 140-41. The Court stated: "Insofar as [the Sherman Act] sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity" *Id.* at 140.

¹¹³*Id.* at 144.

¹¹⁴*Id.*

¹¹⁵*See* 404 U.S. 508; *see infra* notes 134-51 and accompanying text.

B. United Mine Workers of America v. Pennington

The *Noerr* doctrine was enlarged four years later with the Supreme Court's opinion in *United Mine Workers of America v. Pennington*.¹¹⁶ The Court held that concerted efforts to induce public officials to take action detrimental to competition was not a violation of the Sherman Act, even when it was part of a broader scheme that was itself a violation of the Act.¹¹⁷ The antitrust allegations, made in a cross-claim, charged that the United Mine Workers and the large mining operators agreed to solve the coal industry's problem of overproduction by eliminating the smaller companies. The United Mine Workers agreed to abandon their efforts to control working time and to abandon their opposition to rapid mechanization in the mines. In exchange, the union was to receive higher wages for its members and larger payments by mine operators into the UMW welfare fund. The large mines and the union allegedly agreed that the union would impose the higher wage scale on all operators, including small ones, without regard for their ability to pay.¹¹⁸

In addition, the cross-claim alleged that the large mine operators had persuaded the Secretary of Labor to impose a minimum wage for coal miners working in mines that sold their product to the Tennessee Valley Authority (TVA).¹¹⁹ It was also alleged that the conspirators discouraged the TVA from purchasing non-contract coal from small mines on the open market.¹²⁰ Independent of this petitioning activity, the large coal mines allegedly conspired to dump large tonnages of coal on the spot market to drive down prices and drive the small operators out of the market entirely.¹²¹

The jury's verdict for the small mine owner was overturned by the Supreme Court, in part because the efforts to influence the Secretary of Labor and the TVA were ruled protected by the *Noerr* doctrine.¹²² The Supreme Court held that evidence introduced at trial regarding attempts to influence the Secretary of Labor and the TVA should have been excluded.¹²³

Most of the initial commentary resulting from the *Pennington* decision focused on the Court's discussion of the labor exemption to antitrust law.¹²⁴ Yet, the Court's discussion of the *Noerr* doctrine was of equal

¹¹⁶381 U.S. 657.

¹¹⁷*Id.* at 670.

¹¹⁸*Id.* at 659-60.

¹¹⁹*Id.* at 660.

¹²⁰*Id.*

¹²¹*Id.* at 661.

¹²²*Id.* at 670.

¹²³*Id.*

¹²⁴See Note, *Labor Law—Antitrust Law—Exemption of Labor Union from Sherman Act*, 7 B.C. IND. & COM. L. REV. 158 (1965); Note, *When Do Union Agreements with*

importance. *Pennington* added much to the definition of antitrust immunity for government petitioning first established in *Noerr*. Unlike the conduct in *Noerr*, the defendants in *Pennington* were not engaged in purely political activity.¹²⁵ The allegations of dumping coal on the spot market indicated a conspiracy that would, standing alone, violate antitrust laws.¹²⁶

In *Pennington*, all other activity that was not governmental petitioning remained susceptible to antitrust liability on remand. Justice Douglas pointed this out in his concurrence:

On the new trial the jury should be instructed that if there were an industry-wide collective bargaining agreement whereby employers and the union agreed on a wage scale that exceeded the financial ability of some operators to pay and that if it was made for the purpose of forcing some employers out of business, the union as well as the employers who participated in the arrangement with the union should be found to have violated the antitrust laws.¹²⁷

The *Pennington* Court emphasized the distinction between the defendants' private actions and their actions in the political arena. The Court determined that petitioning activity, which was one part of a broader course of anticompetitive conduct, was protected under the *Noerr* doctrine, but that the remainder of the defendants' conduct was not.¹²⁸ Therefore, the Court concluded that evidence of the petitioning activity should not have been put before the jury and that admitting such evidence could not be considered harmless error.¹²⁹

In *Pennington*, the Court announced that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act."¹³⁰ The Court's discussion of the antitrust immunity is instructive in that the focus remains, as in *Noerr*, on political activity, which is outside the scope of the Sherman Act.¹³¹ Despite the recognition of the constitutional under-

Non-Labor Groups Violate the Antitrust Laws?, 51 CORNELL L.Q. 576 (1966); Comment, *Labor Law—Employers' Right to Close Plant Due to Union Activities*, 2 GA. ST.B.J. 521 (1966); Comment, *Labor and Antitrust Law: Union Combinations with Non-Labor Groups*, 27 MONT. L. REV. 107 (1965); Note, *Labor Law—Application of Antitrust Law to Union Activities—Extra Unit Agreements*, 44 N.C.L. REV. 474 (1966); Comment, *Union Activity Falls Within the Ambit of the Sherman Antitrust Act When a Conspiracy Between Labor and Management is Found*, 11 N.Y.L.F. 549 (1965); Note, *Collective Bargaining Under the Antitrust Laws*, 61 NW. U.L. REV. 156 (1965).

¹²⁵381 U.S. at 669-70.

¹²⁶*Id.* at 670.

¹²⁷*Id.* at 672-73 (Douglas, J., concurring).

¹²⁸*Id.* at 670.

¹²⁹*Id.*

¹³⁰*Id.*

¹³¹*Id.*

pinnings to the doctrine in *Noerr*,¹³² the emphasis of the Court in *Pennington* remained one of statutory construction.¹³³

C. California Motor Transport v. Trucking Unlimited

The third major development of the *Noerr-Pennington* doctrine came in 1972 with the Supreme Court's decision in *California Motor Transport v. Trucking Unlimited*.¹³⁴ One group of trucking companies filed an antitrust suit alleging that another group of trucking companies had conspired to bring meritless actions before state regulatory agencies and courts. The complaint alleged that the truckers' purpose was to defeat the plaintiffs' efforts to gain operating rights in California so that the defendants would monopolize the freight-hauling business in the area.¹³⁵ The district court dismissed the complaint on the ground that the defendants' activities were protected under the *Noerr-Pennington* doctrine. The Ninth Circuit Court of Appeals reversed on two grounds: First, the *Noerr-Pennington* immunity did not extend to efforts to influence adjudicatory agencies and courts,¹³⁶ and second, even if it did, the defendants' activities were within the sham exception articulated in *Noerr*.¹³⁷

The Supreme Court granted certiorari¹³⁸ and affirmed on the second ground. Justice Douglas, writing for the majority, rejected the circuit court's contention that the *Noerr-Pennington* doctrine did not extend to attempts at petitioning through courts and administrative tribunals.¹³⁹ The Court affirmed the circuit court's view, however, that the defendants' activities in *California Motor Transport* came within the sham exception to the doctrine.¹⁴⁰

In extending *Noerr-Pennington* protection to activities directed at courts, the Supreme Court observed that the doctrine was based on two grounds and then stressed the first amendment rationale in plainly constitutional language:¹⁴¹

¹³²See *supra* text accompanying note 106.

¹³³There is no first amendment language in *Pennington* characterizing the *Noerr* immunity. The Court's entire discussion of the doctrine is of the construction of the Sherman Act.

¹³⁴404 U.S. 508.

¹³⁵*Id.* at 509.

¹³⁶432 F.2d 755, 760 (1971).

¹³⁷*Id.* at 763 (citing *Noerr*, 365 U.S. at 144).

¹³⁸402 U.S. 1008 (1971).

¹³⁹404 U.S. at 510.

¹⁴⁰*Id.* at 516.

¹⁴¹The shift in emphasis by the Court from statutory construction to first amendment protection is distinct. One commentator observed that in *California Motor Transport* the Court virtually abandoned *Noerr's* focus on the proper interpretation of the Sherman Act in favor of an emphasis on the essential first amendment protection the *Noerr* rule affords the individual or group trying to influence governmental decision-making. Note, *Corporate Lobbyists Abroad*, *supra* note 2, at 1258 n.31.

The same philosophy [that the right of petition is one of the fundamental freedoms protected by the first amendment] governs the approach of citizens or groups of them to administrative agencies . . . and to courts, the third branch of Government. Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition.¹⁴²

Thus, in clear language, the Court defined the constitutional rationale skirted in *Noerr*.¹⁴³

The Court concluded that it could not hold "that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors"¹⁴⁴ because such a holding would violate the first amendment right to petition and the right to association.¹⁴⁵ The extension of the doctrine to court petitioning was largely based on first amendment protections instead of a judicial construction of the Sherman Act. The result of *California Motor Transport* was the protection of concerted petitioning in administrative agency hearings and in the courts, provided that the petitioning was not a sham.¹⁴⁶ Despite the extension of the doctrine, the defendants in the case were not afforded its protection because the Court determined that their particular petitioning was within the sham exception.¹⁴⁷

The finding of a sham was predicated upon the baselessness of the proceedings brought before the tribunals.¹⁴⁸ The plaintiffs alleged that the proceedings were filed automatically, without probable cause, and without regard for the merits of the case.¹⁴⁹ The Court explained the application of the sham exception:

One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result Insofar as the administrative or judicial processes are involved,

¹⁴²404 U.S. at 510.

¹⁴³*Id.* at 510-11.

¹⁴⁴*Id.*

¹⁴⁵*Id.* at 510. The Court's inclusion of the right of association reinforces the shift to full focus on the first amendment rationale for *Noerr-Pennington*.

¹⁴⁶*Id.* at 510-11.

¹⁴⁷*Id.* at 511-12.

¹⁴⁸*Id.* at 513.

¹⁴⁹*Id.* at 512.

actions of that kind cannot acquire immunity by seeking refuge under the umbrella of "political expression."¹⁵⁰

After *California Motor Transport*, lower courts using the sham exception were directed by this language and often held that a single lawsuit could not constitute a sham.¹⁵¹

Over the course of eleven years, the Supreme Court developed a doctrine establishing that attempts to influence the government through legislative, executive, or judicial petitioning are beyond the reach of antitrust laws.¹⁵² Such activity is protected when it stands alone or when it is part of a broader scheme that violates the antitrust laws, provided that the petitioning conduct is not a sham. Whether the same holds true for governmental petitioning that occurs outside the United States remains to be determined by the Court.

V. PETITIONING FOREIGN GOVERNMENTS

A. *Petitioning Cases Prior to Noerr-Pennington*

Long before the *Noerr-Pennington* doctrine ever came into use, businesses operating abroad were persuading foreign governments to take official actions that, in effect, were harmful to rivals. *American Banana Co. v. United Fruit Co.* is one example.¹⁵³ Decided in 1909, the case is the oldest United States Supreme Court decision dealing with the application of United States antitrust laws to activities occurring outside the United States.¹⁵⁴ *American Banana* was a private action for treble damages under Section 7 of the Sherman Act.¹⁵⁵ The plaintiff complained that the defendant had monopolized and restrained trade in bananas, thereby injuring the plaintiff and violating the Sherman Act.¹⁵⁶ The plaintiff had purchased a banana plantation in Panama from a grower named

¹⁵⁰*Id.* at 513.

¹⁵¹*See* *Huron Valley Hosp., Inc. v. City of Pontiac*, 466 F. Supp. 1301 (E.D. Mich. 1979), *vacated*, 666 F.2d 1029 (6th Cir. 1981); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 462 F. Supp. 1072 (N.D. Ill.), *aff'd*, 594 F.2d 594 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979); *Mountain Grove Cemetery Ass'n v. Norwalk Vault Co.*, 1977-2 Trade Cas. (CCH) ¶61,709 (D. Conn. 1977); *Central Bank v. Clayton Bank*, 424 F. Supp. 163 (E.D. Mo. 1976), *aff'd*, 553 F.2d 102 (8th Cir.), *cert. denied*, 433 U.S. 910 (1977).

¹⁵²Only bona fide efforts to influence domestic governments are beyond the reach of the Sherman Act. For an example of illegitimate petitioning efforts, see *Sage Int'l, Ltd. v. Cadillac Gage Co.*, 507 F. Supp. 939 (E.D. Mich. 1981).

¹⁵³213 U.S. 347. *American Banana* preceded *Noerr* by fifty-two years. The case is rife with petitioning efforts on the part of the defendant, who sought the assistance of the civil government, the military, and the courts to oust its competition from the banana export market. *Id.* at 354-55.

¹⁵⁴Graziano, *supra* note 41, at 101.

¹⁵⁵*See* 15 U.S.C. § 15 (1982).

¹⁵⁶213 U.S. at 355.

O'Connell.¹⁵⁷ Prior to the sale, O'Connell had begun constructing a railroad from the plantation to the coast as a means to get his product to the export market.¹⁵⁸ The defendant allegedly approached O'Connell and informed him that he would either have to combine with them or stop the construction of his railroad.¹⁵⁹ It was claimed that the defendants persuaded the Governor of Panama to recommend that Costa Rica be allowed to administer the land over which the railroad was to run.¹⁶⁰ After the defendant and the government of Costa Rica allegedly interfered with O'Connell's banana export business, O'Connell sold the plantation and the railroad to the plaintiff.¹⁶¹ Shortly afterward, Costa Rican officials and soldiers seized the plantation and stopped work on the railroad.¹⁶² A Costa Rican court declared that the plantation belonged to a third party, who promptly sold the land to the defendant's agents.¹⁶³

The amount of petitioning in the case was substantial. The defendant allegedly sought to influence the Governor of Panama, the Costa Rican government, Costa Rica's military, and the Costa Rican courts.¹⁶⁴ The Supreme Court held that the complaint did not state a cause of action under the Sherman Act because the acts complained of occurred outside of the United States and were legal under the laws of the nations where they occurred.¹⁶⁵

Justice Holmes, writing for the majority, relied on the act-of-state doctrine¹⁶⁶ for the holding. The Court stated that

it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law.¹⁶⁷

In effect, the Court held that successful petitioning was protected from antitrust liability because it resulted in official governmental action that the American courts will not judge.¹⁶⁸

¹⁵⁷*Id.* at 354.

¹⁵⁸*Id.*

¹⁵⁹*Id.*

¹⁶⁰*Id.*

¹⁶¹*Id.*

¹⁶²*Id.* at 354-55.

¹⁶³*Id.* at 355.

¹⁶⁴*Id.* at 354-55.

¹⁶⁵*Id.* at 357-59.

¹⁶⁶*Id.* at 358.

¹⁶⁷*Id.*

¹⁶⁸*Id.*

American Banana reflected the "territorial view" of extraterritorial jurisdiction under the Sherman Act.¹⁶⁹ Another view had gained prominence by the time the Court considered *United States v. Sisal Sales Co.*¹⁷⁰ By 1927, the emphasis in determining extraterritorial antitrust jurisdiction had shifted away from the physical location where the activity had occurred to the effects within the United States of acts committed elsewhere.¹⁷¹ In *Sisal*, the government brought an action under Sections 1 and 2 of the Sherman Act, alleging that five American corporations and one Mexican corporation had conspired inside the territory of the United States to monopolize the import of sisal to this country.¹⁷² The complaint charged that the defendants had persuaded the Mexican government to enact legislation that discriminated against their competition.¹⁷³ The result was that only the Mexican corporation was able to purchase sisal from its Mexican producers, and Sisal Sales Co. became the sole importer of the commodity into the United States.¹⁷⁴

The Supreme Court held that although the discriminatory Mexican legislation had contributed to the conspirators' goals, it did not excuse them from liability by the operation of the act-of-state doctrine.¹⁷⁵ The Court distinguished *American Banana* on the grounds that the conspiracy in *Sisal* was formed inside the United States, and that the effect of the *Sisal* conspiracy within the United States was substantial.¹⁷⁶ Thus, the Court held that the Sherman Act provided a remedy.¹⁷⁷ *Sisal* thus stands for the proposition that when some acts in furtherance of a conspiracy in restraint of trade occur in the United States, and there is a direct effect within the United States, American citizens can be held liable for some actions taken abroad and involving actions of foreign governments.¹⁷⁸ As one commentator observed, *Sisal* established some limits on extraterritorial petitioning:

The *Sisal* case thus retreated from the broad implication of *American Banana* that a company could never be prosecuted under American antitrust laws for petitioning a foreign government to act in a discriminatory fashion. *Sisal* made clear that such petitioning is punishable under the Sherman Act where the conspiracy

¹⁶⁹See *supra* note 32 and accompanying text.

¹⁷⁰274 U.S. 268 (1927).

¹⁷¹See generally TOWNSEND, *supra* note 9, at 44-47.

¹⁷²274 U.S. at 271-74.

¹⁷³*Id.* at 273.

¹⁷⁴*Id.* at 273-74.

¹⁷⁵*Id.* at 276.

¹⁷⁶*Id.*

¹⁷⁷*Id.*

¹⁷⁸*Id.*

in question commences in this country and its anticompetitive effects on American trade are substantial.¹⁷⁹

These cases were decided prior to the development of *Noerr-Pennington*. Since then, federal courts have faced a more direct assertion of antitrust liability predicated upon foreign governmental petitioning.¹⁸⁰

B. Foreign Petitioning After Noerr-Pennington

Two circuit courts have since entertained the question whether *Noerr-Pennington* makes attempts to influence foreign governments immune from antitrust liability.¹⁸¹ However, these circuits announced conflicting answers to that question.

1. *Occidental Petroleum v. Buttes Gas & Oil Co.*—The earlier case, *Occidental Petroleum v. Buttes Gas and Oil Co.*,¹⁸² held that the *Noerr-Pennington* antitrust immunity does not extend to efforts to influence foreign governments.¹⁸³ The case was a private action for treble damages in which the plaintiff alleged that the defendants had instigated an international boundary dispute in the Persian Gulf, which resulted in the plaintiff's inability to enjoy the benefits of its oil concession in the Gulf.¹⁸⁴

Occidental had acquired an offshore oil concession in the Trucial States from the ruler of one state, Umm al Qaywayn, in 1969.¹⁸⁵ The concession gave Occidental exclusive rights to explore for, extract, and sell oil from the territorial waters of Umm al Qaywayn.¹⁸⁶ Later, the defendants acquired a similar concession from the Ruler of Sharjah, an adjacent state, which granted them offshore rights to territorial waters next to the plaintiff's concession.¹⁸⁷ When the explorations began, the parties worked together harmoniously and exchanged information from undersea testing in 1970.¹⁸⁸ Their cooperation ended when Occidental discovered a major

¹⁷⁹Note, *Corporate Lobbyists Abroad*, *supra* note 2, at 1267 (footnote omitted).

¹⁸⁰See, e.g., *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *Coastal States Mktg. v. Hunt*, 694 F.2d 1358 (5th Cir. 1983); *Bulkferts, Inc. v. Salatin, Inc.*, 1983-1 Trade Cas. (CCH) ¶65,272 (S.D.N.Y. 1983); *Dominicus Americana Bohio v. Gulf & W. Indus., Inc.*, 473 F. Supp. 680; *United States v. AMAX, Inc.*, 1977-1 Trade Cas. (CCH) ¶61,467 (N.D. Ill. 1977).

¹⁸¹See *Coastal States Mktg.*, 694 F.2d 1358; *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972).

¹⁸²331 F. Supp. 92, *aff'd per curiam*, 461 F.2d 1261, *cert denied*, 409 U.S. 950. The Ninth Circuit, in a brief per curiam opinion, affirmed "for the reasons stated in the district court's opinion." 461 F.2d at 1261. Thus, all cites will be to the opinion of the lower court.

¹⁸³331 F. Supp. at 107-08.

¹⁸⁴*Id.* at 95.

¹⁸⁵*Id.* at 98.

¹⁸⁶*Id.*

¹⁸⁷*Id.* at 98-99.

¹⁸⁸*Id.* at 99.

oil field nine miles seaward from the lower water mark off the island of Abu Musa. The island belonged to the Ruler of Sharjah, whose claim extended three miles into the waters surrounding the island. At first, the extensive oil find by Occidental appeared to be outside the territory of Sharjah.¹⁸⁹

After the oil was discovered, a boundary dispute erupted which eventually involved Umm al Qaywayn, Sharjah, Iran, and Great Britain. The complaint alleged that the defendants induced and procured the Ruler of Sharjah to claim ownership of the oil-rich portion of the plaintiff's concession.¹⁹⁰ This allegedly was done by submitting to the British Political Agent, who had authority to approve or reject such claims pursuant to a treaty then in force between Britain and the Trucial States, a backdated decree which represented that the Ruler of Sharjah had claimed territorial waters extending twelve miles seaward from the low water mark off Abu Musa, thereby placing the plaintiff's concession within the Sharjah claim.¹⁹¹ When the British agent rejected the decree, the defendants induced the government of Iran to claim the territorial waters in which the plaintiff's concession was located.¹⁹² After at least one incident in which the British naval forces prevented the plaintiff from entering its concession, the Ruler of Umm al Qaywayn requested that the plaintiff stop its operations until the border dispute could be resolved.¹⁹³

Occidental alleged that the defendants intended to extract oil and gas from the plaintiff's concession area once the British withdrew from the Persian Gulf in 1971, with the approval of the Ruler of Sharjah.¹⁹⁴ The defendants responded with five grounds supporting their motion to dismiss, including that their conduct was protected as governmental petitioning under the *Noerr-Pennington* doctrine.¹⁹⁵ The district court refused to extend the *Noerr-Pennington* doctrine to foreign governmental petitioning.¹⁹⁶

In arguing for the foreign extension of the doctrine, the defendants relied heavily on *Continental Ore Co. v. Union Carbide and Carbon Corp.*¹⁹⁷ as an implied extension by the Supreme Court of the *Noerr-Pennington* immunity to foreign petitioning. In *Continental Ore*, the Court held that the antitrust immunity did not apply to the petitioning of an agent of a Canadian governmental agency when that agent was not performing any governmental function and was in fact a commercial enterprise.¹⁹⁸ Electro Met of Canada was a wholly-owned subsidiary of

¹⁸⁹*Id.*

¹⁹⁰*Id.* at 100.

¹⁹¹*Id.* at 100-01.

¹⁹²*Id.* at 101.

¹⁹³*Id.*

¹⁹⁴*Id.*

¹⁹⁵*Id.* at 101-02.

¹⁹⁶*Id.* at 107-08.

¹⁹⁷370 U.S. 690 (1962).

¹⁹⁸*Id.* at 707-08.

Union Carbide and had been appointed by the Canadian government as the exclusive wartime purchasing agent for the Canadian Metals Controller.¹⁹⁹ The plaintiff, Continental Ore, alleged that, through Union Carbide's influence, Continental Ore had been eliminated from the Canadian vanadium market by Electro Met of Canada.²⁰⁰ Continental Ore offered proof of Union Carbide's influencing efforts, but the offer was denied by the district court.²⁰¹ The Supreme Court reversed,²⁰² rejecting Union Carbide's claim that *Noerr* protected its conduct in influencing purchasing decisions made by its subsidiary pursuant to powers delegated by the Canadian Government.²⁰³ *Noerr* was deemed inapplicable on factual grounds because the conduct sought to be protected was "wholly dissimilar to that of the defendants in *Noerr*."²⁰⁴ The important dissimilarity was that Union Carbide was "engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws."²⁰⁵ Thus, *Noerr* was simply distinguished on its facts.

The defendants in *Occidental Petroleum* argued that if the Supreme Court had not believed that the *Noerr-Pennington* doctrine could be applied to petitioning foreign governments through their agents, there would have been no need to discuss the difference between private and public conduct.²⁰⁶ The defendants suggested that the Supreme Court in *Continental Ore* assumed that the *Noerr* doctrine would apply to extraterritorial petitioning when influencing governmental actions was intended.²⁰⁷ The district court in *Occidental Petroleum* rejected the idea that the Supreme Court had impliedly extended *Noerr* protection to efforts to influence foreign sovereigns.²⁰⁸ In the district court's view, "an at least equally tenable interpretation of *Continental Ore* is that the Court deemed it unnecessary, in view of the facts, to decide the legal question at all."²⁰⁹ Absent binding precedent, the district court examined the rationales supporting *Noerr-Pennington* to determine the validity of foreign extension.

Because the court viewed the doctrine as primarily grounded in the first amendment, it concluded that "the case's [sic] rationales do not readily fit into a foreign context"²¹⁰ The court's review of the *Noerr* rationales was succinct. The doctrine was seen as "a desire to avoid a construction of the antitrust laws that might trespass upon the First

¹⁹⁹*Id.* at 695.

²⁰⁰*Id.*

²⁰¹*Id.* at 703.

²⁰²*Id.* at 704.

²⁰³*Id.* at 707-08.

²⁰⁴*Id.* at 707.

²⁰⁵*Id.*

²⁰⁶331 F. Supp. at 107-08.

²⁰⁷*Id.*

²⁰⁸*Id.*

²⁰⁹*Id.* at 107.

²¹⁰*Id.* at 107-08.

Amendment right of petition.”²¹¹ The court observed that the “constitutional freedom ‘to petition the Government’ carries limited if indeed any applicability to the petitioning of foreign governments.”²¹²

The court recognized that a second basis for the *Noerr-Pennington* doctrine was the Supreme Court’s concern that a representative democracy have continued access to the opinions of those it represents.²¹³ “The persuasion of Middle Eastern states alleged in the present case is a far cry from the political process with which *Noerr* was concerned,” the court observed.²¹⁴ It concluded that because the interests asserted in *Occidental Petroleum* were dissimilar from those which *Noerr* protected, no wholesale application of the doctrine outside the United States was justified.²¹⁵

In deciding against foreign application of the *Noerr-Pennington* doctrine, the district court emphasized the doctrine’s constitutional underpinnings. The Ninth Circuit Court of Appeals affirmed per curiam for the reasons stated in the district court’s opinion, which was regarded as “extensive and well researched.”²¹⁶

2. *Coastal States Marketing v. Hunt*.—Ten years later, in *Coastal States Marketing v. Hunt*,²¹⁷ an action under Section 1 of the Sherman Act,²¹⁸ the Fifth Circuit Court of Appeals affirmed the district court’s directed verdict in favor of the defendants by giving foreign application to the *Noerr-Pennington* doctrine.²¹⁹ The defendants had been granted an oil concession by the government of Libya in 1957 for exploration and exploitation rights.²²⁰ These defendants, Nelson Bunker Hunt and his brothers, assigned half of their interest to British Petroleum Ltd.; together, they discovered oil in the Sarir oil field in 1961.²²¹ The oil field was developed and a pipeline was constructed to the Libyan coast. By 1967, the Hunts and British Petroleum were exporting the “Sarir crude.”²²²

In 1971, Libya nationalized British Petroleum’s interest in the Sarir field, assigning it to the Libyan-owned Arabian Gulf Exploration Company (AGEC).²²³ In response, British Petroleum launched a worldwide publicity campaign claiming title to the crude in newspaper notices.²²⁴ Additionally, the company investigated the movement of crude from the Sarir

²¹¹*Id.* at 108 (citation omitted).

²¹²*Id.* (footnote omitted).

²¹³*Id.*

²¹⁴*Id.*

²¹⁵*Id.*

²¹⁶461 F.2d at 1261.

²¹⁷694 F.2d 1358 (5th Cir. 1983).

²¹⁸*Id.* at 1362 (citing 15 U.S.C. § 1 (1976)).

²¹⁹694 F.2d at 1366-67.

²²⁰*Id.* at 1360.

²²¹*Id.*

²²²*Id.*

²²³*Id.*

²²⁴*Id.*

field and it sent notices to those it identified as buyers. Later, the company filed twenty-nine lawsuits around the world, claiming title to the crude oil exported by AGECE.²²⁵

The plaintiff entered into contracts with AGECE in May 1973 to purchase Sarir crude. It also arranged to refine the crude at a refinery at Montedison, Italy. An agent of British Petroleum contacted the plaintiff and warned against involvement with Sarir crude because of the title dispute.²²⁶

In June 1973, the Hunts' remaining interest in the Sarir field was also nationalized by the Libyan Government.²²⁷ A short time later, a British Petroleum agent contacted the Hunts and suggested that they combine their efforts to claim the crude, " 'or to take other joint action to protect our respective rights.' "²²⁸ The Hunts joined in twenty-one of the twenty-nine lawsuits and also initiated their own worldwide publicity campaign to inform crude oil purchasers about the title dispute.²²⁹ One of the lawsuits was a conversion action filed in a Texas state court against Coastal States, which counterclaimed for tortious interference with business relations. The Texas courts denied both claims.²³⁰

The Hunts resorted to the courts in another incident involving the plaintiff, in which Hunt brought an attachment proceeding against the oil tanker Hilda's cargo because he believed it contained Sarir crude.²³¹ All the while, the publicity campaign continued.²³² Coastal States alleged that the overall effect was to restrain trade in Sarir crude because the publicity had had a negative effect on Coastal States' efforts to market its products refined from the disputed oil.²³³ Coastal States also alleged that, on several occasions, the Hunts had contacted Coastal States' customers to inform them directly of the title dispute. The circuit court noted that "[t]here was evidence that these communications with Coastal's customers frustrated potential sales by Coastal."²³⁴ Eventually Coastal States was unable to obtain a credit extension, in part because it was dealing with Sarir crude.²³⁵ By August, 1973, the plaintiff's economic

²²⁵*Id.*

²²⁶*Id.*

²²⁷*Id.*

²²⁸*Id.*

²²⁹*Id.*

²³⁰*Id.* at 1361; see *Hunt v. Coastal States Producing Co.*, 570 S.W.2d 503 (Tex. Civ. App. 1978), *aff'd*, 583 S.W.2d 332 (Tex. 1979).

²³¹694 F.2d at 1361; see *Hunt v. A Cargo of Petroleum Products Laden on Steam Tanker Hilda*, 378 F. Supp. 701 (E.D. Pa. 1974), *aff'd mem.*, 515 F.2d 506 (3d Cir.), *cert. denied*, 423 U.S. 869 (1975).

²³²694 F.2d at 1361.

²³³*Id.*

²³⁴*Id.*

²³⁵*Id.* In an interesting aside, the court stated: "Whether this fact raises an inference or is mere coincidence, two of the banks [that refused to extend Coastal's credit] had

health had deteriorated to the point that it was forced to assign its right in Sarir crude to another firm.²³⁶ Contending that it had lost millions of dollars in profits due to the assignment, Coastal States filed the antitrust action in October of 1974.²³⁷

In the antitrust action, Coastal States claimed that the publicity campaign by the Hunts was a secondary boycott that sought to intimidate, and succeeded in intimidating, Coastal States' potential customers and bankers.²³⁸ The defendants moved for summary judgment, in part on the grounds that all of their conduct had been protected by the *Noerr-Pennington* doctrine.²³⁹ To support that claim, the defendants relied on four pretrial stipulations which described the Hunts' purpose in initiating the lawsuits as "to establish legal title to the expropriated Sarir crude oil."²⁴⁰ The defendants' motion for summary judgment was denied. At trial, Coastal States introduced evidence that the purpose behind the Hunts' conduct was to render the crude oil unmarketable.²⁴¹ Nevertheless, at the close of the plaintiff's evidence, the district court directed a verdict in the defendants' favor on the ground that the *Noerr-Pennington* doctrine applied.²⁴² Coastal appealed to the Fifth Circuit, which affirmed.²⁴³

Coastal States' first contention, that the Hunts' "secondary boycott" was outside the protection of the doctrine, was rejected as being "without merit."²⁴⁴ The court observed that the publicity campaign initiated by Hunt was similar to the publicity campaign initially protected in *Noerr*.²⁴⁵

The circuit court's conclusion that the *Noerr-Pennington* doctrine applied extraterritorially followed from its view that *Noerr* was entirely based on a construction of the Sherman Act and not on constitutional grounds.²⁴⁶ Discussing *Noerr*, the Fifth Circuit observed:

[*Noerr*] was not a first amendment decision. While the Court's opinion in *California Motor Transport* stressed the first amendment underpinnings of petitioning immunity, we do not view that opinion as overruling *Noerr*'s clear holding that the Sherman Act simply does not extend to joint efforts to influence government officials.²⁴⁷

employees of Standard Oil Company of Ohio (Sohio) on their boards of directors. Sohio is owned in part by [British Petroleum]." *Id.*

²³⁶*Id.*

²³⁷*Id.*

²³⁸*Id.* at 1362.

²³⁹*Id.*

²⁴⁰*Id.* The exact language of the stipulations is set forth at *id.* n.13.

²⁴¹*Id.* at 1362.

²⁴²*Id.* at 1363.

²⁴³*Id.* at 1372-73.

²⁴⁴*Id.* at 1364.

²⁴⁵*Id.*

²⁴⁶*Id.* at 1364-65.

²⁴⁷*Id.* (footnotes omitted).

Thus, the Fifth Circuit, in characterizing the Supreme Court's opinion in *Noerr* as being based on a construction of the Sherman Act rather than on the constitutional right to petition, arrived at a conclusion directly opposite to that of the Ninth Circuit's in *Occidental Petroleum*.²⁴⁸

The Fifth Circuit relied in part on *Continental Ore Co. v. Union Carbide & Carbon Corp.*²⁴⁹ as support for foreign extension of the petitioning immunity. According to the Fifth Circuit, the Supreme Court's result in *Continental Ore* was best explained by the interpretation that the Court assumed the *Noerr-Pennington* doctrine applied to petitioning foreign governments.²⁵⁰ Again, the Fifth Circuit in doing so adopted a viewpoint that is totally at odds with that of the court in *Occidental Petroleum*.²⁵¹ The Fifth Circuit stated that "the fact that the Court [in *Continental Ore*] distinguished *Noerr* on factual grounds instead of simply holding it inapplicable does support our conclusion that petitioning immunity is not limited to the domestic political arena."²⁵² The strength of that support is certainly dubious and points to the problems inherently present when courts attempt to look behind the language of the Supreme Court's opinions to what was "really meant." In fact, neither circuit can know with any degree of certainty whether its reading of *Continental Ore* is correct. To base a decision whether to extend the petitioning immunity outside the United States on judicial tea leaves is unacceptable.

The Fifth Circuit did not depend solely on *Continental Ore*, however; it also relied on the official position of the Department of Justice's Antitrust Division that the *Noerr-Pennington* doctrine is not limited to domestic petitioning.²⁵³ These guidelines were not available to the *Occidental Petroleum* court; had they been, they might have affected the outcome of that case.²⁵⁴ For this combination of reasons, the Fifth Circuit declined to follow *Occidental Petroleum*.²⁵⁵ As the Fifth Circuit explained:

We reject the notion that petitioning immunity extends only so far as the first amendment right to petition and then ends abruptly. The Sherman Act, as interpreted by *Noerr*, simply does not penalize as an antitrust violation the petitioning of a government

²⁴⁸Compare *id.* with *Occidental Petroleum*, 331 F. Supp. at 108; see *supra* text accompanying notes 210-15.

²⁴⁹370 U.S. 690 (1962), cited in 694 F.2d at 1365.

²⁵⁰694 F.2d at 1365. The view is shared by Graziano, *supra* note 41, at 132.

²⁵¹*Cf. Occidental Petroleum*, 331 F.Supp. at 107-08; see *supra* text accompanying notes 206-09.

²⁵²694 F.2d at 1365.

²⁵³694 F.2d at 1366 (citing *Antitrust Guide for International Operations*, *supra* note 24, at E-1, E-17, E-18).

²⁵⁴The Antitrust Division's guidelines were published six years after the district court decided *Occidental Petroleum*.

²⁵⁵694 F.2d at 1366.

agency. We see no reasons why acts that are legal and protected if done in the United States should in a United States court become evidence of illegal conduct because performed abroad.²⁵⁶

It appears that the court would accept the view that the first amendment basis for the doctrine is insufficient to extend *Noerr-Pennington* protection to foreign governmental petitioning.²⁵⁷ But because the Fifth Circuit adopted a view of the doctrine that was based totally on the construction of the Sherman Act, its perceptions regarding the applicability or inapplicability of the Bill of Rights to interaction with foreign sovereigns was not an insurmountable barrier to its extension of the *Noerr* doctrine to the petitioning of foreign governments. The court posed an interesting question as to why activity that is protected when performed within the United States should become illegal when performed outside the country.²⁵⁸ It did not consider as a possible response that political petitioning within the country is subject to the checks included in an open, democratic government, while petitioning in totalitarian regimes would not be subject to the same kinds of safeguards.²⁵⁹

In fact, the Fifth Circuit rejected any link between the political persuasion of the foreign government involved and the validity of the petitioning immunity:²⁶⁰ "The political character of the government to which the petition is addressed should not taint the right to enlist its aid."²⁶¹ The court seemed to agree that petitioning is political conduct wherever it occurs, and political conduct is beyond the scope of the Sherman Act, wherever the Act may reach.²⁶²

Coastal States asserted that the Hunts' threats to litigate claims to the Sarir crude were unprotected in any event because they were not directed at any government.²⁶³ That claim was also rejected, as the Fifth Circuit explained:

Given that petitioning immunity protects joint litigation, it would be absurd to hold that it does not protect those acts reasonably and normally attendant upon effective litigation. . . . If litigation is in good faith, a token of that sincerity is a warning that it will be commenced and a possible effort to compromise the dispute.²⁶⁴

²⁵⁶*Id.*

²⁵⁷At least one commentator has argued against that position. See Davis, *supra* note 78, at 444-47.

²⁵⁸694 F.2d at 1366.

²⁵⁹See Note, *Corporate Lobbyists Abroad*, *supra* note 2, at 1273.

²⁶⁰694 F.2d at 1366-67.

²⁶¹*Id.* at 1367.

²⁶²See *id.* at n.29.

²⁶³*Id.* at 1367.

²⁶⁴*Id.*

Finally, the Fifth Circuit rejected Coastal States' claim that the petitioning activity which occurred in the courts was removed from the protection of the *Noerr-Pennington* doctrine by operation of the sham exception.²⁶⁵ The court held the plaintiff bound to stipulations which provided that the Hunts' purpose in the campaign, the investigations, and the litigation was to settle their title dispute.²⁶⁶

VI. ANALYSIS OF THE CONFLICT

The differing results of the Fifth and Ninth Circuits may be explained by their differing views of the "true" rationale underlying the *Noerr* opinion. Both courts limited their analysis to the question: Is the *Noerr-Pennington* doctrine a first amendment doctrine, or is it one of statutory construction? Neither court recognized fully that the two rationales are interwoven to support the doctrine; neither analyzed whether other reasons support application in the foreign context. As a result, the Fifth and Ninth Circuits avoided critical considerations in determining whether the *Noerr-Pennington* doctrine should be applied to the petitioning of foreign governments.

The Ninth Circuit subscribed to the view that the *Noerr-Pennington* doctrine is a first amendment doctrine, based entirely on the right to petition the government for redress of grievances.²⁶⁷ The *Occidental Petroleum* analysis was direct: Since the *Noerr-Pennington* doctrine is based on the first amendment, and since the first amendment protections are presumably without force outside the United States' territory, the *Noerr-Pennington* doctrine has no validity when applied to petitioning outside the United States.²⁶⁸

The *Occidental Petroleum* analysis was flawed in one important respect. It failed to recognize that the *Noerr-Pennington* doctrine was based on both statutory construction and the first amendment, and that the two rationales are inextricably combined. The constitutional character of the doctrine was formally recognized by the Supreme Court in *California Motor Transport*.²⁶⁹ Yet, that opinion must be read in tandem with the earlier opinions that avoided the constitutional question. The validity of foreign extension should have been tested on both grounds. The *Occidental Petroleum* analysis failed to consider the question of whether the Supreme Court's construction of the Sherman Act is applicable to conduct which occurs outside the United States. It should have considered

²⁶⁵*Id.* at 1371.

²⁶⁶*Id.*

²⁶⁷*Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 461 F.2d 1261 (9th Cir. 1972) (*per curiam*). The Ninth Circuit adopted the reasoning of the district court, as reported at 331 F. Supp. 92 (C.D. Cal. 1971).

²⁶⁸331 F. Supp. at 107-08.

²⁶⁹404 U.S. 508 (1972); see *supra* notes 141-47 and accompanying text.

whether the policy reasons which supported the creation of the domestic doctrine supported foreign extension, and whether there were other policy considerations involved unique to the foreign context.

In comparing the Fifth and Ninth Circuits' characterizations of the *Noerr* rationales, it appears the Fifth Circuit's analysis²⁷⁰ is more closely aligned to that of the *Noerr* opinion. The Fifth Circuit correctly recognized that, initially, the *Noerr-Pennington* doctrine was announced because the Court determined that the Sherman Act was not intended to regulate political activity.²⁷¹ In *Noerr*, the Supreme Court also strongly intimated, however, that if the Sherman Act were applied to regulate political activity, such an application probably would be unconstitutional.²⁷² The Fifth Circuit's characterization of *Noerr* was accurate, but the doctrine does not rest on *Noerr* alone.

Just as the Ninth Circuit artificially viewed the *Noerr-Pennington* doctrine in a vacuum of constitutional law, the Fifth Circuit viewed the Supreme Court's construction of the Sherman Act in a vacuum. The Fifth Circuit recognized that the development of the doctrine included *California Motor Transport v. Trucking Unlimited*,²⁷³ which extended petitioning immunity to activities directed at courts and administrative hearings.²⁷⁴ However, the Fifth Circuit seemed to read *California Motor Transport* selectively for the extension, while ignoring the Supreme Court's belated but express recognition of the constitutional rationale underlying the *Noerr-Pennington* doctrine.

The *Coastal States* rationale was based purely on statutory construction.²⁷⁵ It viewed the *Noerr-Pennington* doctrine as a limitation on the reach of the antitrust laws, and stated that the limitation should apply to any antitrust case involving the petitioning of a government agency, whether domestic or foreign.²⁷⁶ Through this construction, the Fifth Circuit extended the *Noerr-Pennington* doctrine as far as the Sherman Act can reach. Because the Fifth Circuit viewed the doctrine in other than its constitutional terms, its application was not limited to the territorial boundaries of the United States.²⁷⁷

The question of foreign extension cannot be answered simply by deciding whether the doctrine is constitutionally or statutorily based. To employ such an analysis is to ignore the full history of the doctrine, which includes Supreme Court approval of both rationales. At its core, the *Noerr-Pennington* doctrine is both: It reflects a construction of the Sherman

²⁷⁰See 694 F.2d at 1364-67.

²⁷¹*Noerr*, 365 U.S. at 137.

²⁷²*Id.* at 138.

²⁷³404 U.S. 508 (1972), cited in 694 F.2d at 1363.

²⁷⁴404 U.S. at 510-11.

²⁷⁵694 F.2d at 1364-65.

²⁷⁶*Id.* at 1366.

²⁷⁷*Id.*

Act that removes political activity from the sphere of regulated conduct, and that removal is based on the belief that to regulate political conduct would violate the first amendment. The Fifth and Ninth Circuits would have done better to ask whether there are any reasons to develop one set of rules to govern petitioning activity within the United States and another to govern extraterritorial petitioning.

One reason supporting different treatment is that the policies underlying the doctrine's domestic application do not readily support foreign extension. The weight of scholarly opinion is that the first amendment guarantees neither the right to petition foreign governments nor free association outside the United States.²⁷⁸ It is the law of the place which must determine these assertions of rights when made outside the territory of the United States.

Another major policy reason supporting the *Noerr-Pennington* doctrine is the need to maintain the free flow of information between the constituent and his elected representative.²⁷⁹ Perpetuation of an effective constituent-representative relationship is an important part of democracy in the United States; however, it is not a relevant consideration when petitioning occurs between an American business operating abroad and a foreign ruler. Where there is no constituency relationship, that policy is inapplicable.

In addition, when the *Noerr-Pennington* doctrine is applied domestically, the governmental entities who are petitioned can be presumed to have the economic well-being of the United States in mind. A similar presumption would be ill-advised in the case of foreign petitioning. The economic health of the United States is not likely to be considered by the executive or legislature of a foreign government when it enacts laws with an economic effect outside its territory.

While policies which brought about the domestic doctrine are inapplicable in the foreign setting, the international business environment introduces new considerations which support foreign extension of the *Noerr-Pennington* doctrine. Those reasons are (1) that American businesses operating abroad will face competitive disadvantages unless United States antitrust laws are construed so as not to discourage their use of foreign political systems; (2) that foreign application of the *Noerr-Pennington* doctrine is consistent with the act-of-state doctrine; and, (3) that foreign ex-

²⁷⁸See, e.g., B. HAWK, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 145-46 (1979); Fischel, *Antitrust Liability for Attempts to Influence Government Actions: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80, 120-21 (1977); Fugate, *The Department of Justice's Antitrust Guide for International Operations*, 17 VA. J. INT'L L. 645, 693 (1977); Graziano, *supra* note 41, at 132; McManis, *Questionable Corporate Payments Abroad: An Antitrust Approach*, 86 YALE L.J. 215, 240 (1976); Note, *Corporate Lobbyists Abroad*, *supra* note 2, at 1275-77; Note, *Immunities to Extraterritorial Application of U.S. Antitrust Law*, 12 J. INT'L L. & ECON. 487, 500 n.27 (1978).

²⁷⁹*Noerr*, 365 U.S. at 137.

tension of the doctrine is consistent with the position of the executive branch which should, under the principle of the separation of powers, set foreign policy.

American businesses are likely to face competitive disadvantages unless the *Noerr-Pennington* doctrine is applied extraterritorially.²⁸⁰ If the petitioning of foreign sovereigns can lead to antitrust liability in the United States, some American businesses may consider the risks too great and decide against the pursuit of competitive advantage through political means. At the same time, foreign businesses, which are not subject to U.S. antitrust liability, will be able to act to enhance their market position using political means. The result would be to discourage some United States businesses from participating in foreign politics when there exists the potential for future allegations of an anticompetitive effect in the United States. Foreign political activity by U.S. businesses ought not to be discouraged. The conduct covered by the *Noerr-Pennington* doctrine is lawful petitioning, whether it is to secure the passage of legislation, or to bring lawsuits to challenge title to expropriated property. This conduct is undertaken in recognition of the fact that politics is yet another forum in which competition is possible. That fact remains unchanged whether the conduct is undertaken within the United States or abroad. If U.S. antitrust laws are applied to discourage United States businesses from participating in one of several competitive forums, the result to those businesses is unfair.

The second reason supporting foreign extension of the *Noerr-Pennington* doctrine is that to do so would be consistent with the act-of-state doctrine.²⁸¹ The act-of-state doctrine already operates to protect some antitrust defendants from liability for *successful* actions to influence the acts of a foreign sovereign. If petitioning is successful and results in an official action by a foreign government, then United States courts are asked to balance relevant considerations to determine whether they ought to hear any resultant antitrust case.²⁸² The act-of-state doctrine recognizes that United States courts sitting in judgment on the validity of the official acts of foreign sovereigns could embarrass or impede the executive branch in its conduct of foreign affairs. Such judicial inquiries could also offend the foreign sovereign whose acts are being scrutinized. If it appears that embarrassment, impediment, or offense will result, American courts will not judge the acts of a foreign sovereign nor the influencing efforts by American businesses which precipitated the sovereign's actions. In these situations, the act-of-state doctrine²⁸³ provides an effective defense to allegations that petitioning a foreign sovereign has brought about a significant anticompetitive effect within the United States.

²⁸⁰Hawk, *supra* note 65, at 1001.

²⁸¹*Id.*

²⁸²*See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964); *see supra* notes 59-64 and accompanying text.

²⁸³*See supra* notes 49-68 and accompanying text.

While the act-of-state doctrine can operate to immunize successful petitioning activity from antitrust liability, there is no similar protection for the antitrust defendant whose petitioning is unsuccessful. Nevertheless, the policies underlying the act-of-state doctrine are just as applicable to the case in which petitioning a foreign government has been unsuccessful. If the *Noerr-Pennington* doctrine is not extended to foreign petitioning cases, unsuccessful petitioners remain potentially liable for their participation in foreign politics. The issue is whether there is a compelling reason to punish an antitrust defendant whose petitioning of a foreign government was unsuccessful, even though his conduct and intentions may have been substantially identical to those of a successful petitioner who is immunized by the act-of-state doctrine.

Special "punishment" for the unsuccessful petitioner is unwarranted. In the unsuccessful petitioning case, a safeguard exists to make certain that antitrust liability is not entirely avoided; that is, only the petitioning activity is immunized.²⁸⁴ If the petitioning is unsuccessful, then, in the typical case, there will have been other conduct involved that caused the anticompetitive effect complained of.²⁸⁵ The remainder of that conduct, the broader scheme of anticompetitive activity, is not protected by the *Noerr-Pennington* doctrine.²⁸⁶ In this way, foreign extension of the doctrine would not operate as a complete bar to antitrust liability in cases involving unsuccessful petitioning activity.

Additionally, to punish an antitrust defendant for being unsuccessful places him in an undesirable position of business uncertainty. At the time the defendant petitions the foreign sovereign, he will be unable to determine whether his actions would have antitrust enforcement consequences. This total absence of notice is unduly harsh and is likely to have one of two consequences: either prospective defendants will be deterred from political competition entirely; or, they will be encouraged to succeed at all costs. Neither consequence is desirable.

Denial of antitrust immunization is also unwarranted for the defendant who elected to direct his petitioning at a foreign government. Since the same activity would clearly be immunized from antitrust activity when performed domestically, the issue is whether the defendant who petitions

²⁸⁴*Pennington*, 381 U.S. at 670. Thus, the "punishment" here referred to is the admissibility of evidence of the defendant's unsuccessful petitioning activity to develop an antitrust case against him. Evidence of petitioning the government is inadmissible when such activity occurs domestically, under the *Noerr-Pennington* doctrine, and when it occurs both extraterritorially and successfully, under the act-of-state doctrine.

²⁸⁵A possible exception to the "typical case" is when the defendant's petitioning activity consists primarily of application to adjudicatory bodies. In that situation, it would seem possible that the cost to the antitrust plaintiff of contesting worldwide lawsuits, as in *Coastal States*, might be sufficiently high to cause a diminution in the plaintiff's ability to compete. Thus, an anticompetitive effect could be achieved through unsuccessful petitioning activity alone.

²⁸⁶*Pennington*, 381 U.S. at 670.

extraterritorially should be punished for acting outside the United States. An affirmative response fails to recognize that much modern business is conducted in an international marketplace. American businesses must act extraterritorially in order to compete. They should not be forced to avoid competition for favorable political treatment, especially when that same conduct is recognized as appropriate when it occurs at home.

Finally, foreign extension of the *Noerr-Pennington* doctrine is appropriate because it is consistent with the view adopted by the executive branch. Judicial inquiry into the politics of a foreign nation is involved whenever the courts examine foreign petitioning. This kind of inquiry places the courts in the position of questioning the internal political affairs of a foreign sovereign, and it is likely to offend the other nation's sovereignty. As such, it comes within the area of foreign relations which is primarily within the control of the executive. The separation of powers doctrine counsels that once the executive has stated a policy in the foreign policy area, any subsequent considerations by the courts should reflect that policy.

Regarding foreign governmental solicitation, the Department of Justice, Antitrust Division, adopted guidelines in 1977 that describe the policy of the executive branch.²⁸⁷ This policy was developed during two years of study by both the Department of Justice and the President's Export Council:²⁸⁸

The only question . . . is whether the *Noerr-Pennington* doctrine applies to efforts to cause a foreign government to impose restraints on U.S. commerce. While the *Noerr* case turns in part on U.S. domestic constitutional considerations, the Department does not consider it to be limited to the domestic area.²⁸⁹

Because the Department of Justice and the President's Export Council have determined that the U.S. ought not impose antitrust liability for foreign petitioning activity, U.S. courts should defer to that statement of policy.

It would be helpful if these guidelines, as they relate to the petitioning immunity, were updated and clarified. After seven years,²⁹⁰ it remains unclear whether the *Noerr-Pennington* doctrine is fully operative outside the United States. For example, it is presently unknown whether the sham exception applies in the same manner extraterritorially as it applies domestically. Because foreign governmental systems are widely varied, iden-

²⁸⁷See generally *Antitrust Guide for International Operations*, *supra* note 24, at E-1 to E-18.

²⁸⁸See *Antitrust Guide for International Operations*, *supra* note 24, reprinted in SEVENTEENTH ANNUAL ADVANCED ANTITRUST LAW SEMINAR: INTERNATIONAL TRADE AND THE ANTITRUST LAWS, 199 (1977).

²⁸⁹See *Antitrust Guide for International Operations*, *supra* note 24, at E-18 (footnote omitted).

²⁹⁰The Antitrust Division's guidelines were promulgated in 1977. See *id.* at E-1.

tifying sham activity extraterritorially will be more difficult and cannot be dealt with in a generalized manner. Revised guidelines should address application of the sham exception in systems other than representative democracies, where domestic application is analogous.

The uncertainty remains whether extraterritorial application of the *Noerr-Pennington* doctrine is coextensive to domestic application of the doctrine. Because of the flexibly applied act-of-state doctrine, there may be no need to invoke the *Noerr-Pennington* doctrine in successful extraterritorial petitioning cases. Whether selective application of the *Noerr-Pennington* doctrine to unsuccessful extraterritorial petitioning is desired should be addressed in updated guidelines.

Private antitrust litigators would be greatly assisted by a better definition of the executive branch's view of the foreign reach of *Noerr-Pennington*. Additionally, the courts would benefit from greater direction in an area better left to executive leadership. If the view that the doctrine should be extended is to be followed, precise guidelines are needed so that the courts can be consistent in their decisions with the executive implementation of foreign policy. As more circuit courts face the question of foreign application of the *Noerr-Pennington* doctrine, it may become necessary for the Supreme Court to resolve this conflict that has emerged between the Fifth and Ninth Circuits. The Supreme Court should consider those policies unique to foreign petitioning discussed here, and extend the *Noerr-Pennington* doctrine to attempts to influence foreign governments.

VII. CONCLUSION

Businesses operating internationally are subject to the antitrust laws of the United States through the exercise of "extraterritorial jurisdiction." When they become involved in antitrust litigation for conduct which occurred outside the United States, it is not uncommon for defendants to argue that their conduct was somehow legal or compelled by the government of another nation. To avoid problems in foreign relations and to advance international comity, the courts have adopted doctrines, such as act-of-state and sovereign compulsion, so that American courts will not be placed in a position of judging the laws of another nation.

A different situation arises when the government or a private plaintiff alleges that the defendant has violated antitrust laws by inducing or attempting to induce a foreign nation to take action which would be detrimental to the defendant's competitor. That kind of activity is protected under the *Noerr-Pennington* doctrine when performed within the United States because of its political character. Courts are split, however, as to whether the petitioning activity should also be protected when an antitrust defendant has petitioned a foreign government. The Fifth and Ninth Circuits, the only courts that have considered the question, have expressed opposing views on the subject. The view expressed by the Fifth

Circuit in *Coastal States Marketing v. Hunt*, that the *Noerr-Pennington* doctrine does apply extraterritorially, is the better view, especially in light of the policy considerations unique to foreign petitioning and the official position adopted by the Department of Justice in 1977. But because of the uncertainty in the area as a result of the conflict in the circuits, it would be advisable for the Antitrust Division of the Justice Department to update those guidelines to explain precisely when and how the *Noerr-Pennington* doctrine should be applied extraterritorially.

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