CORPORATE LOBBYISTS ABROAD: THE EXTRA-TERRITORIAL APPLICATION OF NOERR-PENNINGTON ANTITRUST IMMUNITY

The magnitude of direct investment by United States corporations in the world economy is staggering. For example, the gross annual product of American foreign investment is exceeded only by the gross national products of the United States and Russia.¹ This corporate activity has a tremendous impact on the economy of the United States;² it is not surprising, therefore, that much of it has been brought within the scope of United States antitrust laws.³ The problem of defining the exact limits of the applicability of these laws to foreign investment activity, however, has long plagued courts and commentators.⁴ This Comment considers one facet of that problem: whether the Noerr-Pennington doctrine, which provides that corporations do not violate the antitrust laws when they lobby on the state or federal level for the enactment of anticompetitive legislation,⁵ should be ex-

¹. Model, The Politics of Private Foreign Investment, 1967 FOREIGN AFFAIRS 639, 641. "[T]he gross value of production by American companies abroad is well in excess of $100 billion a year." Id. at 640 (citing a report by the U.S. Council of the International Chamber of Commerce).


expanded to include the foreign activities of both domestic and foreign corporations.

This Comment first discusses the development of the Noerr-Pennington exemption. It then considers the proper territorial and jurisdictional boundaries of the federal antitrust laws. Finally, it weighs the interests protected by the exemption against countervailing political and economic considerations in order to determine whether the Noerr-Pennington doctrine should be extended to the international arena.

I. DEVELOPMENT OF THE NOERR-PENNINGTON DOCTRINE

Under the Noerr-Pennington doctrine, concerted solicitation of government action with the goal of influencing legislation or law enforcement is immune from prosecution under the Sherman Act. This immunity applies even if the solicitation is intended to destroy competition and even if the anticompetitive lobbying is part of a broader scheme which is itself violative of the antitrust laws. The doctrine developed from two United States Supreme Court decisions, Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc. and United Mine Workers of America v. Pennington.

Noerr involved a bitter feud between long-distance freight truckers and railroads to secure long-distance freight business. The truckers charged that the railroads had violated sections 1 and 2 of the Sherman Act by organizing a public relations campaign that promoted laws harmful to the interests of the truckers. The truckers' complaint centered on an allegation that the railroads' "sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors for the long-distance freight business." The

---

7. 381 U.S. at 670.
11. 15 U.S.C. § 1 (1970): "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."
12. 15 U.S.C. § 2 (1970): "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be guilty of a misdemeanor."
13. Carl Byoir & Associates, a public relations firm hired by the railroads, conducted this campaign. 365 U.S. at 129.
railroads' public relations campaign was highly successful, culminating in a veto of the Fair Truck Bill by the governor of Pennsylvania. The truckers sought injunctive relief against further pursuit of the public relations campaign, damages for loss of business resulting from the veto, and expenses incurred in fighting the railroads' campaign.

The trial court found that the railroads' publicity campaign had violated the Sherman Act, although it expressly disclaimed any intention to condemn as illegal efforts on the part of the railroads only to influence the passage of new legislation or the enforcement of existing law. Instead, it rested the judgment upon its findings, first, that the railroads' publicity campaign was malicious and fraudulent—malicious in that its only purpose was to destroy the truckers as competitors, and fraudulent in that it was predicated upon the deception of lawmaking authorities through the use of the "third-party technique." Second, the trial court found that the railroads' campaign had as an important, if not overriding, purpose the destruction of the truckers' goodwill with their customers, as well as with the general public; thus, the campaign injured the truckers in ways unrelated to the passage or enforcement of laws. The judgment awarded substantial damages to the truckers' trade association for its costs in fighting the railroads' campaign and granted the injunction requested in the complaint. In accordance with its belief that restraints of trade and monopolization resulting from

15. Id. at 144.
16. Id. at 130. The Fair Truck Bill would have raised the 45,000-pound maximum truck load limit to 60,000 pounds. Costillo, Antitrust's Newest Quagmire: The Noerr-Pennington Defense, 66 Mich. L. Rev. 333 & n.3 (1967).
17. The truckers asked that the defendants be restrained from disseminating any disparaging information about the truckers without disclosing railroad participation, from attempting to exert any pressure upon the legislature or Governor of Pennsylvania through the medium of front organizations, from paying any private or public organizations to propagate the arguments of the railroads against the truckers or their business, and from doing any other act or thing to further . . . the objectives and purposes of the conspiracy.
365 U.S. at 131.
18. 365 U.S. at 130-31.
20. The third-party technique was described by the Supreme Court as "giving propaganda actually circulated by a party in interest the appearance of being spontaneous declarations of independent groups." 365 U.S. at 140.
valid laws were not actionable under the Sherman Act, however, the trial court awarded only nominal damages to the individual truckers. In particular, it held that no damages were recoverable for loss of business due to the veto of the Pennsylvania Fair Truck Bill.\textsuperscript{28} The court of appeals upheld the judgment of the trial court in every respect.\textsuperscript{24} The Supreme Court unanimously reversed the judgment.\textsuperscript{25}

Four basic principles were central to the Supreme Court's decision. First, the Court held that the Sherman Act does not forbid restraints of trade resulting from valid governmental action.\textsuperscript{28} It reasoned from this that no violation of the Sherman Act could be predicated upon an attempt to influence regulatory legislation.\textsuperscript{27} Second, the Court construed the Sherman Act as not intended to prohibit lobbying activity of the kind engaged in by the railroads. Though it noted that this factor was not in itself conclusive,\textsuperscript{28} the Court found an "essential dissimilarity" between conspiracies to seek enforcement of laws and conspiracies associated with traditional section 1 violations:

Although such associations could perhaps, through a process of expansive construction, be brought within the general proscription of "combination[s] . . . in restraint of trade," they bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements.\textsuperscript{29}

\begin{itemize}
\item \textsuperscript{25} 365 U.S. 127 (1961).
\item \textsuperscript{26} Id. at 136. The Court cited Parker v. Brown, 317 U.S. 341 (1943), and United States v. Rock Royal Co-operative, Inc., 307 U.S. 533 (1939), in support of this proposition.
\item \textsuperscript{28} 365 U.S. at 136-37.
\item \textsuperscript{29} Id. at 136 [footnotes omitted]. Contrast this language with that of an earlier Court, which observed that sections 1 and 2 of the Sherman Act "embraced every conceivable act which could possibly come within the spirit or purpose of the
The Court did not explain why it believed such associations to be dissimilar to those generally associated with section 1 violations; rather, it appeared simply to be restating its first rationale. For the purposes of analysis, therefore, these two arguments hereinafter shall be considered as one.

The Court's third argument was that to interpret the Sherman Act so as to prohibit certain types of political lobbying and publicity campaigns would impair the ability of the legislative and executive branches to govern effectively. "In a representative democracy such as [ours], these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of people to make their wishes known to their representatives."30

Finally, the Court warned that application of the Sherman Act in a Noerr-type situation might raise serious constitutional questions regarding the right to petition.31

The Court felt that these considerations precluded application of the Sherman Act to the case before it even though the purpose of the railroads' campaign had been to destroy the truckers as competitors

prohibitions of the law, without regard to the garb in which such acts were clothed." United States v. American Tobacco Co., 221 U.S. 106, 181 (1911) (emphasis added). See also United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553-59 (1944). Some kinds of anticompetitive associations may be not only economically harmful, but also politically and socially undesirable. See Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958); United States v. Aluminum Company of America, 148 F.2d 416, 428-29 (2d Cir. 1945). Stressing the social goals of the antitrust laws, Dean Walden has argued that the Sherman Act should be "utilized to prevent horizontal combinations of large competitors with common legislative programs." Walden, More About Noerr—Lobbying, Antitrust and the Right to Petition, 14 U.C.L.A. L. Rev. 1211, 1249 (1967).

30. 365 U.S. at 137. At least one commentator has argued that this rationale is only a restatement of the "essential dissimilarity" approach. See 33 ROCKY MT. L. REV. 413, 415 (1961).

31. 365 U.S. at 137-38. The Court did not resolve the first amendment issue. Indeed, in a footnote, it expressly declined to decide the question. Id. at 132 n.6. Nevertheless, the opinion made it clear that the Court's doubt as to the constitutional validity of "imput[ing] to the Sherman Act a purpose to regulate, not business activity, but political activity" was definitely a factor in its decision. Id. at 137.

In the most recent Supreme Court case to examine the rationale behind Noerr, California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), 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 decisionmaking. The Court's relative indecisiveness in Noerr about whether penalizing anticompetitive lobbying activity would infringe the lobbyists' right to petition thus gave way in Trucking Unlimited to a firm conviction that constitutional rights were at stake. Id. at 510-17. Handler, Twenty-Five Years of Antitrust, 73 COLUM. L. REV. 415, 434-35 (1973). For a general discussion of the Trucking Unlimited decision, see text accompanying notes 40-66 infra.
and even though the railroads had employed the third-party technique. The Court concluded that the "right of the people to inform their representatives... of their desires with respect to the passage or enforcement of laws cannot be properly made to depend upon their intent in doing so." While it agreed that third-party lobbying did not accord with accepted principles of business ethics, the Court concluded that this was irrelevant to determining whether the conduct constituted a violation of the antitrust laws.

Finally, the Supreme Court considered the trial court's finding that this was "more than merely an attempt to obtain legislation"—that the railroads' campaign had as an important, if not overriding, purpose the destruction of the truckers' goodwill. The Court observed:

There may be situations in which a publicity campaign, ostensibly directed towards 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. Nevertheless, the Court dismissed the allegation as unsupported by the facts present in Noerr.

Having weighed the constitutional and statutory considerations militating against the application of antitrust laws in a Noerr-type situation against the interest in free trade and competition served by those laws, the Supreme Court concluded that "mere solicitation of governmental action with respect to the passage and enforcement of laws" should not be barred by the Sherman Act.

Four years later the Court reexamined the Noerr rule in United Mine Workers of America v. Pennington. In Pennington, a union and certain large coal mining companies were charged with conspiring to force small, nonunionized mines out of business. According to the cross-claim, the union and the companies had jointly approached the Secretary of Labor and persuaded him to establish a minimum wage for

---

32. 365 U.S. at 138-42. For a description of the "third-party technique," see note 20 supra.
33. Id. at 139.
34. Id. at 140-42.
36. 365 U.S. at 144 (emphasis added).
37. Id. This exception became significant 12 years later when the Court reexamined the Noerr doctrine in California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972). See notes 40-66 infra and accompanying text.
38. 365 U.S. at 138.
40. The Union's request was essentially a request to extend the Walsh-Healey Act, 41 U.S.C. §§ 35-45 (1964) to TVA employees.
employees of contractors selling coal to the Tennessee Valley Authority (TVA). The effect of this minimum wage, which was much higher than that in other industries, had been to cripple small companies in the TVA term contract market.\footnote{41} It was also alleged that the large mine owners and the union had urged the TVA to curtail spot market purchases, which were generally exempt from the minimum wage provision.\footnote{42}

While Noerr had involved only activities of competitors seeking to influence public officials, Pennington had nongovernmental as well as governmental aspects. The cross-claim alleged, for example, that the large mineowners had engaged in a “destructive and collusive price-cutting campaign in the TVA spot market for coal” in order to drive smaller competitors out of business.\footnote{43} The Supreme Court ruled, however, that “[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition” and even though “part of a broader scheme itself violative of the Sherman Act.”\footnote{44}

Finally, in an opinion which some judges and commentators have viewed as both signaling a retreat from and an extension of the basic tenets of Noerr,\footnote{45} the Supreme Court grappled with the application of the Noerr-Pennington doctrine to the petitioning of courts and administrative agencies. \textit{California Motor Transport Co. v. Trucking Unlimited}\footnote{46} was a civil suit brought under section 4 of the Clayton Act\footnote{47} by one group of highway carriers against a competing group of carriers. Plaintiffs alleged that defendants had conspired to institute a series of frivolous claims\footnote{48} in state and federal tribunals designed to delay action on plaintiffs’ application for certain operating rights. Plaintiffs urged that this pattern of harassment effectively denied them “free and un-

\footnotesize{41. 381 U.S. at 660-61.  
42. Id. at 660-61.  
43. Id. at 661.  
44. Id. at 670.  
46. 404 U.S. 508 (1972).  
48. 404 U.S. at 511.}
limited access" to the administrative agency charged with issuing operating permits. The complaint charged that the aim and purpose of the defendants' actions was to weaken their competitors or put them out of business, thereby monopolizing the highway common carrier business in California and elsewhere. The district court had dismissed the complaint on the ground that the alleged activity was immune from antitrust prosecution under the Noerr-Pennington doctrine. On appeal, the circuit court reversed, holding that Noerr-Pennington immunity extended only to legislative and executive petitioning and that, in any case, the defendants' alleged conduct came within the "sham" exception to that doctrine.

The Supreme Court affirmed the decision of the court of appeals, but on only one of the two alternative grounds advanced below. The Court's opinion began with the observation that the rationale of Noerr was as applicable to the petitioning of administrative agencies and courts as to the petitioning of legislative and executive bodies. Nevertheless, if the defendants' actions were as alleged, they would still not be immune from antitrust attack, for, under Noerr, the protection afforded attempts to influence government action would not be extended to "a mere sham" whose true purpose was to destroy competition. The Court noted that the Noerr decision rested on two grounds. First, the concept of representation depends upon the ability of the people to make their wishes known to their representatives. And, second, the right of petition is protected by the Bill of Rights. Although the same general considerations govern the access of citizens to administrative agencies and to courts, any unethical conduct in this setting need not be tolerated to the extent that it is tolerated in the political arena:

[When a] pattern of baseless, repetitive claims . . . emerge[s] which leads the factfinder to conclude that the administrative and judicial processes have been abused . . . [defendants] cannot acquire immunity by seeking refuge under the umbrella of "political expression."

49. Id. at 512.
50. Id. at 511.
53. Id. at 760-63.
54. 404 U.S. at 510-11.
55. 365 U.S. at 144.
56. 404 U.S. at 511, 516.
57. 404 U.S. at 510. See note 31 supra.
58. 404 U.S. at 513.
The Supreme Court concluded, therefore, that although the defendants’ right to petition agencies and courts was protected by the first amendment, this did not necessarily immunize them from antitrust liability.9

The impact of Trucking Unlimited on the Noerr-Pennington doctrine is difficult to gauge. The Court’s primary concern may have been that the intent of the conspirators was not so much to invoke the processes of administrative agencies and courts for themselves as to discourage and ultimately prevent the plaintiffs from utilizing those processes.90 Such an intent would place this conspiracy within the traditional sham exception of Noerr, since it would constitute “‘an attempt to interfere directly with the business relationships of a competitor.’”91 The Court’s emphasis on abuse of adjudicative processes,92 however, suggests that it has fashioned a broader “sham” test for cases involving courts and administrative agencies. This test appears to depend more upon misuse of the courts than upon the intent of conspirators to weaken or destroy their competitors. If this is true, the sham exception developed by Justice Douglas in Trucking Unlimited expands that enunciated by Justice Black in Noerr. As Mr. Justice Stewart stated in his concurring opinion, “It is difficult to imagine a statement more totally at odds with Noerr”93 than the declaration of the majority in Trucking Unlimited that while recourse to administrative agencies is protected by the first amendment, those who initiate such proceedings are not necessarily shielded from antitrust liability.94

Evidently, then, freedom to petition courts and administrative agencies without incurring antitrust liability has been significantly affected by the Trucking Unlimited decision. It is possible that the Supreme Court will someday extend the sham exception of Trucking Unlimited even further to cover lobbying of legislative and executive bodies; however, it appears more likely that application of the Trucking Unlimited rule will be confined to cases where the Court perceives an abuse of the adjudicative process. Judges, and administrators acting in a judicial capacity, must be able to depend on the honesty of litigants, applicants, and other interested parties who appear before them, since ordinarily their entire knowledge of a case derives from

90. Id.

91. Justice Stewart, joined by Justice Brennan, concurred in the opinion of the majority on this ground alone. Id. at 518.


94. Id. at 517. But cf. Handler, Twenty-Five Years of Antitrust, 73 COLUM. L. REV. 414, 438 (1973) (argues that Justice Douglas did not intend to make such a broad statement).
the statements and written submissions of those parties. Legislators, on the other hand, have almost unlimited access to information about matters in controversy. Consequently, they are able to tolerate testimony that is slanted or even blatantly dishonest to a degree that would be indefensible if offered in an adjudicatory proceeding. 64

Thus, limitations on the right to petition, including the right to petition dishonestly, are much easier to justify when the integrity of the judicial process is at stake than when the validity of a particular political determination is involved. 65 Viewed in this light, it is doubtful that Trucking Unlimited has seriously eroded the foundations of the Noerr-Pennington doctrine. 66

64. "Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." Id. at 513. See also Attempt, note 45 supra.

65. See Oppenheim, supra note 45, at 223-24; Antitrust, supra note 45, at 601-02.

66. Nor have the other minor exceptions which have been carved out of the Noerr-Pennington doctrine by lower federal courts seriously weakened the doctrine. See, e.g., Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971), cert. denied, 404 U.S. 1047 (1971) (Noerr not applicable to attempts to influence governmental actions which do not make, but merely implement policy); Sacramento Coca-Cola Bottling Co. v. Teamsters Local 150, 440 F.2d 1096 (9th Cir.), cert. denied, 404 U.S. 826 (1971) (Noerr not applicable to union coercion); Woods Exploration & Producing Co., Inc. v. Aluminum Company of America, 438 F.2d 1286 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972) (wilful filing of false nomination forecasts with the Texas Railroad Commission not exempted from antitrust liability); George R. Whitteu, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), cert. denied, 400 U.S. 850 (1970) (attempts to influence government when it is operating in its proprietary capacity not exempt from antitrust prosecution); Rangen, Inc. v. Sterling Nelson & Sons, Inc., 351 F.2d 851 (9th Cir. 1965), cert. denied, 383 U.S. 936 (1966) (same).

Furthermore, many courts have refused to adopt even these limited exceptions. See, e.g., Household Goods Carriers' Bureau v. Terrel, 452 F.2d 152 (5th Cir. 1971) (Noerr applicable even to Government acting in its proprietary capacity); United States v. Johns-Manville Corp., 259 F. Supp. 440 (E.D. Pa. 1966) (same). See also United Mine Workers v. Pennington, 381 U.S. 697 (1965) (draws no distinction between petitioning of Secretary of Labor and TVA authorities); Schenley Ind., Inc. v. New Jersey Wine & Spirit Wholesalers' Ass'n, 272 F. Supp. 872 (D.N.J. 1967) (Noerr applicable even to illegal lobbying activity).

And the cases subsequent to Trucking Unlimited do not appear to alter the vitality of Noerr. See, e.g., Israel v. Baxter Laboratories, Inc., 466 F.2d 272 (D.C. Cir. 1972) (influencing F.D.A. to deny fair consideration to plaintiff's new drug application falls within sham exception); Semke v. Enid Auto Dealers Ass'n, 456 F.2d 1361 (10th Cir. 1972) (Noerr applicable to competitors obtaining injunction from state motor vehicle commission for selling used cars without a license); Aloha Airlines, Inc. v. Hawaiian Airlines, Inc., 349 F. Supp. 1064 (D. Hawaii 1972) (Noerr not applicable if defendant opposed plaintiff's subsidiary with "predatory intent" and with the purpose of eliminating plaintiff as a viable corporation); Marketing Assistance Plan, Inc. v. Associated Milk Producers, Inc., 338 F. Supp. 1019 (S.D. Texas 1972) (sham exception applicable to commercial practices which manipulate regulatory scheme resulting in a governmental monopoly); Clipper Carloading Co. v. Rocky Mt. Tariff Bureau, 1972 Trade Cas. ¶ 74,229 (N.D. Cal.) (without mentioning either Trucking or Noerr, court held that ICC may not immunize a conspiracy to employ sham protests before that agency and other boards to prevent proper tariff reductions); Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers,
II.

THE EXTENSION OF NOERR-PENNINGTON INTO THE
INTERNATIONAL ARENA

A. The Extraterritorial Application of American Antitrust Laws

The foreign activities of both American and foreign corporations are subject to federal antitrust laws. Although initially the Supreme Court flatly rejected the suggestion that the Sherman Act could or should be applied extraterritorially, it is now clear that an action that restrains the commerce of the United States with foreign nations does not escape the antitrust laws simply because it takes place abroad. Any restrictive or monopolistic agreement that “directly and materially affects [the] foreign commerce” of this country, whether formed here or abroad, is subject to control under the Sherman Act. It is not essential that the parties to the agreement do business in the United States. Even an agreement made by a group of foreign producers and put into effect abroad which restricts the importation of products into

---

Bartenders & Hotel, Motel & Club Service Workers, 1973 Trade Cas. ¶ 74,513 (N.D. Cal.) (lobbying government agency to deny business permits to competitors does not fall within sham exception); United States v. Otter Tail Power Co., 1973 Trade Cas. ¶ 74,565 (D. Minn.) (Noerr does not protect repeated litigation designed to preserve a monopoly).


68. American Banana Co. v. United Fruit Co., 213 U.S. 347, 355-59 (1909). “It is obvious that . . . the plaintiff’s case depends on several rather startling propositions. In the first place the acts causing the damage were done . . . outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress.” Id. at 355.

69. See cases cited notes 70-71 infra. It is unclear whether Congress originally intended foreign conduct to fall within the purview of the Sherman Act. For a discussion of this aspect of the legislative history of the Act, see BREWSTER, supra note 4, at 19-21.


71. In Thomsen v. Cayser, 243 U.S. 66 (1917), a case involving a combination formed by common owners of steamship lines which operated between New York and South Africa, the Supreme Court concentrated on the effect which had been produced on American commerce with other nations and found a violation of American antitrust law even though the conspiratorial agreement had been made in a foreign country. More recently, in United States v. Timken Roller Bearing Co., 341 U.S. 593 (1951), aff’g, 83 F. Supp. 284 (N.D. Ohio 1949), the Supreme Court affirmed that restrictive agreements made abroad and effective abroad were nevertheless in violation of the Sherman Act when they had a direct effect on trade between the United States and foreign countries. And, in Continental Ore v. Union Carbide and Carbon Corp., 370 U.S. 690, 704 (1962), the Supreme Court held that United States antitrust jurisdiction applied to a conspiracy to restrain United States commerce, even though the anticompetitive conduct took place in a foreign country.
the United States is subject to control, to the extent that personal or in rem jurisdiction can be obtained.\(^\text{72}\)

Thus, it is well settled that activity that has an effect on the foreign commerce of the United States\(^\text{73}\) is sufficient for the attachment of legislative jurisdiction.\(^\text{74}\) Once this requirement is satisfied the geographic location of the activity and the nationality of the parties involved are immaterial.\(^\text{75}\)

### B. The Development of Antitrust Law Regulating International Petitioning

Since United States corporations engage in a vast amount of international commerce, the precise extent to which the Noerr-Pennington doctrine may be applied extraterritorially has considerable significance. Both economic and political considerations must be taken into account in determining whether antitrust immunity should be extended to the efforts of American and foreign companies to influence the actions of governments abroad.

Few cases have considered whether inducing a foreign government to assist a company in restraining trade or achieving a monopoly is a violation of American antitrust laws,\(^\text{76}\) and only two have ex-

---

72. See Brewster, supra note 4, at 54-63; Fugate, supra note 4, at 43-76; Areeda, supra note 4, at 61-63.

73. A more substantial anticompetitive effect is required in order to impose liability for an unreasonable restraint on trade than is required merely to assert legislative jurisdiction over anticompetitive conduct. Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 102 (C.D. Cal. 1971), aff'd, 461 F.2d 1261 (9th Cir. 1972), cert. denied, 409 U.S. 950 (1972). See also I.J. Von Kalinowski, Antitrust and Trade Regulation § 5.502[2], at 5-120 (1969); Beausang, The Extraterritorial Jurisdiction of the Sherman Act, 70 Dick. L. Rev. 187, 191 (1966). If the effect on United States commerce is only incidental, there will be no antitrust violation. Alfred Bell & Co. v. Calida Fine Arts, Inc., 191 F.2d 99, 106 (2d Cir. 1951).

74. Legislative jurisdiction should not be confused with personal or in rem jurisdiction. The primary concern of the latter is to determine whether the person or assets of the defendant are sufficiently “present” within the territory of the forum court to satisfy the requirements of due process. See note 72 supra. See also Comment, Extraterritorial Application of the Antitrust Laws: A Conflict of Laws Approach, 70 Yale L.J. 259, 263-65 (1960). Legislative jurisdiction (sometimes called “the jurisdiction of the United States”) refers to the statutory reach of laws, whether or not they are intended to apply extraterritorially. See A. Ehrenzweig, Conflict of Laws § 25, at 75 (1962).

75. In cases involving strictly foreign acts by foreign parties, however, the requirement has developed that some intent to affect United States commerce must be shown before the courts will attach liability for violation of the Sherman Act. See United States v. Aluminum Company of America, 148 F.2d 416 (2d Cir. 1945); United States v. General Electric Co., 82 F. Supp. 753, 884-91 (D.N.J. 1949). The general rule in antitrust cases involving only interstate commerce is that the parties are presumed to have intended the natural consequences of their acts. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899). See Fugate, supra note 4, at 45.

76. Liability for persuading a foreign government to do acts illegal under United
amine the question since Noerr. The earliest case was *American Banana Co. v. United Fruit Co.* This was a private action for treble damages in which American Banana Company charged that the United Fruit Company had induced the government of Costa Rica to seize the plaintiff's banana plantation and to halt the construction of a railroad intended to transport the plaintiff's bananas. American Banana Company charged that this action was intended to further United Fruit's monopolization of the banana trade between the United States and Latin America. The Supreme Court held that the defendant had not violated the Sherman Act. The Court's primary consideration was that the acts complained of were not prohibited under the laws of Costa Rica:

> [N]ot only were the acts of the defendant in Panama or Costa Rica not within the Sherman Act, but they were not torts by the law of the place and therefore were not torts at all, however contrary to the ethical and economic postulates of that statute.

> . . . . [I]t 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 . . . to be desirable and proper.

*American Banana* thus enunciated the proposition that a corporation does not violate American antitrust laws when it persuades a foreign sovereign to take anticompetitive action against a rival corporation.

Eighteen years after *American Banana*, in *United States v. Sisal Sales Corp.*, the Supreme Court adopted a radically different approach to the problem. In *Sisal*, the government charged five United States corporations (three of which were banking concerns) and a Mexican corporation with conspiring in the United States to eliminate competition in the importation of sisal, a Mexican plant used in making twine. The complaint alleged that the defendants had persuaded the national government of Mexico and the state government of Yucatan to enact legislation that discriminated against defendants' competitors. As a result of this legislation, the Mexican company, financed by United States banks, had become the sole purchaser of sisal from producers, and Sisal Sales Corporation, an American company, had become the sole importer of sisal in the United States.

---

States law has been considered in other contexts than that of antitrust law. In *Frazier v. Foreign Bondholders Protective Council*, 283 App. Div. 44, 125 N.Y.S.2d 900 (1953), for example, the court held that such activity does not constitute a tort.

78. *Id.* at 357-58.
79. 274 U.S. 268 (1927).
80. *Id.* at 273.
81. *Id.*
The Supreme Court held that the assistance given defendants by foreign discriminatory legislation did not excuse them from liability.\textsuperscript{82} The Court did not overrule \textit{American Banana}, but distinguished it on two grounds. First, the conspiracy complained of in \textit{Sisal} had commenced in this country. And, second, the acts of the defendants, both "here and elsewhere," had "brought about forbidden results within the United States."\textsuperscript{83}

The first distinguishing feature is of questionable validity. The Court in \textit{American Banana} explicitly stated that "[a] conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law."\textsuperscript{84} The second argument for distinguishing the two cases is also tenuous. There was little discussion in \textit{American Banana} of the effects of the defendant's activity on American commerce; the Court apparently viewed the case as involving only the legality under foreign law of actions by United States citizens in a foreign country.\textsuperscript{85}

\textit{The Sisal} case thus retreated from the broad implication of \textit{American Banana} that a company could never be prosecuted under American antitrust laws for petitioning a foreign government to act in a discriminatory fashion. \textit{Sisal} made clear that such petitioning is punishable under the Sherman Act where the conspiracy in question commences in this country and its anticompetitive effects on American trade are substantial.\textsuperscript{86}

Few other cases dealt with the issue of international petitioning prior to \textit{Noerr}.\textsuperscript{87} Subsequent to that decision, however, two cases

\textsuperscript{82} \textit{Id.} at 276. The Court granted the request of the United States government for an injunction to restrain further action. \textit{Id.} at 271, 276.

\textsuperscript{83} \textit{Id.} at 276. "The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties." \textit{Id.}

\textsuperscript{84} 213 \textit{U.S.} at 359.

\textsuperscript{85} \textit{Fugate}, \textit{supra} note 4, at 21.

\textsuperscript{86} Any question concerning the validity of this view of \textit{Sisal} and \textit{American Banana} was answered by the Supreme Court's later decision in \textit{Steele v. Bulova Watch Co.}, Inc., 344 \textit{U.S.} 280 (1952):

Unlawful effects in this country, absent in the posture of the \textit{Banana} case before us, are often decisive [of the legislative jurisdiction of the Sherman Act over extraterritorial anticompetitive activity]; this Court held as much in \textit{Thomsen v. Cayser}, 243 \textit{U.S.} 66 (1917), and \textit{United States v. Sisal Sales Corp.}, 274 \textit{U.S.} 268 (1927).

\textit{Id.} at 288.

\textsuperscript{87} In \textit{United States v. Chemical Specialties Co.}, Inc., 1958 Trade Cas. ¶ 69,186 (S.D.N.Y.) (consent decree), the district court enjoined the defendant chemical companies from procuring anticompetitive regulations, orders, or actions from foreign governments. \textit{Id.} at 74,637. No defendant, however, was prohibited from "presenting its views to officials of any government so long as such presentation [was] based upon actual facts or expert opinion" and so long as the presentation was not used to monopolize the manufacturing, handling, importation, or exportation of the products in question. \textit{Id.} at 74,638. It would appear extremely difficult to distinguish between the
involving this issue were considered by the courts: *Continental Ore Co. v. Union Carbide and Carbon Corp.*,\(^8\) and *Occidental Petroleum Corp. v. Buttes Gas and Oil Co.*\(^9\) *Continental Ore* was a private treble-damage action\(^6\) for injuries caused by violations of sections 1 and 2 of the Sherman Act.\(^9\) The complaint charged that the defendants had conspired to restrain and monopolize United States trade in vanadium by excluding the plaintiff from the Canadian vanadium market during World War II.\(^9\) This exclusion allegedly came about because the defendant's Canadian subsidiary, Electro Met of Canada, which the Canadian Government had appointed the exclusive wartime agent to purchase and to allocate vanadium for Canadian industries,\(^8\) had conspired with the other defendants to refuse to purchase from the plaintiff. The plaintiff offered evidence to support this allegation at the trial but it was excluded by the court.\(^8\) On appeal, the circuit court ruled that the proof offered by the plaintiff was insufficient to support a finding that the activity of the defendants had in fact caused injury to Continental's business. Even assuming the allegations of the complaint to be true, Electro Met had acted, in the circuit court's view, "as an arm of the Canadian government."\(^8\) The court concluded, therefore, citing *Noerr*, that the defendants' efforts to persuade and influence the Canadian government did not fall within the purview of the Sherman Act.\(^8\)

The Supreme Court reversed. It held that the actions of Electro Met could not legitimately be considered the actions of the Canadian government. The Court was careful to note that "there is no indication that the Controller or any other official within the structure

\(^{88}\) See also *United States v. Azteca Films, Inc.*, 1960 Trade Cas. ¶ 69,683 (S.D.N.Y.) (consent decree) (prohibiting the procurement of governmental regulations which would prevent any person from obtaining or exporting Spanish-language films to the United States).


\(^{90}\) The suit was brought under section 4 of the Clayton Act, 15 U.S.C. § 15 (1970), which reads in pertinent part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

\(^{91}\) See notes 11 & 12 *supra*.

\(^{92}\) 370 U.S. at 693.

\(^{93}\) Id. at 695.

\(^{94}\) Id. at 703.

\(^{95}\) *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 289 F.2d 86, 94 (9th Cir. 1961), *rev'd*, 370 U.S. 690 (1962).

\(^{96}\) Id.
of the Canadian Government approved or would have approved of joint efforts to monopolize the production and sale of vanadium or directed that purchases from Continental be stopped. It was also the Court's opinion that *Noerr* was not applicable to the case, since the defendants had engaged in private commercial activity rather than in lobbying for the passage or enforcement of laws. Thus, none of the constitutional issues considered in *Noerr* would be affected by the imposition of liability under the Sherman Act.

The Supreme Court in *Continental Ore*, therefore, did not decide whether a corporation that petitions a foreign sovereign to enact anticompetitive legislation is exposed to liability under American antitrust laws. Although apparently approving *Sisal*, the *Continental Ore* decision rested on the premise that the acts complained of were without government sanction and were commercial rather than political in nature. At least one commentator has suggested that since *Noerr* was distinguished only on its facts, the Court in *Continental Ore* actually decided sub silentio that the *Noerr* immunity would have applied had defendants actually solicited government action. A more plausible interpretation, however, in view of the Court's traditional reluctance to reach constitutional issues when they can be avoided, is that the Court found it unnecessary to decide the *Noerr* question at all.

A more recent case, *Occidental Petroleum Corp. v. Buttes Gas and Oil Co.*, dealt more directly with the issue of extraterritorial corporate petitioning in light of the *Noerr*-Pennington doctrine. *Occidental Petroleum* was a private antitrust suit for treble damages and an injunction. The complaint charged that the defendants had instigated an international dispute over sovereign rights to a portion of the Persian Gulf in order to prevent the plaintiffs from enjoying their concession to explore, develop, and exploit the petroleum reserves in the territorial waters of the Trucial States. Both plaintiffs and defendants had negotiated with the rulers of two different states, Umm al Qaywayn

---

97. 370 U.S. at 706. The Court noted that "petitioners do not question the validity of any action taken by the Canadian Government or by its Metals Controller. Nor is there left in the case any question of the liability of the Canadian Government's agent, for Electro Met of Canada was not served." *Id.*

98. 370 U.S. at 707-08.


100. 370 U.S. at 705. *See Fugate, supra* note 99, at 954.


103. The significance of these petroleum reserves to the United States is inestimable. Oil from these reserves in the amount of 200,000 barrels a day will help to ease this country's energy crisis. San Francisco Chronicle, June 26, 1973, at 14, col. 1.
and Sharjah, for exclusive development rights in their offshore waters. After extensive quantities of oil were discovered within the Umm al Qaywayn concession territory, the defendants allegedly "induced and procured" the Ruler of Sharjah to claim ownership of the oil-rich portion of plaintiffs' concession area. With this goal in mind, the Ruler of Sharjah submitted to the British agent a concession amendment and two decrees, one of which was fraudulently back-dated, stating that Sharjah had claimed this territory prior to the granting of the Umm al Qaywayn concession.

When the concession amendment and the decrees failed to convince the British foreign agent, the defendants allegedly persuaded Iran to become involved in the dispute by also claiming the territory. They then persuaded the British Foreign Office to request that all drilling operations cease until the ownership of the disputed territory could be resolved. Finally, Umm al Qaywayn ordered the plaintiffs to cease drilling, allegedly as the result of threats of exile and military intimidation directed at its ruler by the British.

In response to these allegations, defendants contended, inter alia, that under the Noerr-Pennington doctrine they were immunized from antitrust liability. In the court's view, however, the rationale underlying Noerr was not persuasive in the international context before it. Reviewing two of Noerr's premises, the court found, first, that the constitutional right of freedom to petition carried "limited if indeed any applicability to the petitioning of foreign governments," and, second, that Noerr's concern with ensuring the proper functioning of representative government by removing any impediments to the free flow of information had little relevance in a case involving Middle Eastern sheikdoms. Although the court ultimately dismissed the complaint, it did so on grounds other than the Noerr-Pennington rule.

104. Id. at 98-99.
105. Id. at 100.
106. A treaty existed between Britain and the Trucial States which required submission to the British foreign office of all oil concession agreements. Id. at 99.
107. Id. at 100-01.
108. Id. at 101.
109. Id.
110. Id.
111. Id. at 108.
112. Id. at 108-10. The court dismissed on the basis of the act of state doctrine. The essence of this doctrine is that the courts of one government will not adjudicate the validity of the acts of another done within its own territory. Underhill v. Hernandez, 168 U.S. 250 (1897). In dismissing the plaintiffs' case, the court in Occidental Petroleum misapplied that doctrine. The complaint did not seek damages for the acts of a foreign state; rather, it sought compensation for and relief from the acts of those who had induced the state's conduct. The court apparently recognized the conceptual difference, for in another portion of the opinion it specifically noted that its decision
It remains to be seen whether other courts will follow the lead of the Occidental court in denying application of the Noerr-Pennington

did not require examination of the validity of governmental claims to the disputed territory. 331 F. Supp. at 104. The fact that the complaint contained alternative pleadings which "dubbed the states involved in the present Persian Gulf controversy as coconspirators" and which charged that Sharjah's conduct had violated international law did not alter the validity of the plaintiffs' request for relief from the conduct of the defendants alone. Id. at 110. Nevertheless, the court found that in order to determine the damage resulting from the defendants' acts of persuasion it would necessarily be forced to "sit in judgment" of the acts of sovereign states. Id. The court declined, therefore, to entertain the case.

The district court's interpretation of the act of state doctrine is at odds with modern concepts. The court relied upon American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), but misconstrued the real thrust of the opinion. The Supreme Court in that case assumed that the legality of the anticompetitive conduct was governed by the laws of Costa Rica, rather than by the antitrust laws of the United States, since the latter could not be applied extraterritorially. See note 68 and text accompanying note 78 supra. As the acts of the defendants were legal under Costa Rican law, the plaintiff's claim was reduced to one solely for seizure of property by the sovereign government, to which the act of state doctrine was decidedly relevant. Note, 11 COLUM. J. TRANSNAT'L L. 317, 330-31 (1972).


Indeed, some doubt has been raised about the continued strength of the act of state doctrine. In Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), a case involving title to property expropriated by the Castro government, the Supreme Court observed that the doctrine is not "compelled either by the inherent nature of sovereign authority, as some of the earlier decisions seem to imply, [e.g., Underhill and American Banana] . . . or by some principle of international law." Id. at 421. Taking great pains not to lay down an inflexible rule with regard to the doctrine, the Court decided only that it would not examine the validity of a taking of property by a foreign sovereign within its own territory, in the absence of a treaty or other unambiguous agreement. Id. at 421-37. This limited holding was further restricted by the Hickenlooper Amendment to the Foreign Assistance Act of 1964. 22 U.S.C. § 2370 (e)(2) (1964). Directed specifically at the Supreme Court's holding in Sabbatino (see Graziano, supra note 67, at 127-28), this legislation provided that when principles of international law have been violated no court shall decline, on the basis of the act of state doctrine, to adjudicate on the merits of any case involving an expropriation of property. Id. Any doubt which remained that the act of state doctrine essentially constituted a diplomatic approach to foreign relations was dispelled by the Supreme Court's subsequent refusal, in First National Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972), to apply the doctrine in a case where the executive branch expressly represented to the Court that its application would not advance the interests of American foreign policy. The Court reemphasized that "[t]he act of state doctrine . . . has its roots not in the Constitution, but in the notion of comity between independent sovereigns." Id. at 765.
defense when dealing with governments whose political and economic systems differ markedly from our own. But when nations are involved whose political and economic systems closely resemble our own it seems more plausible that American courts would permit extension of Noerr-Pennington immunity. In deciding these matters, courts will need to weigh the interests underlying the Noerr-Pennington doctrine against countervailing political and economic considerations in order to determine whether Noerr remains valid in a given international context.

C. Economic and Political Factors Involved in the Extension of the Noerr-Pennington Doctrine

Since the Noerr-Pennington doctrine is a judicially created exception to American antitrust laws, the rationales behind the doctrine must be applicable in an international context if they are to justify expansion of the doctrine. The first premise of the Supreme Court's decision in Noerr was that because a restraint on trade that results from valid governmental action cannot violate the antitrust laws, another doctrine similar to the act of state doctrine in that its purpose is to prevent embarrassment to the executive branch of government in matters of foreign relations is the doctrine of sovereign immunity.

The seminal case for this doctrine is Schooner Exch. v. M'Fadden, 11 U.S. (7 Cranch) 116, 137 (1812): [O]ne sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him. Unlike the sovereign immunity afforded to domestic states and the federal government, the sovereign immunity afforded to foreign governments does not rest on an "explicit command of the constitution." National City Bank v. Republic of China, 348 U.S. 356, 359 (1955). Rather, its "guiding principle [is] ... that courts should not act so as to embarrass the executive arm in its conduct of foreign affairs." Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945).

Thus, in determining whether the doctrine applies in a particular matter great deference is given to the executive branch. National City Bank v. Republic of China, 348 U.S. 356 (1955); Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945); Ex parte Peru, 318 U.S. 578, 588 (1943).

Currently, the State Department adheres to a limited theory of sovereign immunity in which immunity is not afforded to commercial aspects of a government. 26 DEPT. STATE BULL. 984, 985 (1942). The courts have apparently adhered to this limitation. See, e.g., National City Bank v. Republic of China, 348 U.S. 356, 361 (1955); Victoria Transport, Inc. v. Comisaria General de Abstecimientos Y Transportes, 336 F.2d 354 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965).

113. See notes 26-31 supra and accompanying text.

114. The foundation for this "state action" rationale was laid by Parker v. Brown, 317 U.S. 341 (1943). In Parker, the Supreme Court considered a California scheme for regulating the marketing of raisins under the California Agricultural Prorate Act. Id. at 344-48. Though the Court acted on the assumption "that the California prorate program would violate the Sherman Act if it were organized and made effective
violation can result from an attempt, anticompetitive or otherwise, to bring about such action. There is an “essential dissimilarity between an agreement jointly to seek legislation or law enforcement and the agreements traditionally condemned by [the Sherman Act].” The difference lies in the assumption that legislators and executive officers carefully consider the economic and social costs to this country before enacting or recommending anticompetitive legislation. These checks are absent in the case of agreements to act privately to monopolize or restrain trade in a particular commodity.

Significantly, these checks may also be absent from the legislative or executive decisions of foreign governments to take action which adversely affects United States trade. Thus, it does not follow that because petitioning domestic states to enact anticompetitive laws is immune from antitrust liability, such petitioning of foreign governments should likewise be protected. The United States may be unable or solely . . . by private persons,” id. at 350, nevertheless, the Court held that no antitrust liability could be predicated upon a restraint imposed “as an act of government which the Sherman Act did not undertake to prohibit.” (Citations omitted.) Id. at 352.

The viability of the Parker doctrine in an international context is questionable. It does not necessarily follow that because laws passed by domestic states of the United States are valid, laws passed by foreign governments should be presumed valid. See Note, Development of the Defense of Sovereign Compulsion, 69 Mich. L. Rev. 888, 896 (1971). But cf. Interamerican Refining Corporation v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1298 (D. Del. 1970); Graziano, supra note 67, at 128-30. However, this interpretation may conflict with the requirement of the act of state doctrine that courts of this country not judge the validity of foreign laws and also may conflict with the doctrine of sovereign immunity. See note 112 supra.

Furthermore, the state action rationale arguably is no longer at the heart of the Noerr-Pennington doctrine. In California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972), the Supreme Court stated that Noerr rested on two premises: (1) the importance “in a representative democracy” of keeping the government fully informed of the desires of the people and (2) the constitutional significance of the right of the people to petition their government. Id. at 510. No mention was made of the state action rationale or “the essential dissimilarity between governmental petitioning and traditional Sherman Act violations.” See note 31 and text accompanying notes 45-59 supra.


116. 365 U.S. at 136.

117. There is, however, an important difference between the state action rationale employed in Noerr and the act of state doctrine relied on by the district court in Occidental Petroleum. See note 112 supra and text accompanying notes 102-12 supra. The former rests on the conviction of Congress and the Supreme Court that domestic states will take anticompetitive action only when they judge that it is in the best social and economic interest of their citizens. The latter doctrine, as the Supreme Court recently made clear, rests entirely on “the notion of comity between independent sover- eigns.” First National Bank v. Banco Nacional de Cuba, 406 U.S. 759, 765 (1972). See note 112 supra. The Court’s persuasion, as evidenced in Noerr, is that sufficient safeguards exist in the American legislative and executive process that prosecuting those who work through that process in order to procure anticompetitive governmental action is unjustified in light of the damage it would do to constitutionally protected
unwilling to control the actions in restraint of American trade taken by other governments, but this does not mean that it need necessarily relinquish its authority over private corporations, domestic and foreign, whose anticompetitive petitioning generates such restraints.\textsuperscript{118}

Even if a foreign government were to act in good faith, its economic policy may favor the imposition of trade restraints which are prohibited by American antitrust law.\textsuperscript{119} To the extent that such for-

...
eign governmental restraints have adverse effects on American trade, the United States has an interest in discouraging their inducement by companies which have contacts with this country. That interest is strongest in the case of those underdeveloped countries whose relative economic weakness increases the likelihood that a powerful international corporation can impose its will on the government. In the United States the influence of corporate lobbying is limited by the size and strength of the United States government. Developing countries, however, may find it impossible to resist anticompetitive pressures applied by powerful companies. The result, as one commentator has observed with respect to Latin American countries, is that in these countries American corporations frequently become superpowers capable of dictating the economic policies of entire nations.

In Noerr the Supreme Court was concerned solely with the effects of anticompetitive lobbying carried on within the American political and constitutional framework. The state-action rationale behind Noerr rests on the assumptions that the legislative and executive branches will act to restrain trade only after making a full assessment of the impact on the American economy and that the strength and integrity of our decision-making processes will adequately protect against anticompetitive pressures exerted by corporate lobbyists. Since these assumptions may not be justified when made about the political processes in many foreign countries, the state-action rationale is a slender reed upon which to base the extension of the Noerr-Pennington doctrine into the international arena.

A second major rationale for Noerr lies in the proposition that for a representative democracy to function effectively the people must be able to make their wishes known to their representatives. Since not all foreign nations function as representative democracies, this proposition is obviously of less than universal applicability. Determining which countries qualify as “democracies,” however, would be a difficult task for any court. Moreover, if the critical factor is the
relative importance to a government of encouraging a free flow of
information, it can be argued that an ironclad dictatorship, lacking
the close contact with its citizenry that elected representatives might
provide, is in even greater need of Noerr-Pennington protection for its
petitioners than other governments. Of course, it is possible to assume
that in an authoritarian country it is unnecessary to encourage a free
flow of information, since information can be obtained by force or
stealth, but that judgment in itself is highly value-laden. Even a
nondemocratic country might well deem it essential to the formulation
of its national economic policy that avenues of communication be kept
open.\textsuperscript{124}

More importantly, however, the "representative government"
rationale is based on the presumption that in this country the danger
of the enactment of harmful anticompetitive legislation is outweighed
by the importance of encouraging businessmen to make their wishes
known to the government. Not only the size and strength of the gov-
ernment, but also a generally shared view of the limits of acceptable
restraints on trade reduce to a tolerable level the risk that corporate
petitioners will have excessive influence on legislative action. In con-
trast, another country may be as democratic as the United States, yet
its people, legislators, and executive officials may hold a radically dif-
f erent view of the desirability of a laissez-faire economic system based
on competition. In such a situation, the risk to United States trade
resulting from anticompetitive lobbying abroad may be much greater
than that entailed in domestic lobbying.

The purpose of American antitrust law is nothing less than the
preservation of the traditional economic fabric of this country. Ac-
cordingly, the mandate of the Sherman Act is very broad, and any ju-
dicially created exceptions to it must be as narrow as possible.\textsuperscript{125}
Other than its generalized reference to the proper functioning of a

\textsuperscript{124} Cf. Comment, International Law: The Act of State Doctrine as a Limita-
tion upon the Extraterritorial Application of United States Antitrust Laws, 21 J.

\textsuperscript{125} See United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553-59
"representative democracy," Noerr itself gives no clue to the appropriateness of extraterritorial application of antitrust immunity for corporate petitioners. Since the potential in most other countries for the enactment of economic legislation harmful to American interests is much higher than it is in this country, and since foreign lobbying activity by companies which do business in the United States has a much greater chance of inducing injurious anticompetitive restraints on American trade than does domestic lobbying, the term "representative democracy" should probably be interpreted to refer primarily to domestic states and the federal government. In the absence of a clear indication that the court in Noerr intended it, a broader construction seems unwarranted.126

The final rationale for the Supreme Court's decision in Noerr was that to prohibit anticompetitive lobbying would encroach upon the lobbyists' constitutional right to petition.127 It is generally thought, however, that the protection of the Federal Constitution does not extend to the petitioning of foreign governments.128 Of course, the right of a corporation, foreign or domestic, to petition the federal government or any state government will not be infringed by a decision not to extend Noerr-Pennington protection to petitioning of foreign governments. Thus, none of the rationales behind the Noerr-Pennington doctrine are directly applicable to foreign petitioning.

Nevertheless, diplomatic and foreign policy considerations may well justify extension of Noerr's protection to the lobbying activities of businessmen abroad. Foreign governments have always been extremely sensitive to the extraterritorial enforcement of United States antitrust laws. Indeed, the assumption of jurisdiction by American courts has often led to protests or acts of retaliation. For example, following the decision of the district court in United States v. The Watchmakers of Switzerland Information Center, Inc.,129 the Swiss government strenuously protested the judgment of an American court against the Swiss Trade Association on the ground that insufficient recognition had been afforded Swiss sovereignty in Switzerland's regulation of its own trade.130 In another case the English government sent a letter to one of the corporations involved directing that it disregard

126. But see P. Areeda, Antitrust Analysis ¶ 187 & n.206 (1967) (arguing that Noerr and Continental Ore taken together imply that Noerr should be extended to foreign democracies).
127. 365 U.S. at 137-38. See note 31 and text accompanying notes 45-59 supra.
128. Cf. Downes v. Bidwell, 182 U.S. 244, 270 (1901) (the Constitution not applicable to foreign countries); The "City of Panama," 101 U.S. 453, 460 (1879) (the Constitution extends no further than the political jurisdiction of the United States).
an order from an American court. The Ontario legislature responded to one American decision by passing a statute prohibiting compliance with foreign court orders involving the production of business records. Several other decisions provoked the wrath of the government of the Netherlands, with the result that today it is a crime for anyone in that country to comply deliberately with any foreign antitrust decree unless the Dutch government grants its permission.

Most antitrust violations which occur in foreign commerce involve traditional Sherman Act violations resulting from strictly private agreements. While decisions in these cases are often resented by the host country, foreign nations reserve their most bitter invective for cases in which American courts have applied the Sherman Act to agreements having an element of governmental participation. The Noerr-Pennington doctrine, however, by definition is concerned with the relationships between business and government. When American courts regulate these relationships, foreign governments interpret the regulation as a much greater affront to their sovereignty than prosecution of private antitrust agreements. Understandably, foreign nations are likely to take particular umbrage at limitations placed on the right of their own corporations to petition within their borders simply because those corporations are subject to personal or in rem jurisdiction in the United States. The practice of lobbying for anticompetitive legislation may well be an essential and accepted feature of local economic practice. Yet, in the absence of the Noerr-Pennington exemption, largely local businesses with contacts in the United States could be liable for petitioning their own governments to enact restrictive legislation which is altogether reasonable and necessary in the minds of those governments. If the Noerr-Pennington doctrine is not extended
abroad, foreign governments may be tempted to try to protect their businesses by passing compulsory legislation. Furthermore, it is even conceivable that failure to extend Noerr-Pennington would induce some governments to nationalize United States companies doing business in their territory as a response to what they might consider an affront to their sovereign dignity.

Paradoxically, therefore, the result of confining Noerr-Pennington protection to domestic petitioning may be that the governments of other countries would become increasingly involved in trade which has heretofore been carried out through private enterprise.

CONCLUSION

In applying American antitrust laws abroad, the judiciary must

138. Traditionally, compulsion by a foreign government has constituted a defense to antitrust liability; courts are reluctant to subject a defendant to the dilemma of choosing between contradictory laws. See Interamerican Refining Corporation v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970); United States v. Watchmakers of Switzerland Information Center, Inc. ("Swiss Watch"), 1963 Trade Cas. ¶ 70,600 (S.D.N.Y. 1962). Only direct foreign government action compelling a defendant's activities will shield the defendant from antitrust liability. 1963 Trade Cas. at 77,457. Mere approval of some of the defendant's activities does not exempt him from liability. Id.; Fugate, supra note 99, at 934. Whether American courts would apply the exemption in a case where a government has deliberately courted this exemption is debatable.

Furthermore, it has been suggested that the defense of governmental compulsion might be pierced when the defendant lobbied for the governmental action in question. See Interamerican Refining Corporation v. Texaco Maracaibo, Inc., 307 F. Supp. at 1297 n.14; see also Baker, The Multinational Corporation and the Great Antitrust Myth, ANTITRUST & TRADE REG. REP. D-1, at D-2; Graziano, supra note 67, at 116-17. But cf. Brewster, supra note 4, at 95-96.

In addition, it is still an open question whether acts performed in the United States and acts which restrain domestic commerce may be excused when required by a foreign government. See Graziano, supra note 67, at 140. It seems reasonable for our courts to take the position that whatever a sovereign's power in its own territory, it may not authorize actions in United States territory which conflict with United States laws. If a foreign government does order persons within its jurisdiction to perform acts outside its jurisdiction, antitrust immunity should not be granted.

This position, however reasonable, nevertheless may place businesses which carry on international operations in an intolerable position. No matter which law they obey, they will be committing a crime. Thus, it is not difficult to understand the position advocated by Judge Caslin in dictum in the "Swiss Watch" case:

If, of course, the defendants' activities had been required by Swiss law, this court could indeed do nothing. An American court would have under such circumstances no right to condemn the governmental activity of another sovereign nation.

tread a very fine line between regulating the anticompetitive acts of private entities and those of sovereign governments. The United States has a decided interest in not antagonizing foreign governments to such an extent that American foreign trade and international relations are damaged. It is to avoid encroaching on the sovereign prerogative of other countries that the United States adheres to the "act of state" doctrine,elects not to prosecute companies which operate under the compulsory anticompetitive laws of other countries, and subscribes to the doctrine of sovereign immunity. This country is not compelled to abide by these principles. It has adopted them strictly as a matter of international comity and, ultimately, self-interest. Similar considerations apply to the extension of Noerr-Pennington.

Admittedly, the rationales behind the Noerr-Pennington doctrine do not support its extension into the international arena; the doctrine was formulated entirely with domestic political and social considerations in mind. Nevertheless, so inseparable are the legislative or executive actions of a government and the lobbying of corporations and trade associations for such actions that for American courts to refuse to extend antitrust immunity to the latter may have the same adverse consequences for trade relations between the United States and other countries as a refusal to grant immunity to the activities of the governments themselves. Unquestionably, there is a legal difference be-

139. See notes 112 & 138 supra.
140. It is possible to argue that some countries are so little able to protect themselves from the overweening influence of large corporations that it is incumbent upon the American government to relieve this corporate pressure through the enforcement of American antitrust laws. Unquestionably, large American corporations have at times persuaded the legislatures of underdeveloped countries to pass laws adverse to the interests of their people. Cf. Baer & Henrique Simonsen, American Capitalism and Brazilian Nationalism, 53 THE YALE REVIEW 192, 197-98 (1963). With regard to Latin America, one commentator has asserted that the Yankee imperialist of the past "who kept a private army to protect his interests in oil in Mexico or set up banana dictatorships in Central America" has metamorphosed into a "Spanish-speaking business administration graduate who manages to bend local law to his company's interest while charming the undersecretary of foreign trade on the golf course." Lernoux, Defying the Dollar: Latin America Slams the Door, 213 THE NATION 271, 272 (1971). She argues that smooth takeovers of local industries featuring elaborate arguments supporting foreign investments have replaced the strong-arm tactics of the past. Id. Needless to say, these maneuvers can backfire. When a foreign nation realizes what has happened and succeeds in restoring its powers, the resulting resentment and loss of faith can seriously jeopardize this nation's economic relations with it. Id. Recall the furor which resulted after the exposure of ITT's political machinations in Chile.

Additionally, any benefits which accrue to a country as a result of the enforcement of American antitrust laws abroad are at best incidental. The primary function of these laws is to protect American trade. To use the antitrust laws against corporate lobbyists abroad, therefore, will do little to change the powerful influence exerted by large corporations on the governments of economically weak countries or to reduce the resentment caused by their presence. Indeed, resentment against the United States
tween prosecuting a private corporation for persuading a government to take action and prosecuting the government itself for that action. From the point of view of other countries, however, the affront to sovereignty may be equally galling.

Thus, as a matter of international comity and in the interest of preserving good trade relations with other countries, courts and legislatures should proceed only with the greatest trepidation in imposing limitations on the right of corporations to petition foreign governments. Because of the worldwide increase in nationalistic sentiment, particularly in developing countries, and the heightened sensitivity these countries display toward encroachment by the superpowers, self-interest dictates that decisions regarding the extension of Noerr-Pennington into the international arena be made only after the most careful review of the relevant social and political, as well as legal and constitutional factors. Such a review would best be undertaken by the legislative branch, in consultation with the executive. Until this is done, courts faced by these problems can only proceed on an individual basis, examining each case on its own merits. In doing so, it is hoped, the analysis offered herein will prove helpful.

Gabrielle R. Campbell

for meddling in the affairs of other countries, whether developed or developing, would almost certainly be increased:

[A]ll sovereigns jealously guard the right to regulate political activity within their own territory. International comity and good foreign relations demand that there be no interference with their prerogative. Who may petition a sovereign, how, and for what purposes are questions to be answered only by the sovereign involved, not by the courts of the United States. Graziano, supra note 67, at 132. Thus, underdeveloped countries are much more likely to resent the intrusion by American courts into their affairs than they are to appreciate any economic advantage which might accrue from that step.

141. See notes 112 & 114 supra.