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NOTE

The Uranium Cartel Saga — Yellowcake and Act of State: What Will Be Their Eventual Fate?

by Raymond J. Pikna, Jr.*

I. INTRODUCTION†

On September 8, 1975, Westinghouse Electric Corporation announced that it could not meet its contractual obligations to supply nuclear fuel to many purchasers of Westinghouse nuclear reactors. Westinghouse raised the "commercial impracticability" defense of section 2-615 of the Uniform Commercial Code, arguing that the tremendous increase in uranium prices was partly due to an international uranium cartel. As John E. Moss observed,

There is no doubt now that a cartel existed. The controversy is over its effectiveness in the world market and, more particularly, in the United States.

What we do know is that the price of uranium, or "yellowcake," was

* J.D. (1979) Case Western Reserve University School of Law; Clerk, U.S. Bankruptcy Court, Southern District of Ohio.
† On January 29, 1981, Gulf Oil Company and Westinghouse Electric Corporation announced a settlement of Westinghouse's Chicago-based uranium cartel litigation against Gulf Oil Corp.

Under terms of the settlement, . . . . Gulf will pay Westinghouse $25 million. Further, Gulf agreed to drop a counterclaim that Westinghouse used illegal tactics to drive competitors out of the nuclear-energy business. . . . Gulf will (also) assume "complete responsibility" for delivering up to 13 million pounds of uranium — currently valued at $350 million — to six of Westinghouse's utility customers.


Settlement of such uranium cartel suits prevents a full judicial interpretation of these complex antitrust and international issues, but Mr. Pikna's work more than adequately presents and discusses these timely and important issues.

2 See Appendix A, infra. At least one commentator stated that this defense should fail. Joskow, Commercial Impossibility, the Uranium Market and the Westinghouse Case, 6 J. LEGAL STUD. 119 (1977).
$5 per pound when the cartel was organized in 1972, threatening to drop to $4 and it is now over $40 per pound.4

The resultant litigation promises to be time-consuming, complex, and heatedly contested as many of this nation's best-known law firms jockey for positions which allow their clients to prevail. Seventeen utilities sued Westinghouse Electric Corporation in Virginia for breach of its uranium delivery contracts. Westinghouse sued uranium producers in Illinois for alleged antitrust violations due to the producers' participation in an international uranium cartel. Moreover, discovery issues pertaining to documents located abroad are being contested in New Mexico. This note will explore this litigation and analyze the application of two defenses, the act of state and sovereign compulsion doctrines, to the antitrust violations which Westinghouse alleged in its Illinois complaint. Initially, the note presents a detailed analysis of the facts and explores the development and status of the act of state and sovereign compulsion doctrines. Subsequent analysis examines the applicability of such doctrines as defenses in the uranium cartel litigation. Explanatory footnotes serve to raise and discuss issues beyond the scope of this note.

II. THE INTERNATIONAL URANIUM CARTEL

A. History

In 1976, documents surfaced in Australia5 and California6 which indicated the existence of an international uranium cartel. In 1971 a London-based conglomerate, Rio Tinto Zinc (RTZ) approached the Canadian Government concerning the formation of a cartel for controlling uranium markets.7 The initial meeting was held in Paris, France, on February 1-4, 1972.8 Government representatives from Canada, Australia, South Africa, and France,9 as well as producer representatives from these countries and Britain,10 quietly11 met and effectively allocated markets, rigged bids, and

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4 International Uranium Cartel: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess., pt. 1, at 129 (1977) (statement of John E. Moss) [hereinafter cited as IUC Hearings]. The IUC Hearings contain a great deal of testimony and numerous documents which explain the history and actions of the international uranium cartel.
5 Parisi, supra note 1.
7 IUC Hearings, supra note 4, pt. 2, at 1 (statement of Albert Gore, Jr.).
8 IUC Hearings, supra note 4, at 665.
9 Time, Nov. 21, 1977, at 98.
10 Id. at 96. Various foreign suppliers who either contracted or offered to contract with
fixed prices for uranium. Gulf Oil Corporation, through its wholly owned Canadian subsidiary, Gulf Minerals of Canada Limited (GMCL), was the only known participant from the United States.

Subsequent meetings in February 1971 resulted in the establishment of a secretariat with the power to punish those who violated the cartel's orders. Although meetings were held at various locations around the world from 1972 until 1975, the price of uranium was initially fixed in Johannesburg, South Africa, on May 29, 1972. At that time, the price of uranium sold to Japan, Taiwan, and Korea was 30 cents per pound higher than the sales price in other countries. Prices were later increased on October 9, 1973, in London, England, and on January 28, 1974, in Johannesburg.

The reason for establishing the Club was clear to its participants. The 100,000 ton uranium supply was approximately four times greater utilities of the United States are:

3. From Germany: Uranerz and Urangesellschaft.
5. From South Africa: Nuclear Fuels Corporation (Nufcor).
6. From England: RTZ.

IUC Hearings, supra note 4, at 340 (statement of Patrick McLain).
13 IUC Hearings, supra note 4, pt. 2, at 2. (statement of Albert Gore, Jr.).
14 IUC Hearings, supra note 4, at 132 (statement of Jerry McAfee).
15 Time, supra note 9, at 96.
16 The meetings were held in Paris February 22-24, 1972, and the secretariat was later described as a joint marketing research organization. IUC Hearings, supra note 4, at 177. The cartel, dubbed the “Uranium Market Research Organization,” has allegedly ceased operations, but the Uranium Institute has been created in London, “claiming to be just an umbrella group for uranium users and suppliers.” Bus. Week, supra note 6, at 126; Akron Beacon J., May 14, 1978 (Parade Magazine), at 1.
18 IUC Hearings, supra note 4, pt. 2, at 2 (statement of Albert Gore, Jr.).
17 IUC Hearings, supra note 4, at 665.
19 Akron Beacon J., supra note 15.
20 IUC Hearings, supra note 4, at 665.
21 The higher price is a result of increased sales costs as business must be done through agents. See Draft Report prepared by Frank R. O’Hara of Gulf Oil Corp. re Uranium Market Research Organization (July 20, 1972), reprinted in IUC Hearings, supra note 4, pt. 2, at 78 [hereinafter cited as O’Hara Draft Report].
22 IUC Hearings, supra note 4, at 342.
23 Id.
than the 1971 world demand of 26,000 tons.\textsuperscript{23} Thus, mining uranium was not a profitable venture.\textsuperscript{24} Furthermore, newly discovered Australian uranium deposits threatened to maintain the excessive uranium supply until the early 1980's.\textsuperscript{25} Open domestic markets were to be maintained in France, South Africa, Australia, Canada, and the United States.\textsuperscript{26} The exclusion of the U.S. market would, however, possibly be reviewed when the Atomic Energy Commission of the United States lifted its ban on imports of uranium.\textsuperscript{27} Indeed, beginning in 1977, the import ban on foreign uranium fuel was gradually phased out.\textsuperscript{28}

The cartel was admittedly effective in market allocation and raising the price of uranium overseas.\textsuperscript{29} Nevertheless, a disputed question exists as to whether the cartel raised prices in the United States. Gulf Oil Corporation has stated that the prices purportedly adopted by the Club were below the prevailing prices in the United States.\textsuperscript{30} Contrary testimony has established that significant quantities of uranium were purchased by U.S. utilities from foreign suppliers during the Club's operations.\textsuperscript{31} Nuclear power corporations purchased uranium at cartel prices and industrial and family consumers were required to pay more for electricity.\textsuperscript{32} In New York State alone, the short run cost to consumers may have run as high as $1 billion.\textsuperscript{33} The exact impact of the Club on U.S. prices is difficult to establish,\textsuperscript{34} but the consumer is clearly paying the price as a result of the Club's activities.

B. Canada: Actor or Reactor?

The Canadian policy regarding uranium exports was first outlined to the Canadian House of Commons on June 3, 1965. This policy provided export safeguards to ensure the peaceful use of uranium, and stockpiling

\textsuperscript{23} IUC Hearings, supra note 4, pt. 2, at 2 (statement of Albert Gore, Jr.).
\textsuperscript{24} It Worked for the Arabs . . . , \textit{Forbes}, Jan. 15, 1975, at 19.
\textsuperscript{25} Time, supra note 9, at 96.
\textsuperscript{26} O'Hara Draft Report, supra note 19, at 75.
\textsuperscript{27} Id.
\textsuperscript{28} Time, supra note 9, at 98.
\textsuperscript{29} IUC Hearings, supra note 4, at 231 (statement of S.A. Zagnoli).
\textsuperscript{30} Id. at 150 (statement of Gulf Oil Corp.).
\textsuperscript{31} At the minimum, contracts were signed between cartel members and U.S. utilities, which were said to be excluded from the cartel, at prices which matched those of the price schedule agreed upon at the Club's meetings. Id. at 343 (statement of Albert Gore, Jr.). The Tennessee Valley Authority, for instance, purchased approximately 20 million pounds of uranium from three cartel members. IUC Hearings, supra note 4, pt. 2, at 2 (statement of Albert Gore, Jr.). See Forbes, supra note 24, at 20.
\textsuperscript{32} IUC Hearings, supra note 4, pt. 2, at 3 (statement of Oliver Koppell); Time, supra note 9, at 96.
\textsuperscript{33} Time, supra note 9, at 96.
\textsuperscript{34} Id. at 98.
to ensure the continued operation of Canadian uranium mines while markets developed for the ore.\textsuperscript{35} Due to the growing world demand for uranium and the signing of the Non-Proliferation Treaty by many countries, the Government described "its uranium policy in greater detail to ensure that full account [be] taken of the Canadian public interest in these new circumstances."\textsuperscript{36} Prior to approval by the appropriate federal agency of permits for the export of uranium or thorium, such export contracts were to be examined in detail to "cover all aspects and implications of the contract such as nuclear safeguards, the relationship between contracting parties, reserves, rate of exploitation, domestic requirements, domestic processing facilities, and selling and pricing policy"\textsuperscript{37} (emphasis added).

Canadian national interest was served by the international uranium marketing arrangement\textsuperscript{38} because it was "defensive in nature and directed at protecting the Canadian industry and Canadian communities against restrictive actions by the U.S."\textsuperscript{39} Indeed, on several occasions the Canadian Government advised the U.S. Government that U.S. foreign uranium restrictions\textsuperscript{40} contravened the international responsibilities of the United States under the General Agreement on Tariffs and Trade.\textsuperscript{41} The Canadian Government nonetheless notified the U.S. Government of steps taken toward the formation of the Club.\textsuperscript{42}

The Canadian Government authorized its crown corporations to participate in the international uranium marketing arrangement. A regula-


\textsuperscript{36} Id. See also Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161.

\textsuperscript{37} Gulf Position Paper, supra note 35, at 8.


\textsuperscript{39} Id. at 5.

\textsuperscript{40} GOV'T OF CAN., BACKGROUND PAPER ON THE CANADIAN URANIUM INDUSTRY'S ACTIVITIES IN INTERNATIONAL URANIUM MARKETING (Sept. 22, 1976) [hereinafter cited as Canadian Background Paper], reprinted in Gulf Position Paper, supra note 35, at 10. For a thorough study of the uranium market in the United States, see Joskow, supra note 2.


\textsuperscript{42} Letter from H.C. Armstrong to A.S. Friedman (Feb. 14, 1972), reprinted in EMR NEWS RELEASE, supra note 38, at 19.
tion issued under section 9 of the Atomic Energy Control Act kept export pricing and quota provisions in line with the Club’s arrangements. These prices were revised periodically, and rarely exceeded U.S. domestic market prices. The Canadian Government realized, however, that a separate issue was raised by the Uranium Information Security Regulations.

The Regulations were passed because it became obvious, late in 1976, that the government [of Canada] would have to act to prevent documentation on the marketing arrangements from being released to U.S. courts. Failure to take such action would have placed the government in the untenable position of allowing evidence to be provided to a foreign court for use in the possible prosecution of Canadian nationals for acts that were in accordance with Canadian law and government policy.

These Regulations were amended to limit their application to “information relating to the export from Canada or marketing for use outside Canada of uranium or its derivatives and to persons associated with uranium producers and the federal government.” The terms of the Regulations could no longer be waived by any Canadian official. A diplomatic solution, however, to the conflict between extraterritoriality and sovereignty principles is being sought by the Canadian and U.S. governments.

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44 Gillespie Press Release, supra note 38, at 1; CANADIAN BACKGROUND PAPER, supra note 40, at 12.

45 Gillespie Press Release, supra note 38, at 4-5; CANADIAN BACKGROUND PAPER, supra note 40, at 12.

46 Gillespie Press Release, supra note 38, at 8. For a more detailed explanation of the policy behind non-disclosure of protected documents, see Gulf Position Paper, supra note 35, at 16-17. It appears that the Uranium Information Security Regulations do not take United States sovereignty into account. As a result, multinational companies will increasingly face the dilemma of having to obey conflicting laws as a risk of doing business.


49 Gillespie Press Release, supra note 38, at 10. Objections from the State Department and Canadian Government probably protected Gulf from felony charges and allowed Gulf to plead no contest to a criminal misdemeanor information. Burnham, Data Show U.S. Rejected Uranium Cartel Prosecution, N.Y. Times, Dec. 4, 1979, §1, at col. 2. Mr. McAfee, Chairman of Gulf Oil Corp., testified that he was involved in Gulf’s efforts to get permission from the Canadian authorities to produce the documents. Wall St. J., June 6, 1980, at 10,
C. The Major Litigants: Westinghouse and Gulf Oil

1. The Position of Westinghouse Electric Corporation

The federal government allowed private businesses to purchase uranium directly from producers in 1966. Utilities which pioneered the development of nuclear powered electric plants needed fuel for their reactors. Thus, manufacturers of such reactors made long-term fuel supply commitments. Westinghouse Electric Corporation, a major manufacturer of nuclear reactors, entered into an unsurpassed volume of refined uranium commitments. Westinghouse's marketing and sales strategy emphasized the advantages of a guaranteed supply of low-cost uranium. Although Westinghouse initially honored its contracts, its policy shifted when it was unable to fulfill its commitments.

On September 8, 1975, Westinghouse announced that it could not meet its uranium contracts. Westinghouse had sold 65 million more pounds of yellowcake than it had in inventory or due from suppliers. Selling uranium from inventory without making additional purchases increased return on investment and improved cash flow. Although most of the pre-1974 contracts had an escalation clause to cover various production cost increases, the contracts did not provide for price increases resulting from changes in the market. Thus, Westinghouse could lose over $2 billion if required to fulfill its contractual obligations.

Westinghouse has declared that it was "legally excused" from its fuel contracts under section 2-615 of the Uniform Commercial Code. The Code states that "unforeseen circumstances" are the key to the "commercial impracticability" defense. Westinghouse had raised the Club's activities as one of the principal unforeseen circumstances which artificially increased uranium prices. There is some evidence which tends to support this position. Westinghouse might argue that the Club adversely af-

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52 Id.
53 Id.
54 Id. at 18.
55 Id. at 5; FORTUNE, Aug. 1976, at 154.
56 Karp, supra note 51, at 5.
57 FORTUNE, supra note 55, at 154; BUS. WEEK, supra note 6, at 125.
58 FORTUNE, supra note 55, at 147, 154; BUS. WEEK, supra note 6, at 125.
60 U.C.C. §2-615 (Appendix A, infra).
fected its package export dealers. The Club was prepared to argue that foreign producers would make their uranium available at a price lower than the U.S. market price. Furthermore, Canadian uranium producers met in Ottawa on September 5, 1972 and discussed the impact of Westinghouse's bidding in Europe. Some members suggested that Westinghouse should be approached directly. "... The consensus finally reached was that if the club was to survive as a viable entity, it would be necessary to delineate where the competition was and the nature of its strength as a prelude to eliminating it once and for all." A subsequent letter sent to certain Gulf executives modified the above emphasis by deleting the elimination of competition language. As noted by John Atkisson, this deletion represents a significant change in the attitude of the uranium producers.

Many utilities believe that Westinghouse was not a victim of "unforeseen circumstances." They argue that foreign cartels in basic commodities are "eminently foreseeable," and that Westinghouse apparently rejected bids from 1973 to 1975 to buy uranium at "reasonable" prices. Consequently, the consumer was forced to pay for Westinghouse's speculation. It may well be that section 2-615 of the Uniform Commercial Code provides the "ultimate in a price renegotiation strategy" such that settlements will follow. Westinghouse, however, has a problem:

The healthier Westinghouse looks—and the better its earnings prospects in the years to come—the more pounds of flesh the utilities will demand. For this reason, Kirby [Westinghouse Chairman Robert E. O'Hara Draft Report, supra note 19, at 83.


Jackson Letter, supra note 63; IUC Hearings, supra note 4, at 594. Prior to becoming President of Oil Insurance, Ltd., Mr. Jackson was an attorney for Gulf Oil Corp. until early August, 1972. Mr. O'Hara effectively succeeded Mr. Jackson. One or two contacts occurred between the two men, and the Jackson Letter followed. IUC Hearings, supra note 4, pt. 2, at 68-69, 103-166 (statement of Roy D. Jackson, Jr.). Mr. O'Hara then sent a letter to some Gulf executives, "parroting" Mr. Jackson's advice. Id. at 112 (statement of John McElroy Atkisson); letter from Frank R. O'Hara to Nick M. Ediger (Nov. 20, 1972), reprinted in IUC Hearings, supra note 4, pt. 2, at 109-11 [hereinafter cited as O'Hara Letter (1972)].

O'Hara Letter (1972), supra note 64.

Id.

IUC Hearings, supra note 4, pt. 2, at 112 (statement of John McElroy Atkisson).

Karp, supra note 51, at 18. The utilities also argue that Westinghouse tried to join the Club. Id. at 18-19.

Westinghouse rejected bids which would have provided 60.8 million pounds of uranium, almost enough to cover its shortage of 65 million pounds. Id. at 19.

CHEM. WEEK, June 14, 1978, at 19.

Karp, supra note 51, at 20.

Id.; see CHEM. WEEK, supra note 70, at 19.
Kirby] and his associates are in a dilemma. To counter the low price of Westinghouse stock they must trumpet the company's widely ignored strengths. Unfortunately, the utilities are listening, too.\(^3\)

At the very least, "it was foolhardy [for Westinghouse] to let the uranium commitments get so far ahead of the supply in hand."\(^4\) There does not seem to be any reason to believe that a buyer must assume the seller's risk of short sales.\(^5\) The pricing policies of the Organization of Petroleum Exporting Countries (OPEC) contributed to an increase in all energy prices,\(^6\) but it is difficult to measure accurately the effect on uranium prices.\(^7\) In contrast, it might be possible to prove that the Club increased domestic prices for uranium.

2. The Position of Gulf Oil Corporation

Gulf Oil Corporation, the eighth largest industrial concern in the United States,\(^8\) has attempted to maintain a consistent position throughout the uranium cartel controversy.\(^9\) Gulf stated that the Canadian Government compelled it to join the Club,\(^10\) and that Gulf was not in violation of the U.S. antitrust laws.\(^11\) Furthermore, Gulf argued that the

\[^{3}\] Fortune, supra note 55, at 156.
\[^{4}\] Id. at 154.
\[^{5}\] Chem. Week, supra note 70, at 19; Karp, supra note 51, at 18.
\[^{6}\] Fortune, supra note 55, at 154.
\[^{7}\] Karp, supra note 51, at 18; Time, June 12, 1978, at 72.
\[^{8}\] Time, supra note 77, at 72.
\[^{9}\] Gulf Oil Corporation’s position was clearly developed and stated in Gulf Position Paper, supra note 35.
\[^{10}\] IUC Hearings, supra note 4, at 132-33 (statement of Jerry McAfee); Parisi, supra note 1, at 1, col. 1; see Bus. Week, supra note 6, at 125; Time, supra note 9, at 98.

A foreign government may, because of its economic or national interest in “rationalizing” competition in certain industries, promote certain private cooperative agreements or understandings by companies within that industry. It may, therefore, expect a U.S. company seeking to do business in its territory to agree to abide by the governmentally-desired—but not officially imposed—system of private arrangements as a condition of securing (and keeping) the necessary permits and approvals.

Such officially encouraged arrangements may involve, for example, the agreed pricing of products at a level which will not take markets away from competing products important to the local company, or the entering into by competitors of cooperative agreements for joint utilization of existing production facilities rather than the construction of new ones which might create overcapacity.
cartel's prices were below those prevailing in the United States,\(^2\) and that the U.S. market was specifically excluded.\(^3\) Gulf also observed that the price of uranium was affected by other factors, including:

(a) U.S. policies, particularly the government embargo, the stockpiling of uranium and sales from that stockpile;
b) The policies of foreign governments such as Australia which prohibited exporting uranium;
c) The Arab oil embargo in 1973 increased the pressure to develop nuclear power plants;
d) Higher exploration and development costs;
e) Lower uranium ore grades and fewer discoveries of uranium;
f) Inflation; and
g) The activities of Westinghouse Electric Corporation.\(^8\)

Gulf's charges that Westinghouse was itself a major contributing factor to the rapid escalation in the price of uranium are well documented.\(^5\) Gulf's Position Paper of June 9, 1977 provided several sources of information which bolster Gulf's allegations. Reports by the Nuclear Exchange Corporation (NUEXCO) implied that Westinghouse was primarily responsible,\(^8\) and two other sources reached similar conclusions.\(^8\) Perhaps

Official encouragement of arrangements of this sort is especially likely where necessary raw materials or labor or transportation facilities are in short supply, foreign exchange may be limited or the government may wish to prevent a single company from becoming too important to the national economy.

In general, restrictions such as these applying to commerce in the host country and imposed by the host government will create no antitrust hazards for the American company. In particular, price or capacity restrictions in the foreign market imposed at the insistence of the foreign government and not involving exports to the United States should not violate U.S. antitrust laws.

This specific section is quoted in the Gulf Position Paper, supra note 35, at 20-21 and the O'Hara Letter (1974), supra.

\(^{8}\text{IUC Hearings, supra note 4, at 150 (statement of Gulf Oil Corp.); Bus. Week, supra note 6, at 125.}\)

\(^{8}\text{IUC Hearings, supra note 4, at 133 (statement of Jerry McAfee); O'Hara Draft Report, supra note 19, at 75; Bus. Week, supra note 6, at 125; Parisi, supra note 1, at 1, col. 1.}\)

\(^{8}\text{IUC Hearings, supra note 4, at 136 (statement of Jerry McAfee). New environmental, safety, and health standards were apparently also a contributing factor. Gulf Position Paper, supra note 35, at 26; see also id. at 28-34.}\)

\(^{8}\text{Gulf Position Paper, supra note 35, at 26-34.}\)

\(^{8}\text{Id. at 26-28. The impact of the NUEXCO reports may be diminished, however, as the Justice Department instituted contempt proceedings against George White, Jr., executive vice-president of NULEXCO, alleging that Mr. White destroyed business records which he knew the federal grand jury had subpoenaed on June 16, 1976. N.Y. Times, June 3, 1978, §1 at 27, col. 4.}\)

\(^{8}\text{In a study by Joskow for the Massachusetts Institute of Technology, Westinghouse was cited as the main source for the increase in uranium prices in 1975 and 1976. Gulf Position Paper, supra note 35, at 30. See Joskow, supra note 2, at 168. This might, however, imply that Westinghouse was not the main source for the increase in uranium prices prior to}\)
INTERNATIONAL URANIUM CARTEL

Gulf Chairman Jerry McAfee best summarized his company's position when he stated:

Gulf has been taking the brunt of this in the press due to our unique position of being a U.S. domiciled parent corporation with a foreign minerals subsidiary which was required by the Canadian government to participate in an international marketing arrangement. . . .

. . . Westinghouse, with no record as a uranium producer, sold short some 60 million pounds of uranium and now is attempting to win court sanction for breaking its commitments. I think they are entitled to the same right that any commodity speculator enjoys when he has badly misjudged the market.28

Presumably, Mr. McAfee meant that Westinghouse had the right to bankrupt itself.29

D. The Lawsuits

The uranium cartel lawsuits occurring in the United States30 can be grouped into three broad categories.31 The first category involves breach

1975. By not covering its uranium contracts, Westinghouse prevented normal market factors from forcing an earlier rise in the price of uranium.

Kirkland & Ellis, which represented Westinghouse in certain cartel matters, stated in a 1976 report prepared for the American Petroleum Institute that Westinghouse's Sept. 8, 1975 announcement (Parisi, supra note 1, at 1, col. 1) contributed to the increase in uranium prices. See Gulf Position Paper, supra note 35, at 29. This does not seem to imply that Westinghouse was responsible for pre-1975 increases in uranium prices.


Each broad category is comprised of numerous cases, but not all cases fit into specific compartments. For example, plaintiffs in one complex securities action alleged that Westinghouse either misrepresented or failed to disclose facts relating to its contracts to supply uranium. Simon v. Westinghouse Elec. Corp., 73 F.R.D. 480 (E.D. Pa. 1977). See also In re Westinghouse Elec. Corp. Uranium Contract Lit., 436 F.Supp. 990 (J.M.P.D.L. 1977). Fur-
of contract issues which have been joined in Richmond, Virginia. The second category encompasses price-fixing issues. This litigation, centered in Chicago, Illinois, probably will not commence proceedings until September, 1981. The third category concerns uranium purchasers who believe they should not be bound by their contracts because the price of uranium was artificially inflated due to the Club's activities. This litigation is located in Sante Fe, New Mexico.

1. The Virginia Litigation

Utility customers of Westinghouse filed 13 federal actions in as many districts against Westinghouse. Fundamentally, each utility alleged that Westinghouse had a contractual obligation "for the present or future delivery of uranium." Since these actions involved common questions of fact, they were transferred to the Eastern District of Virginia in order to "best serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation." The trial which began on

thermore, Gulf pleaded no contest on June 2, 1978, to a criminal misdemeanor information filed against it by the Justice Department. One of the alleged violations was the Club's refusal to sell uranium to Westinghouse as a middleman for both domestic and foreign utilities. N.Y. Times, supra note 86, at 27, col. 4. Though fined $40,000, Gulf's no contest plea was dictated by the fact that a successful defense would have cost more than the possible $50,000 maximum penalty. Id.; CHEM. WEEK, June 14, 1978, at 19. Gulf claims that the settlement is not an admission of guilt. CHEM. WEEK, supra note 70, at 19. The offense charged is now a felony, however, with a maximum fine of $1 million. N.Y. Times, supra note 86, at 27, col. 4. Recent developments also revealed that the State Department was aware of a potential uranium cartel prior to its inception, but chose not to inform the Justice Department. Furthermore, in a lengthy fact memorandum, completed March 21, 1978 for the Justice Department, it was unanimously recommended to prosecute Gulf Oil Corporation and eight other companies. Thirteen more corporations would also have been named as co-conspirators, but the concern over "diplomatic furor with the countries affected" resulted in limiting the number of defendants "as a matter of comity and prosecutorial discretion." Eventually, objections from the State Department and Canadian Government helped prevent felony indictments of Gulf and the eight other companies. Burnham, supra note 50, at 1, col. 2.
September 12, 1977\(^8\) is very important to Westinghouse, not only because Westinghouse wants to establish that the Club's activities made it "commercially impracticable" for Westinghouse to meet its contractual obligations, but also because the Richmond trial is a "dress rehearsal" for the Chicago trial.\(^9\) Significantly, most of the 17 utility companies suing Westinghouse have already settled.\(^{100}\)

Many legal issues have been raised in an effort to get to the heart of the Virginia litigation.\(^{101}\) Perhaps the most notable issues of international impact arose when Westinghouse served RTZ with an order to supply information on the Club's activities.\(^2\) Top RTZ executives went to the U.S. Embassy in London and argued that their testimony might incrimi-
nate them under the Fifth Amendment of the U.S. Constitution. The Justice Department wanted to obtain evidence for its grand jury investigation of the Club and therefore it granted use immunity to the RTZ officials. The United Kingdom, however, disallowed such discovery because it was deemed prejudicial to its security and sovereignty. As one commentator observed:

What this saga reveals is how determined members of the uranium "club" are to prevent evidence from falling into the hands of American prosecutors. England became a key forum for a very practical reason: it is the only country that has a "club" member and has not erected a general barrier against U.S. discovery of uranium documents.

Other discovery actions have had a great impact on many Club-related lawsuits. Westinghouse has been prevented from examining certain records physically located in Canada and from deposing certain individuals. The majority opinion in this discovery action based its decision to vacate the civil contempt citation and sanctions against Rio Algom Corporation on questionable reasoning. Serious consideration was given to Rio Algom's argument that if it complied with the discovery order, "it would be in violation of Canadian law and subject to severe sanctions in that country." The Court relied heavily on Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, and applied its "balancing approach" by looking at such factors as Rio Algom's diligent effort to produce materials not subject to the Canadian regulation, its attempt to get a waiver from the Canadian authorities and

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103 Id.; Baker, supra note 90, at 188.
104 Note, supra note 90, at 325 n.7.
105 Id.; see Baker, supra note 90, at 188; Ross-Skinner, supra note 102, at 103.
106 Baker, supra note 90, at 189.
107 In re Westinghouse Elec. Corp. Uranium Contracts Lit., 563 F.2d 992 (10th Cir. 1977). However, Gulf will request the Canadian government to declassify the cartel-related records of GMCL, as it does not believe that the documents contain incriminating evidence. The Canadian government may not be able to release them, however, due to the Liberal administration's commitments to other countries to keep that information secret. Petzinger & Bayless, Gulf Oil to Ask Canada to Declassify Data That May Resolve Uranium Cartel Fight, Wall St. J., Sept. 10, 1979, at 16, col. 1. One source states that Gulf apparently tried to keep its connection with the Club confidential: first, by not bringing sensitive documents into the United States; second, by shipping documents from U.S. offices to Canadian offices; and third, by filing documents in the offices of counsel so that the attorney-client privilege could be claimed. Gulf disputes those allegations. Burnham, Gulf Said To Conceal Cartel Link, N.Y. Times, Jan. 26, 1980, at 27, col. 6.
110 357 U.S. 197 (1958)[hereinafter cited as Societe Internationale].
the physical location of the records in Canada. The Court also viewed the Canadian "national interest," as illustrated by an Ontario Supreme Court opinion, and observed that Westinghouse’s defense in the Virginia litigation did not stand or fall on the contested discovery order.

The dissenting opinion in *Westinghouse* appears to be more persuasive. The dissent noted that Rio Algom is only a witness in the breach of contract action, and also sought to clarify several factors. Firstly, the dissent indicated that Canadian regulations seem to have been promulgated to prevent discovery in the present litigation. Secondly, the Canadian Government’s policy was to protect its uranium industry from an oversupply and low price situation. Thirdly, the Canadian regulations were enacted contemporaneously “with the empanelling of a grand jury in the United States to investigate possible antitrust violations by uranium producers.” Finally, the dissenting opinion observed that Rio Algom is

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113 Id. at 1000 (Doyle, J. dissenting).
114 Id.
116 *In re Westinghouse Elec. Corp. Uranium Contracts Lit.*, 563 F.2d 992, at 1001 (Doyle, J., dissenting). The Canadian Minister of Energy, Mines and Resources has stated: “This action was taken in the light of the sweeping demand for such information by U.S. subpoenas, which, while served on officers of U.S. companies, call for the presentation of information in the possession of subsidiary or affiliate companies ‘wherever located.’” 16 Ont.2d at 283; accord, 563 F.2d at 1002 (Doyle, J., dissenting).
117 *In re Westinghouse Elec. Corp. Uranium Contracts Lit.*, 563 F.2d at 1003 (Doyle, J., dissenting). See 16 Ont.2d at 273; Gillespie Press Release, supra note 38, at 1. However, as stated in the preamble to its Atomic Energy Control Act, the Canadian policy is even broader: “[I]t is essential in the national interest to make provision for the control and supervision of the development, application, and use of atomic energy, and to enable Canada to participate effectively in measures of international control of atomic energy which may hereafter be agreed upon.” Canadian Uranium Policy Statement, supra note 35, at 8.
118 *In re Westinghouse Elec. Corp. Uranium Contracts Lit.*, 563 F.2d 992, 1002 (Doyle, J., dissenting). The Canadian High Court of Justice became “convinced that the principal reason the evidence and productions is [sic] being pursued is not for the Richmond proceedings.” 16 Ont.2d at 289. As stated by that court:

What is evident is that the testimony and documents sought are central to Westinghouse’s claim in the Illinois proceedings and, for that matter, to the Grand Jury investigation and if procured will become available to both. The chief purpose, if not the real object of this exercise, in my opinion, is to search out documents which might have bearing on the Illinois proceedings.

Id.

The High Court of Justice also distinguished their practice and procedures from the broad discovery rules of the United States, id. at 287; stated that the evidence sought was not necessary for use at the Richmond trial or for the purposes of justice, id. at 288; and
an "American corporation which does all of its substantive business in the United States." Thus "if a balancing test is to be used and relief (for Rio Algom Corporation) is to be granted, the case would have to show more merit than we see here." Other courts have examined the merits of discovery claims and have allowed such discovery to occur. Thus, the Tenth Circuit relieved Westinghouse of a stipulation and order which would have blocked the deposition of Mr. Adams, former president of Western Nuclear, Inc. The stipulation was considered inequitable in that it would have prevented the development of potentially critical facts.

It has been ruled that Westinghouse must honor its contracts to supply uranium to seven utilities, and it appears that the issue of damages was resolved by mid-1980. United States District Court Judge Robert R. Merhige, Jr., who urged both sides to settle, stated that the utilities were not entitled to "anything near the full measure of their prayers for relief."

2. The Illinois Litigation

On October 15, 1976, Westinghouse filed a suit in the Northern District of Illinois against 29 domestic and foreign uranium producers.

also rested its conclusion to not enforce the letters rogatory on the Court's discretionary power flowing from international comity, id. at 290. That Court also noted that "letters rogatory should not be enforced against officers of Canadian corporations whose actions during the pertinent period had received the stamp of approval of the Canadian Government." Id. at 292. Rio Algom Corp. is a Delaware corporation with its corporate office in Canada. Therefore, the High Court of Justice's statement of non-enforcement should not have applied to Rio Algom Corp. and its officers.


Id. at 1003. Though the dissenting opinion balanced the strong policy reasons underlying the discovery rules on one side, it concluded by focusing on the Canadian policy of protecting its local industries on the other side. Id. This overlooks the other Canadian national interests explored in note 117, supra. Neither opinion, therefore, seems totally correct.

In re Westinghouse Elec. Corp. Uranium Contracts Lit., 570 F.2d 899, 902 (10th Cir. 1978).

Id. The lawsuits in the Virginia litigation were apparently settled more than a year later at a cost to Westinghouse of $950 million. Hymowitz, supra note 100, at 1, col. 6.

Chem. Week, supra note 61, at 15. It therefore seems that Westinghouse, though exposed to a potential liability of up to $2 billion, id., will benefit considerably from Judge Merhige's discretion under U.C.C. §2-615 in awarding damages. Accord, Solomon, supra note 100, at 82.

Westinghouse alleged that the defendants allocated and divided the uranium market, and simultaneously conducted price-fixing activities. Moreover, Westinghouse claimed that it and other uranium purchasers were the subjects of a boycott by the uranium producers. Westinghouse further charged that the defendants' practices violated the Sherman Act, section 1, and section 73 of the Wilson Tariff Act. Nine of the defendants defaulted.

The major issues in the Illinois litigation will probably be contested

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127 Id. §1 of the Sherman Act and §73 of the Wilson Tariff Act are reprinted in Appendix E, F, infra.
128 Those defendants were Rio Algom Ltd., Rio Tinto Zinc Corp., Ltd., RTZ Services Ltd., Conzinc Rio Tinto of Australia Ltd., Mary Kathleen Uranium Ltd., Pancontinental Mining Ltd., Queensland Mines Ltd., Nuclear Fuels Corp., and Anglo-American Corp. of South Africa, Ltd. Westinghouse Elec. Corp. v. Rio Algom Ltd., 448 F.Supp. 1284, 1286 (N.D. Ill. 1978), modified, 580 F.2d 1311 (7th Cir. 1978), rev'd, 588 F.2d 221 (7th Cir. 1978), cert. denied 439 U.S. 955 (1978). See also CHEM. WEEK, July 25, 1979, at 25. These nine companies have been enjoined from attempting to transfer assets out of the United States without giving Westinghouse twenty days notice to enable it to contest such a transfer. However, it is difficult to identify the assets of the defaulting companies since they must often be traced through their subsidiaries. Furthermore, if the assets of foreign firms are attached, retaliatory action against Westinghouse could occur overseas. Matters should become even more interesting when the amount of damages owed by the defaulting companies is determined. See Getshow, Wall St. J., supra note 125, at 1, col. 6; CHEM. WEEK, supra, at 25. The default judgment entered against the nine foreign defendants, In re Uranium Industries Antitrust Lit., 473 F.Supp. 382 (N.D. Ill. 1979), was affirmed on appeal, 617 F.2d 1248 (7th Cir. 1980), but the order on the issue of liability against those defendants was remanded by the three-judge panel, which stated that the damages hearing could not be held until the liability of the twenty non-defaulting defendants was determined. Another critical conclusion was that the District Court had jurisdiction over the foreign concerns. Wall St. J., supra note 93, at 8, col. 2. Discovery of certain foreign documents was granted in Tennessee Valley Auth. v. Uranegellschaft, 480 F.Supp. 1138 (N.D. Ill. 1979).

An evidentiary hearing held in June 1980 focused on whether Gulf and several other defendants made good-faith efforts to comply with a court demand for uranium-related records located outside the United States. CHEM. WEEK, May 7, 1980, at 32; Wall St. J., June 4, 1980, at 17, col. 1; Wall St. J., June 6, 1980, at 10, col. 2; Wall St. J., June 25, 1980, at 12, col. 1. The outcome of the hearing will undoubtedly influence the severity of the sanctions imposed upon the defendants if they are found liable for the actions alleged in Westinghouse's complaint. See Wall St. J., June 25, 1980, at 12, col. 1.
in the fall of 1981. The existence of the cartel described in the complaint may encourage the defendants to argue an act of state defense. Several of the defendants have filed counterclaims against Westinghouse, alleging that Westinghouse violated the antitrust laws by monopolizing or attempting to monopolize the nuclear reactor market and nuclear reactor fuel supplies. The defendants further alleged that antitrust laws were violated when Westinghouse tied uranium sales to nuclear reactor and fuel assembly sales, and also established exclusive dealing contracts with utilities.

It is ironic that in an action unrelated to Westinghouse's charges of price fixing, General Atomic Company sought to invoke U.C.C. section 2-


TVA actions sharing substantially common allegations of conspiratorial activity with the Illinois actions were transferred to the Northern District of Illinois. In re Uranium Industry Antitrust Lit., 458 F.Supp. 1223, 1228, 1232 (J.P.M.D.L. 1978). This centralization was necessary to prevent duplicative discovery, eliminate the possibility of conflicting pre-trial rulings, and to save time and effort for the parties, the witnesses, and the judiciary. The international aspects of the case created discovery problems which made centralization of the TVA and Illinois actions “especially appropriate.” Id. at 1229. A portion of a New Mexico action involving Homestake Mining Corp. was also transferred to the Northern District of Illinois. In re Uranium Industry Antitrust Lit., 466 F.Supp. 958 (J.P.M.D.L. 1979).

A small step was taken towards expediting discovery when the Antitrust Division was ordered to make all of its investigatory documents in its custody and control available to Westinghouse and TVA for inspection and copying, subject to whatever conditions Judge Marshall of the Northern District of Illinois might consider appropriate. In re Grand Jury Investigation of Uranium Industry, [1978] 2 TRADE CAS. (CCH) 662, 329. Liberal discovery of Grand Jury transcripts in civil antitrust cases seems likely to continue in the Seventh Circuit. Unikel, Discovery of Grand Jury Transcripts in Civil Antitrust Cases in the Seventh Circuit: Fair Use or Abuse?, 66 ILL. BAR J. 706 (1978).


130 See text of part III, infra.

131 In re Uranium Indus. Antitrust Lit., 458 F.Supp. 1223, 1225 (J.P.M.D.L. 1978). The District Court of Illinois refused to dismiss those counterclaims, and also held that the allegations that Westinghouse misrepresented its uranium supply capacity to utility customers were sufficient to establish actionable misrepresentation under the Lanham Trademark Act. In re Uranium Antitrust Lit., 473 F.Supp. 393 (N.D. Ill. 1979).

132 Id.
615 and thereby terminate a contract for nuclear fuel because unforeseen delays had made the contract "commercially impracticable." The action may signify that most uranium suppliers encounter unforeseen problems under their contracts.

3. The New Mexico Litigation

The New Mexico litigation has had an impact beyond its immediate issues. On December 21, 1975, United Nuclear Corporation (UNC) brought suit in the District Court of Sante Fe County to obtain a declaratory judgment setting aside or modifying contractual obligations with General Atomic Company (GAC) with respect to the supply and delivery of uranium. UNC essentially believes that contract prices were artificially inflated by the Club's activities. Therefore, UNC seeks to void the contracts and recover damages in excess of $2 billion. GAC denies these allegations and is seeking specific performance of the contracts. An action by GAC to interplead UNC and four utilities in the United States District Court for the District of New Mexico was dismissed on March 2, 1976, for want of subject matter jurisdiction. Three other federal proceedings also were brought by utilities against GAC. A broad injunction was entered by the Santa Fe court to prevent various actions by GAC and UNC, but the United States Supreme Court held that

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126 United Nuclear Corp. v. Gen. Atomic Co., 90 N.M. 97, 99, 560 P.2d 161 (1976). An amended complaint was filed later to avoid an additional contract on grounds similar to those set forth in the original complaint. Id. UNC also alleged an attempt to monopolize and restrain trade in uranium in New Mexico. Id. at 101. Personal jurisdiction was found to exist. Id. at 102.

127 Time, supra note 9, at 96.

128 Id.


131 See id. at 15 n.4.
such an injunction was not warranted. The Sante Fe court modified its injunction, but the United States Supreme Court reiterated its holding that no restrictions could be placed upon GAC's assertion of its right to litigate arbitration claims in federal forums. The Sante Fe court injunction was thereby ordered to be vacated or modified.

In contrast to the proceedings in the Sante Fe court, GAC's motion on December 9, 1976 to join the Detroit Edison Company as a party was granted by the New Mexico Supreme Court. Other utilities, such as the Indiana & Michigan Electric Company, have been instructed that New Mexico was a proper forum in which all issues could be litigated.

The New Mexico litigation is important for several reasons. Once the findings of fact are made, the impact could be devastating in this and other uranium lawsuits. Furthermore, Judge Felter has clearly indicated that he believes that Gulf tried to conceal documentary evidence by shipping it to Canada, where it would be protected by the Uranium Information Security Regulations. Exxon Corporation also planned to sue Gulf and GAC on charges of fraud and antitrust violations concerning a May, 1973 uranium supply agreement. Should the plaintiffs be relieved of their contractual obligations, they could receive windfall profits of up to 300 percent if they resell the yellowcake at July, 1978 prices.

142 Id., rev'g 90 N.M. 120, 560 P.2d 541 (1977).
144 Id. The New Mexico Supreme Court vacated the Sante Fe Court ruling and opened the way for a possible upset of recent default judgments against GAC in its suit with UNC. $8 million in damages could give UNC windfall profits of $800 million by reselling the disputed uranium, whereas GAC's potential losses are between $500 and $800 million. Parisi, General Atomic Names Agent for Arbitration, N.Y. Times, June 30, 1978, §4, at 12, col. 3. GAC wanted to proceed to arbitration, which UNC opposed. Id. Wall St. J., Feb. 5, 1980, at 33, col. 1.
146 Id. at 308.
147 Id.
149 Parisi, supra note 1, at 13, col. 1. The regulations are reprinted in Appendices C, D, infra. "[T]he federal government's exclusive power over foreign relations does not preclude the courts of New Mexico from litigating the cartel-related issues presented in this case, or from seeking the production of documents that will facilitate their resolution of such litigation." United Nuclear Corp. v. General Atomic Co., 49 U.S.L.W. 2177 (829 N.M. S.Ct. 1980).
150 Parisi, Exxon Nuclear in Plan to Sue Gulf on Fraud and Antitrust Charges, N.Y. Times, Apr. 11, 1978, at 61, col. 5. However, Exxon Nuclear Corporation has been sued in federal district court in Pittsburgh by Duquesne Light Company, Cleveland Electric Illuminating Company, Ohio Edison Company, and Toledo Edison Company, for failure to meet its contractual obligation to deliver a "substantial amount of uranium concentrates." Wall St. J., Sept. 13, 1979, at 33, col. 1.
151 Parisi, supra note 1, at 13, col. 1.
E. Importance of the Lawsuits

The uranium cartel lawsuits have served to focus world-wide attention on the activities of various multinational corporations, and upon cartels in general. Cartels are becoming increasingly more common. A few hundred multinational corporations will soon dominate world trade, and these multinationals are often faced with the dilemma of having to obey conflicting laws of different nations. From a corporate ethics standpoint, it is apparent that the ethics of one company may conflict with those of a foreign client. The uranium litigation may not have a tremendous impact on U.S. law, but it will certainly rekindle ethical debates and demands that oil companies be required to divest themselves of non-petroleum-related activities.

The outcome of the uranium litigation will affect the availability of uranium, and it is likely that domestic energy demands will affect the outcome of the litigation. Prior to the Three Mile Island nuclear accident, though, several sources predicted an increased demand for nuclear energy. As exemplified by the Virginia litigation, many utilities are already involved in uranium raw material activity. It is doubtful that these utilities will be awarded “the full measure of their prayers for relief.” This conclusion recognizes that utilities probably contracted for uranium to supply the projected number of nuclear power plants, and that this projection has since dropped dramatically. Revised projec-

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152 OPEC is probably the most famous cartel. The Justice Department recently dismissed civil antitrust suits against quinine cartel members. CHEM. & ENGINEERING NEWS, Nov. 27, 1978, at 16. A fiber cartel may be created. CHEM. & ENGINEERING News, Aug. 7, 1978, at 7; CHEM. WEEK, Nov. 29, 1978, at 30. In contrast, a chemical cartel was recently found not to be necessary. CHEM. WEEK, June 28, 1978, at 33. The March 28, 1979, nuclear accident at Three Mile Island near Harrisburg, Pennsylvania, and accompanying call for greater nuclear reactor safeguards may slow down such efforts, however. See generally TIME, April 9, 1979, at 8; TIME, April 16, 1979, at 22; Church, Looking Anew at the Nuclear Future, TIME, April 16, 1979, at 32.


156 TIME, supra note 9, at 98. Many of the arguments for and against divestiture are explored in articles appearing in CHEM. ENGINEERING PROGRESS, Apr. 1977. See A.M.R., Tougher Antitrust Laws, DUN'S REV., March 1979, at 87.

157 See TIME, April 9, 1979, at 8.


159 See note 124, supra.

160 In 1970, 1000 nuclear plants were predicted to be in operation by the year 2000, but
tions, combined with licensing and construction delays common to nuclear plants,\textsuperscript{161} suggest that many utilities would currently be unable to use the uranium for which they contracted. Of course, the utilities would be glad to resell the uranium at current market prices and thereby reap a large profit.

III. THE ACT OF STATE AND SOVEREIGN COMPULSION DOCTRINES

A. Development


Though the act of state doctrine appears to be at least 300 years old,\textsuperscript{162} it was not until 1897 that Chief Justice Fuller enunciated the classic American statement of the doctrine:

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. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.\textsuperscript{163}

Fuller's enunciation of the act of state doctrine\textsuperscript{164} was quickly applied in antitrust cases. In American Banana v. United Fruit Co.,\textsuperscript{165} the plaintiff and defendant were American corporations. Plaintiff bought a Panama-

\textsuperscript{161} INDUS. WEEK, June 20, 1977, at 50; accord Anderson, supra note 158, at 9; cf. TIME, Sept. 5, 1977, at 30. Such delays sometimes result in lawsuits. Commonwealth Edison Co. v. Gulf Oil Corp., 541 F.2d 1263 (7th Cir. 1976), aff'd 400 F.Supp. 888 (N.D. Ill. 1975). Efforts are being made to speed up the construction of nuclear power plants. TIME, supra, at 30; TIME, supra note 158, at 57; Long & Murray, 96th Congress expected to be more conservative, thrifter, CHEMICAL & ENGINEERING NEWS, Jan. 8, 1979, at 15; Whether such efforts will be successful depends on Congress. Wechsler, supra note 160, at 93. The March 28, 1979 nuclear accident at Three Mile Island in Pennsylvania and accompanying call for greater nuclear reactor safeguards are slowing such efforts, however. Akron Beacon J., supra note 160, at 3, col. 4. Moreover, many communities and states will not allow uranium mining. Mieher, Eastern States Inhibit Search for Uranium, Wall St. J., June 25, 1980, at 13, col. 3.
\textsuperscript{163} Underhill v. Hernandez, 168 U.S. 250, 252 (1897).
\textsuperscript{164} The acts of the defendant in Underhill were deemed to be acts of the later-recognized government of Venezuela. Id. at 254.
\textsuperscript{165} 213 U.S. 347 (1909).
nian plantation after the Panama Revolution (1903) resulted in the establishment of an independent state. Defendant United Fruit allegedly encouraged Costa Rican soldiers and officials to seize part of the plantation and a cargo of supplies. Thus, the plaintiff alleged that the defendant intended to prevent competition and to control and monopolize the banana trade. Plaintiff sought to void a Costa Rican judgment declaring that the plantation belonged to a third party and not to the plaintiff. Relying on Underhill v. Hernandez, Justice Holmes responded by noting that “a seizure by a state is not a thing that can be complained of elsewhere in the courts.” The Court’s holding, however, was that the defendant’s actions were not within the scope of the Sherman Act. The American Banana holding has since been limited to its particular facts, and the Sherman Act and other U.S. antitrust laws have thereafter been applied to extraterritorial conduct.

In Ricaud v. American Metal Co., Ltd., the act of state doctrine was applied when title to disputed property rested in an American citizen. The United States retroactive recognition of the Carranza Government of Mexico effectively validated the government’s expropriation of property during a Mexican revolt. The Supreme Court observed that an act of one sovereign state within its own boundaries cannot become the subject of reexamination and modification in the courts of another. “Such action, when shown to have been taken, becomes, as we have said, a rule of decision for the courts of this country.” Therefore, plaintiff’s rights could only be asserted through Mexican courts or the political departments of the U.S. Government.

2. The Modern Status of the Act of State Doctrine

Banco Nacional de Cuba v. Sabbatino began the modern era of the

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166 Id.
169 Id. at 349.
171 246 U.S. 304 (1918).
172 Id. at 309.
173 Id. at 310.
174 Id. at 310. The act of state doctrine was also discussed in a companion case, Oetjen v. Central Leather Co., 246 U.S. 297 (1918).
The right to proceeds from property which had been expropriated by the Cuban Government gave rise to the controversy before the Court. The Court held that the act of state doctrine must be determined by federal law, and later stated:

Therefore, rather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

The policies underlying the act of state doctrine were extensively discussed. The Court determined that the doctrine was compelled by neither the inherent nature of sovereign authority nor by some principle of international law. The doctrine, however, did have "constitutional" underpinnings which arose out of the basic relationships between government branches in a system of separation of powers. "The text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state." Rather, the Court observed that the applicability of the act of state doctrine is determined by balancing relevant considerations; "the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches."

The Sabbatino rationale was affirmatively applied in Occidental Petroleum Corp. v. Buttes Gas & Oil Co. In Occidental, the California District Court provided two reasons for rejecting the plaintiffs' charge that the defendants had induced and procured assorted executive acts by foreign states. Firstly, since the plaintiffs termed the states involved in this Persian Gulf controversy as co-conspirators, the court concluded that plaintiffs' questioning of the conduct of these foreign states under the

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179 Id. at 423.
180 Id.
181 Id. at 428.
183 Id. at 107.
antitrust laws was barred by the act of state doctrine.\textsuperscript{184} Secondly, the court decided that plaintiffs' charges that several of Sharjah's acts were violative of international law were barred by the act of state doctrine, as enunciated in \textit{Sabbatino}.\textsuperscript{185} The court then granted the Buttes defendants' motion to dismiss for failure to state a claim upon which relief could be granted.\textsuperscript{186}

The Supreme Court's most recent pronouncement on the act of state doctrine was revealed in \textit{Alfred Dunhill of London, Inc., v. Republic of Cuba}.\textsuperscript{187} The issue was whether Cuba's failure "to return to petitioner Alfred Dunhill of London, Inc. (Dunhill), funds mistakenly paid by Dunhill for cigars that had been sold to Dunhill by certain expropriated Cuban cigar businesses was an 'act of state'..."\textsuperscript{188} Finding for petitioner, the Court concluded that with respect to the government's obligation to return the funds erroneously paid to them, the record did not disclose an act of state.\textsuperscript{189} There was no public act, such as a statute, decree, order or resolution of the Cuban Government, which was entitled to respect in American courts.\textsuperscript{190}

Four Justices in \textit{Dunhill} favored the establishment of a commercial act exception to the act of state doctrine.\textsuperscript{191} The four Justices felt "that the mere assertion of sovereignty as a defense to a claim arising out of purely commercial acts by a foreign sovereign is no more effective if given the label 'Act of State' than if it is given the label 'sovereign immunity.'"\textsuperscript{192} Indeed, there were several reasons for establishing a commercial act exception. Firstly, a distinction exists between public-governmental acts and private-commercial acts of sovereign states.\textsuperscript{193} Secondly, embarrassing conflicts with the Executive Branch would not rise from the failure to recognize the purely commercial conduct of foreign governments as an act of state.\textsuperscript{194} Thirdly, the Justices believed that the existence of a commercial act exception to the act of state doctrine was con-

\textsuperscript{184} \textit{Id.} at 110.
\textsuperscript{185} \textit{Id.}
\textsuperscript{186} \textit{Id.} at 114.
\textsuperscript{188} \textit{Id.} at 684.
\textsuperscript{189} \textit{Id.} at 690.
\textsuperscript{190} \textit{Id.} at 694-95.
\textsuperscript{191} Justice Stevens agreed that the act of state doctrine did not bar entering judgment for the petitioner, but he did not concur with part III of the Court's opinion which set forth the commercial act exception. \textit{Id.} at 715.
\textsuperscript{192} \textit{Id.} at 705.
\textsuperscript{193} \textit{Id.} at 693-94.
\textsuperscript{194} \textit{Id.} at 697-98, 710. The Department of State, in a letter of Nov. 26, 1975 to the Solicitor General, \textit{reprinted in id.} at 708, favored abolishing the act of state doctrine. \textit{Id.} at 710, 697 n.12.
The dissenters cited several reasons in support of the above conclusions. Thus, an act of state could be active or passive, and need not be formalized; and the significance of any letter from the Department of State was minimal. Moreover, the doctrines of sovereign immunity and act of state “differ fundamentally in their focus and in their operation;” while a defendant pleading sovereign immunity was exempt by reason of its status, the act of state doctrine was simply a conflict-of-laws rule. Lastly, the dissenting Justices observed that the validity of a foreign sovereign’s act may be a “political question” not cognizable in American courts.

Dunhill has been generally criticized on the grounds that the Court neither fully understood the act of state doctrine, nor established a strong course which would provide guidance in the future. The commercial act exception has been met with approval, and a merger of sovereign immunity and the act of state doctrine “into a rational and comprehensible rule of American foreign relations law” has been requested.

Recent circuit court decisions shed some light on the path which the act of state doctrine will follow. In Timberlane Lumber Co. v. Bank of America, N.T. & S.A., the principal action was an antitrust suit in which plaintiffs alleged that defendants conspired to prevent Timberlane from milling and exporting Honduran lumber to the United States. Since the alleged intent and result of the conspiracy was to interfere with the exportation of lumber to the United States, the foreign commerce of the United States was directly and substantially affected. In discussing the action, the district court apparently held that American courts could not review the acts of the Honduras Government which caused the injuries

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196 Id. at 698-99.
197 Id. at 719-20.
198 Id. at 725.
199 Id.
200 See id. at 725-26.
201 Id. at 727.
204 Gordon, supra note 203, at 616.
205 549 F.2d 597 (9th Cir. 1976).
206 Id. at 601.
suffered by Timberlane. This decision was later vacated and remanded because "there [was] no indication that the actions of the Honduran court and authorities reflected a sovereign decision that Timberlane's efforts should be crippled or that trade with the United States should be restrained."\textsuperscript{207} A critical distinction from \textit{Occidental}\textsuperscript{208} was that Timberlane named neither Honduras nor any Honduran officer as a defendant or co-conspirator, and that the relations between Honduras and the United States were not threatened by any challenge to Honduran policy or sovereignty.\textsuperscript{209}

In other circumstances, the act of state doctrine has been held to be the proper basis for dismissing an antitrust suit before trial.\textsuperscript{210} In \textit{Hunt Oil Co. v. Mobil Oil Corp.}, seven major oil producers and some independent producers, including plaintiff Hunt, agreed to share oil on a proportionate basis if Libyan government action caused a cutback in the oil production of any party to the agreement.\textsuperscript{211} The plaintiff alleged that its properties were nationalized because the sharing agreement precluded Hunt from settling with Libya. The defendants also allegedly violated the Sherman and Wilson Tariff Acts by conspiring to diminish the competition from Libyan crude oil and maintain the competitive advantage of Persian Gulf crude oil over the Libyan crude.\textsuperscript{212} Though Libya was named as neither a defendant nor as a co-conspirator, the Libyan expropriations of an alien's property within its boundaries were public acts of the sovereign. The lower court stated that "Hunt would be required to establish that \textit{but for} the conspiracy Libya would not have committed any of these aggressive actions."\textsuperscript{213} The majority of the circuit court accepted that analysis and concluded that the act of state doctrine precluded judicial scrutiny of Libya's political act.\textsuperscript{214} The majority also noted that the issue of legality of the foreign sovereign's action cannot be isolated from the issue of that sovereign's motivation and that "Hunt is not within its \textit{[Dunhill]} purely commercial exception and \textit{Sabbatino} remains unblemished."\textsuperscript{215}

It nonetheless seems that the purely commercial act exception, though not formally law, will be generally accepted as such. At the mini-

\textsuperscript{207} Id. at 608.
\textsuperscript{208} 461 F.2d 1261 (9th Cir. 1972).
\textsuperscript{209} Timberland Lumber Co. v. Bank of America N.T. & S.A., 549 F.2d 597, 608 (9th Cir. 1976). The court also used a tripartite test for establishing extraterritorial jurisdiction of the Sherman Act. Id. at 613-15.
\textsuperscript{210} Hunt Oil Co. v. Mobil Oil Corp., 550 F.2d 68, 73-79 (2d Cir. 1977).
\textsuperscript{211} Id. at 71.
\textsuperscript{212} Id. at 72.
\textsuperscript{213} Id.
\textsuperscript{214} Id. at 73, 76-77.
\textsuperscript{215} Id. at 78-79.
mum, it also seems necessary to preclude naming a foreign sovereign as a defendant or co-conspirator; however, an individual pleading may raise the presence of a foreign sovereign such that the act of state doctrine becomes a viable defense. Judicial discretion and prevailing attitudes at the time of the decision are critical because "broad and vague statutory language has precipitated dealing with international restraints of trade on a case by case basis."216

3. Sovereign Compulsion

Sovereign compulsion is a corollary to the act of state doctrine, and there is no antitrust liability when corporate conduct is compelled by a foreign sovereign.217 The landmark case in this area is Interamerican Refining Corp. v. Texaco Maracaibo, Inc.,218 which was the first case to clearly hold that sovereign compulsion is a complete defense to an action under the antitrust laws.219 The plaintiff, Interamerican Refining Corp., alleged that the defendants engaged in a boycott designed to prevent plaintiff from getting the Venezuelan crude oil which plaintiff required for its operations.220 Since Interamerican produced only for export, it would violate Venezuela's policy against sales to unnatural markets such as Canada and Europe. The Venezuelan Government was also hostile toward some of the principal stockholders of Interamerican. The court therefore concluded that the undisputed facts showed that Venezuelan regulatory authorities compelled the boycott.221

219 See id. at 1296.
220 Id. at 1292.
221 Id. at 1295-96. The court analogized to Parker v. Brown, 317 U.S. 341 (1943), where individuals who complied with a state regulatory program were not subjected to antitrust liability. Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F.Supp. 1291, 1298 n.18 (Del. 1970). The act of state doctrine also precluded the court from inquiring into the validity of the acts of compulsion under Venezuelan laws, and the policies behind the doctrine would not be served by limiting it to acts of expropriation. Id. at 1298-99. The court also stated:

It requires no precedent, however, to acknowledge that sovereignty includes the right to regulate commerce within the nation. When a nation compels a trade practice, firms there have no choice but to obey. Acts of business become effectively acts of the sovereign. The Sherman Act does not confer jurisdiction on United States Courts over acts of foreign sovereigns. By its terms, it forbids only anticompetitive practices of persons and corporations. Id. at 1298.

This statement apparently means that sovereign compulsion prevents jurisdiction under
Several authorities supported the *Interamerican Refining* decision. The court noted that sovereign compulsion of anticompetitive practices does not result in restraints of commerce because non-compliance with the foreign sovereign's directives would put an end to commerce. The court also relied on dicta from *United States v. Watchmakers of Switzerland Information Center, Inc.* and *Continental Ore Co. v. Union Carbide & Carbon Corp.* The *Swiss Watch* court stated:

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. In the present case, however, the defendants' activities were not required by the laws of Switzerland. They were agreements formulated privately without compulsion on the part of the Swiss Government.

As established in *Continental Ore*, however, acting in a manner permitted by a foreign sovereign's law does not provide a defense to an antitrust suit. The plaintiffs alleged that the defendants' actions in the trade and commerce of ferrovanadium and vanadium oxide violated sections 1 and 2 of the Sherman Act, thereby injuring Continental and its associates. The United States Supreme Court reversed the decision below and remanded the case for a new trial. The plaintiff's fundamental claim was that the defendants' alleged Sherman Act violations caused or contributed to the shortage of vanadium oxide. The Court concluded that sufficient evidence existed to go to the jury, and then proceeded to examine the issues raised by Continental's alleged elimination from the Canadian market.

In the present case petitioners do not question the validity of any action taken by the Canadian Government or by its Metals Controller. Nor is

the Sherman Act over the acts of foreign sovereigns. Sovereign compulsion alone is a defense to antitrust liability even if jurisdiction exists. *Id.* at 1297 n.14. The issue of what constitutes an act of a foreign sovereign still remains.

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225 Swiss Watch, [1963] TRADE CAS. (CCH) 770,600, at 77,456.
227 *Id.* at 694-95.
228 *Id.* at 696.
229 *Id.* at 697.
230 *Id.* at 702-08.
there left in the case any question of the liability of the Canadian Government's agent, for Electro-Met of Canada was not served. . . . [T]he conspiracy was laid in the United States, was effectuated both here and abroad, and respondents are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government.231

It was also important that no evidence existed to show that either the Canadian Government or the Canadian Metals Controller approved or would have approved of the monopolization efforts.232

Similarly, governmental approval or government actions taken pursuant to encouragement from private parties do not usually provide a defense for private party defendants in antitrust suits.233 In United States v. Sisal Sales Corp.,234 the United States sought an injunction to prevent further alleged violations of the Sherman and Wilson Tariff Acts.235 Laws favorable to the defendants were solicited and secured from the Mexican and Yucatan Governments. The Court distinguished American Banana because the Sisal Sales defendants conspired within the United States. The Court then observed:

The United States complains 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. True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws.236

To be successful, a defense of sovereign compulsion therefore requires that the defendant have no choice but to comply with the foreign sovereign's law. It is no defense if the foreign sovereign's law merely allows or approves of the defendant's action.

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231 Id. at 706. The Court also found that the defendants were not protected by Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1960), because the defendants were engaged in private commercial activity and not trying to get laws passed or enforced, which would have probably been a constitutionally protected activity. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707-08 (1962).

232 Id. at 706.


234 274 U.S. 268 (1927).

235 Id. at 271.

236 Id. at 276. This statement apparently implies that mere acts "done by another government at the instigation of private parties" cannot be reviewed by U.S. courts.
B. Current Status of the Act of State and Sovereign Compulsion Doctrines.

The act of state and sovereign compulsion doctrines are but two of several related defenses in the antitrust field. The critical elements of the act of state doctrine require that: there be an act by a foreign state which is fully executed within the territory of the foreign state. The U.S. courts have discretion since the act of state doctrine is a conflict of laws rule. Thus, when they follow the doctrine, they ultimately choose not

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The defense of sovereign immunity also exists in foreign commerce cases, but is not yet relevant in the uranium cartel litigation because foreign governments are not parties to the litigation; if they were, they could invoke the sovereign immunity defense and be exempt due to their status as a legal entity. See Baker, supra, 61 CORNELL L. REV. at 918; Graziano, supra, at 118; Kitner & Griffin, Jurisdiction over Foreign Commerce under the Sherman Act, 18 B.C. INDUS. & COM. L. REV. 193, 227 (1977); Joelson & Griffin, The Legal Status of Nation-State Cartels Under United States Antitrust and Public International Law, 9 INT'L L. 617, 622 (1975).

238 See part III.A of text and accompanying footnotes, supra. Each of these elements presents definitional problems. The legislative, executive, and judicial branches of a government may perform an "act." See Note, supra note 202, at 725, 738. The foreign state must be recognized by our Executive. Id. The four generally accepted elements of statehood ((1) a permanent population, (2) a defined territory, (3) a government, and (4) the capacity to enter into relations with other states) are also the source of definitional problems. See Convention on Rights and Duties of States, December 26, 1933, 49 Stat. 3097, T.S. No. 881; Maser, Sovereignty and Canada: an Examination of Canadian Sovereignty from a Legal Perspective, 42 SASK. L. REV. 1, 2, 3 n.6 (1978).

To resolve the remaining issues, it is necessary to determine whether the act in question is fully executed or completed, and what constitutes the territory of the foreign state.

Apparently, the distinction between "foreign-party" cases, in which the foreign sovereign was an actual party to the litigation, and "foreign-non-party" cases, in which the foreign sovereign's acts were only questioned collaterally in litigation between private parties, has been abolished. 3 DEN. J. INT'L L. & POL'y 133 (1973).
to pass upon the validity of the foreign sovereign's act.\textsuperscript{239}

In contrast, the doctrine of sovereign compulsion is a theory distinct from the act of state doctrine. Sovereign compulsion currently provides a complete defense to an action under U.S. antitrust laws.\textsuperscript{240} That position will most likely be changed, however, because the Department of Justice clearly opposes the \textit{Interamerican Refining} decision.\textsuperscript{241} The problem with \textit{Interamerican Refining} is that the foreign sovereign effectively implemented a boycott against the United States. The foreign state therefore exceeded its territorial sovereignty.\textsuperscript{242} As with the act of state doctrine, however, it is important to distinguish between extraterritorial action and the extraterritorial effect of an internal action.\textsuperscript{243}

Two changes will likely affect both the act of state and sovereign compulsion doctrines. A commercial act exception will probably gain acceptance in the act of state area,\textsuperscript{244} and could also be extended to sovereign compulsion cases.\textsuperscript{245} This exception will probably be limited to purely commercial acts,\textsuperscript{246} at least in the immediate future. The other change will provide greater flexibility in the act of state and sovereign compulsion doctrines by using a balancing approach,\textsuperscript{247} even though such


\textsuperscript{242} See Rosenthal, \textit{supra} note 241, at 266; Baker, \textit{supra} note 237, 11 \textbf{CORNELL INT'L L. J.} 177 n.66.

\textsuperscript{243} Joelson & Griffin, \textit{supra} note 237, at 634.


\textsuperscript{245} Joelson & Griffin, \textit{supra} note 237, at 634.


\textsuperscript{247} Balancing the relevant considerations was important in \textit{Banco Nacional de Cuba v. Sabbatino}, 376 U.S. 398 (1964). See notes 175-81 and accompanying text \textit{supra}. See also Timberlane, 549 F.2d 597, 606 (9th Cir. 1976); Amon, \textit{Act of State Doctrine}, 12 \textbf{VA. J. INT'L L.} 413, 422 n.44 (1972).
an approach may no longer be predictable. A broad spectrum of suggested approaches in the act of state area ranges from applying a "rule of reason" to a three-pronged analysis which still prevents imposing U.S. values upon independent foreign states. In the sovereign compulsion area, "a broad 'reasonableness inquiry' that focuses upon principles of international law and traditional equity" rather than on the restraint of trade theory could be employed. Both changes are likely to be met by some opposition, but they would seem to be beneficial due to the large amount of commerce which flows between nations and the increasing amount of government activity in commerce.

IV. APPLICATION OF THE ACT OF STATE AND SOVEREIGN COMPULSION DOCTRINES TO THE URANIUM CARTEL LITIGATION

The act of state and sovereign compulsion doctrines may play a major role in the defendants' strategy in the Illinois antitrust litigation and in all discovery procedures involving documents abroad which the parties may request. Since the Virginia breach of contract litigation has apparently been concluded prior to the Illinois antitrust litigation, Westinghouse will not have the opportunity to invoke an act of state or sovereign compulsion defense. The invocation of these defenses elsewhere in the

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246 Note, supra note 202, at 757. The first prong consists of "the needs and practices of the international system." Id. The second prong is "the fundamental public policy of the forum." Id. at 758. The third prong is "the interest of the forum in the dispute." Id. at 759. This third prong is also a balance, and weighs the interests of the United States against those of the foreign state. Id. at 760.
249 Note, International Law—Extraterritoriality—Antitrust Law—Development of the Defense of Sovereign Compulsion, 69 Mich. L. Rev. 888, 905 (1971). Seven representative factors are suggested in determining whether to apply the doctrine of sovereign compulsion: (1) the impact of the compelled activity upon U.S. foreign policy; (2) the scope of the foreign government's directive; (3) the degree of the compulsion, which includes how much of the activity was compelled and what sanctions would have been imposed for noncompliance; (4) the impact of the compelled activity upon U.S. economic policy; (5) the quantitative and qualitative impact of the compelled activity upon competition and commerce; (6) the nationality of the defendant; and (7) the defendant's prior knowledge of the restraint. Id. at 905-09.
251 See generally Baker, supra note 237, 61 CORNELL L. REV. 911.
252 Hymowitz, supra note 100, at 1, col. 6. See notes 123 & 129 and accompanying text, supra.
253 Westinghouse wanted the Illinois proceedings to be given precedence over the Virginia proceedings and hoped to use the discovery obtained in the Virginia litigation in the Illinois litigation. Re Westinghouse Elec. Corp. and Duquesne Light Co., 16 Ont. 2d 273, 289-90 (High Ct. Justice 1977). However, if Westinghouse had succeeded in establishing an act of state or sovereign compulsion defense, with the foreign government's activity resulting in the increase in uranium prices and ending in "commercial impracticability" of the
uranium cartel litigations, however, would provide an opportunity for U.S. courts to analyze the defenses and clarify the status of the act of state and sovereign compulsion doctrines. Perhaps U.S. courts should refuse to hear these and similar matters because they raise nonjusticiable “political questions.” Unfortunately, such an abdication would make it even more difficult to obtain impartial judgments to innately sensitive problems.

A. The Illinois Antitrust Litigation

Antitrust litigation is usually complex, and the Illinois litigation should be no exception. The defendants, like Gulf, undoubtedly feel that they have not violated U.S. antitrust laws. After being contacted by the Canadian Government, GMCL and Gulf consulted attorneys with regard to the Canadian Combines Act and U.S. antitrust laws. They concluded that there was “Canadian Government direction and no likelihood of substantial impact on foreign commerce of the United States” (emphasis added). Unfortunately for the defendants, these conclusions were erroneous because there was a substantial impact on U.S. commerce even though the Club intended to exclude the U.S. market from its price-fixing. It seems likely that there were antitrust violations, and the issue to be resolved is whether the defendants were exempt from U.S. antitrust laws. It will probably be difficult to obtain a proper result due to various foreign laws which impede discovery.

1. Application of the Act of State Doctrine

At least two of the necessary elements for a Canadian act of state

uranium contracts, Westinghouse would then have had no antitrust suit in Illinois. Another Westinghouse option would have been to argue that its contract rights for uranium, rather than the uranium itself, were expropriated. Cf. Sabbatino, 376 U.S. 398, 413 (1964).

GAC may attempt to invoke an act of state or sovereign compulsion defense in the New Mexico litigation, but the critical application of those doctrines will occur if they are raised in the discovery proceedings.

See Golber & Bradford, supra note 202, at 40.

See note 125 supra.


Gulf Position Paper, supra note 35, at 2; see IUC Hearings, supra note 4, pt. 2, at 187.


See notes 31-34 and accompanying text supra.

See part IV. B. infra.
appear to have been exercised. Canada is a foreign state, and the Cana-
dian Atomic Energy Control Regulations amendment of August 2, 1972\textsuperscript{261} should be considered a Canadian act. Participation by the defendants prior to August 2, 1972 would arguably be exempted from U.S. antitrust laws under the sovereign compulsion defense.\textsuperscript{262} Several considerations must be examined, however, because the Canadian act was not fully exe-
cuted within Canadian territory. Moreover, the policy underlying the Ca-
nadian act appears to be purely commercial, and therefore brings that act within the growing exception to the act of state doctrine.

Canada and the Canadian uranium consuming countries began a dia-
logue in 1970 to discuss uranium marketing problems.\textsuperscript{263} In early 1972, private Canadian producers and officials of two Canadian Crown Corpora-
tions were authorized to attend meetings concerning these problems.\textsuperscript{264}

The Canadian government was informed of and approved the marketing
arrangements negotiated by Canadian uranium producers and supported
the arrangement in Canada by issuing a regulation under section 9 of the
Atomic Energy Control Act. . . . The initial Direction of August, 1972
was revised on several occasions as prices recovered from their distressed
levels.\textsuperscript{265}

Canada rubber-stamped the price-fixing arrangements negotiated by the
uranium producers, but such a formality should not constitute an act of
state. The essence of the act was determined and effectively exercised
outside Canadian territory.\textsuperscript{266} To extend a sovereign's territory to include
that of its "co-conspirators" would undermine many legal concepts of


\textsuperscript{262} See part IV.A.2, \textit{infra.}

\textsuperscript{263} \textit{Canadian Background Paper, supra} note 40, at 11.

\textsuperscript{264} \textit{Id.} at 12.

\textsuperscript{265} \textit{Id.} This raises the issue of whether the defendants were engaged in private commer-
cial activity or were trying to get laws passed, which would probably constitute a constitution-
ally protected activity under Eastern R.R. Presidents Conf. v. Noerr Motor Freight,
Inc., 365 U.S. 127 (1960). The grant of immunity to parties seeking foreign political action
used to be uncertain. Amon, \textit{supra} note 247, at 417. The Department of Justice now gener-
ally accepts the Noerr doctrine as protecting parties seeking foreign political action. Ant-
\textit{trust Guide, supra} note 241, at \textsuperscript{266} 7266; Seki, \textit{supra} note 241, at 1647. The Canadian Govern-
ment initiated a discussion of international uranium marketing problems, but apparently
did not then implement price-fixing. \textit{See note 270} and accompanying text, \textit{infra.} The Noerr
doctrine should not apply to the uranium cartel antitrust or discovery litigation because the
initial price-fixing act occurred prior to the issuance of The Atomic Energy Control Regula-
tions Amendment P.C. 1972-1719, \textit{Stat. O. \& R.} 72-301 (issued July 27, 1972), and in all
cases would serve as a shield for what might otherwise be an unlawful conspiracy. The
plaintiffs should at least be given the opportunity to prove the unlawful conspiracy. \textit{Accord,
Amon, supra} note 247, at 418 n.21.

\textsuperscript{266} \textit{See notes 18, 20-21 and accompanying text supra.}
sovereignty and territoriality.

The August 23, 1972, statement of the Honourable Donald S. MacDonald, Minister of Energy, Mines and Resources, lends credence to the possibility that the Canadian act may have been purely commercial:

In order to stabilize the current uranium marketing situation and to promote the development of the Canadian uranium industry, I have today issued a Direction to the Atomic Energy Control Board covering such aspects as minimum selling prices and volumes of sales to export markets. Because of the nature of uranium export contracts it would not be in the public interest to disclose further contract details at this time.687 (emphasis added).

Thus, despite Canada's belief that the international uranium marketing arrangement was in the Canadian national interest,688 and its broad policy for controlling uranium and atomic energy,689 it would seem that the act of state doctrine is inapplicable in the Illinois antitrust litigation.

2. Application of the Sovereign Compulsion Doctrine

The defense of sovereign compulsion is only available if the prohibited actions were compelled by the foreign sovereign; mere authorization or approval is insufficient. In the Illinois litigation it is unclear whether sovereign compulsion actually existed.

The Canadian Government did initiate discussion of international uranium marketing problems,670 and the defendants undoubtedly felt compelled to participate in the Club.671 Evidence of Canadian compulsion may be found in three telexes672 to the GMCL manager “advising him that it was in the national interest of Canada for him to participate in the meetings.”673 In addition, in referring to the reason for the passage of the Uranium Information Security Regulations, the Honourable Alastair W. Gillespie stated that the actions of the Canadian uranium producers were required by Canadian law and taken pursuant to Canadian policy.674 But

688 See note 38 and accompanying text supra.
689 See note 117 supra.
670 See note 263 and accompanying text supra.
671 See note 259 and accompanying text supra; see IUC Hearings, supra note 4, pt.2, at 187; note 80 supra; Gulf Position Paper, supra note 35, at 1, 2; IUC Hearings, supra note 4, at 185-86.
672 IUC Hearings, supra note 4, at 308.
673 Id. at 157-58 (statement of Mr. O'Hara); see also id. at 95 (statement of Mr. Jackson).
there appears to be no Canadian law applicable to international uranium marketing prior to August 2, 1972.\textsuperscript{275} On the other hand, Canadian approval of the Club’s activities is undisputed,\textsuperscript{276} and if this position were distinct from the compulsion argument, the defense of sovereign compulsion could be allowed. Defendants often interpret statements of approval to indicate compulsion, however, and although compulsion may have occurred orally, the tangible evidence supporting such a position is weak.

"Obviously the statement made in 1969 [of Mr. Lang] is not in and of itself compulsion to undertake an action in 1972.\textsuperscript{277} The necessary compulsion should have occurred in 1972. In light of GMCL’s anticipated entry into the uranium market, the Canadian telexes requested GMCL to “take every reasonable step to ensure compliance” and later “make every effort to adhere to the common terms” of the informal world producers’ arrangement because all Canadian producers “should” participate in order for the arrangement to be workable.\textsuperscript{278} Even the Honourable Alastair W. Gillespie stated that the Canadian Government authorized a temporary marketing arrangement. “The government approved this arrangement in 1972, on the specific understanding that it would not apply to the markets of Canada, Australia, South Africa, France and the United States.”\textsuperscript{279} On its face, such language does not indicate compulsion. Based on the available information, it does not appear that the sovereign compulsion defense is available in the Illinois antitrust litigation.

B. The Discovery Issues

The non-production of records in the uranium cartel litigation may seriously impede a just resolution of the issues. Superficially, such a result reflects the “winning” nature of the adversary system, but a closer examination reveals that liberal discovery is favored in U.S. jurisprudence. In this regard, Societe Internationale v. Rogers\textsuperscript{280} provides landmark law when analyzing the non-production of records on the grounds that their production would violate foreign law. The act of state and sovereign com-

\begin{itemize}
  \item \textsuperscript{275} Accord, Gillespie Press Release, supra note 38, at 1.
  \item \textsuperscript{276} See note 265 and accompanying text supra.
  \item \textsuperscript{277} IUC Hearings, supra note 4, pt.2, at 116 (statement of Mr. Jackson). See Canadian Uranium Policy Statement, supra note 35, at 7.
  \item \textsuperscript{278} IUC Hearings, supra note 4, pt.2, at 308.
  \item \textsuperscript{279} Gillespie Press Release, supra note 38, at 1. Accord, Baker, supra note 237, 11 Cornell Int’l L. J. 183 n.94.
  \item \textsuperscript{280} 357 U.S. 197 (1958). The discovery issues are partially explored in notes 116-20, supra. A complete discussion of Societe Internationale and its progeny is beyond the scope of this note.
\end{itemize}
pulsion doctrines may also provide alternative grounds for the failure to produce documents.281

Several nations have passed legislation intended to protect business records located with their jurisdiction.282 The growing trend is to prevent foreign powers from conducting antitrust investigations,283 as evidenced by the legislation passed in Australia, Canada, France, and South Africa.284 "International co-operation in the field of cartel law is therefore, to say the least, very imperfect and in particular does less than justice to the claims of the United States in recognition of its Antitrust Laws."

The above problem is confronted by the existence of two conflicting policies. One policy exists because some nations place the principle of freedom of contract above that of freedom of competition.286 These countries desire to protect their own sovereignty, and might object to the generally recognized principles of procedural law.287 The express purpose of the Uranium Information Security Regulations was "to protect the sovereignty of Canada in the face of extraterritorial application of U.S. legal processes"288 on the grounds that "[f]ailure to take such action would have placed the government in the untenable position of allowing evidence to be provided to a foreign court for use in the possible prosecution of nationals for acts that were in accordance with Canadian law and government policy"289 (emphasis added). The conflicting policy surfaces when examining the United States desire for justice.

What is disturbing about this crop of "business records" laws is that they are being used to prevent the United States from even investigating

281 This would appear to be an original use for these existing defenses. See Tennessee Valley Authority v. Urangesellschaft, 480 F.Supp. 1138 (N.D. Ill. 1970).
286 Id. at 288.
287 Id. at 295-96. Mr. Seidl-Hohenveldern also objects strenuously to "fishing expeditions" for documents. Id.
288 Gillespie Press Release, supra note 38, at 7, 10.
289 Id. at 8. See note 47 and accompanying text supra.
whether a violation of its laws may have taken place. The result is political outrage and frustration in the United States. It is also likely to result in more haphazard and uneven law enforcement. . . . As a result, trials may be shorter but decisions less just. No lawyer can take pride in that.290

Some individuals have suggested that a balancing approach may be necessary to resolve the discovery issues:

[The question this [House Committee on Interstate and Foreign Commerce] must decide is whether the disclosure better serves the purposes of American people, the U.S. national interest, or whether we achieve a greater benefit for the American people through adhering to the request of the Government of Canada, which is requesting this treatment not only as a sovereign power within itself but also as a participant in a commercial venture. Therefore, we have a split role for the Government of Canada291 (emphasis added).

A memorandum prepared for the House Committee Hearings by the Library of Congress may best summarize the recent trend of law: when dealing with antitrust matters which are vital to the U.S. economic policy, foreign non-disclosure laws do not significantly restrain disclosure.292

1. Application of the Act of State Doctrine

The Uranium Information Security Regulations were enacted to protect Canadian sovereignty in the face of extraterritorial reach of the U.S. antitrust laws.293 The elements of an act of state defense would therefore prevent disclosure of business records within Canada's jurisdiction. Basically, three problems exist as regards such disclosure. First, documents in the United States may have been shipped to Canada solely to prevent discovery. Though such behavior should be disallowed, it would be difficult to prove. The second problem is that the defendants may raise a Noerr issue, but if their purpose was merely to hide unlawful activity, this should also be disallowed.294 The third problem is that Canada participated in a commercial venture and this action could fall within the developing commercial act exception to the act of state doctrine.295 A primary danger of acquiescing to a Canadian act of state with regard to the

290 Baker, supra note 237, 11 CORNELL INT'L L. J. 187. See also note 106 and accompanying text supra.
291 IUC Hearings, supra note 4, at 50 (statement of Mr. Moss).
292 Id. at 51 (statement of Mr. McLain).
293 Gillespie Press Release, supra note 38, at 7, 10; Gillespie Statement, supra note 274, at 17.
294 See note 265 supra.
295 See note 291 and accompanying text supra.
Uranium Information Security Regulations is that the United States might be contributing to the development of international law which would hinder its antitrust investigations.\footnote{Cf. Seidl-Hohenveldern, supra note 282.}

2. Application of the Sovereign Compulsion Doctrine

Multinational corporations may find themselves in a position of trying to satisfy conflicting laws when faced with foreign laws compelling the defendants to restrain from producing business records or information pertaining to the Club's activities. Sovereign compulsion might arguably constitute a valid excuse for complying with foreign non-disclosure laws. This defense is confronted by the same three problems which were present with the application of the act of state doctrine in this area. Firstly, the documents might have been shipped to the foreign country solely to prevent discovery. Secondly, the \textit{Noerr} defense will be disallowed if the laws were enacted to hide unlawful activity. Thirdly, the commercial act exception is raised by Canada's participation in a commercial venture.\footnote{See text of part IV. A. 1 and accompanying notes supra.} In addition, there are problems of international comity, sovereignty, extraterritorial application of U.S. antitrust laws, and differing legal and economic policies. Since the defense of sovereign compulsion creates more problems than answers, it would seem preferable to seek a diplomatic solution.

V. Conclusion

Although foreign countries have not been made parties to the uranium cartel litigation, their role is critical to the outcome of the lawsuits. If the Club had followed its prescribed intent and not affected U.S. commerce, it is doubtful that litigation would have ensued. The defendants correctly realized that participating in a cartel might be acceptable if U.S. commerce were not affected.\footnote{ Accord, Antitrust Memorandum, supra note 81.}

The Club's activities have cost American consumers a great deal of money. The very purpose of the U.S. antitrust laws is to protect domestic consumers\footnote{Baker, supra note 248, at 40-41.} and these consumers deserve to be protected.\footnote{Rosenthal, supra note 241, at 1638.} In any event, the parties to the antitrust litigation should share the primary liability. Westinghouse should not have sold uranium which it did not have, and the defendants who participated in the Club should have requested an exemption from U.S. antitrust laws prior to acting.\footnote{It is curious to note, however, that a Canadian doctrine similar to the U.S. state}
ment could be reached whereby the Illinois antitrust defendants relieve Westinghouse of some of its liability in the Virginia breach of contract litigation.

The U.S. consumer would clearly be harmed if multinational corporations were prevented from doing business in several countries. However, consumers would also be harmed if international relations deteriorated. If no settlement can be reached in the uranium cartel litigation, the U.S. courts should at least attempt to clarify the current status of the act of state and sovereign compulsion doctrines.

action doctrine was the basis for providing an exemption to the Canadian antitrust law, the Combines Investigation Act. Even so, a formal inquiry under that Act is taking place to determine if the international marketing arrangement violated the Act. Gillespie Press Release, supra note 38, at 7-8.
Section 2-615 of the Uniform Commercial Code states:

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

Comment 4 to section 2-615 states:

Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance. Neither is a rise or a collapse in the market in itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover. But a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like, which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance, is within the contemplation of this section. (See Ford & Sons, Ltd. v. Henry Leetham & Sons, Ltd., 21 Com. Cas. 55 (1915, K.B.D.).)
APPENDIX B

Registration

No. Date
SOR/72-301 2 August, 1972

ATOMIC ENERGY CONTROL ACT

Atomic Energy Control Regulations,
 amendment

P.C. 1972-1719 27 July, 1972

His Excellency the Governor General in Council, on the recommendation of the Minister of Energy, Mines and Resources, pursuant to section 9 of the Atomic Energy Control Act, is pleased hereby to approve the annexed amendment, made by the Atomic Energy Control Board on the 19th day of July, 1972, to the Atomic Energy Control Regulations approved by Order in Council P.C. 1960-348 of 17th March, 1960,¹ as amended,² in accordance with the Schedule hereto.

SCHEDULE

1. Section 201 of the Atomic Energy Control Regulations is amended by adding thereto the following subsection:

"(2) A permit to export prescribed substances shall not be granted unless the Board is satisfied that the prices stipulated for, and the quantities of, the prescribed substance proposed to be exported meet such criteria, if any, respecting price levels and quantities as may be specified in the public interest in a direction given to the Board by the Minister."

APPENDIX C

Registration

SOR/76-644 23 September, 1976

ATOMIC ENERGY CONTROL ACT

Uranium Information Security Regulations

P.C. 1976-2368 21 September, 1976

His Excellency the Governor General in Council, on the recommendation of the Minister of Energy, Mines and Resources, pursuant to section 9 of the Atomic Energy Control Act, is pleased hereby to approve the annexed Regulations respecting the security of uranium information made by the Atomic Energy Control Board.

REGULATIONS RESPECTING THE SECURITY OF URANIUM INFORMATION

Short Title

1. These Regulations may be cited as the Uranium Information Security Regulations.

Security of Information

2. No person who has in his possession or under his control any note, document or other written or printed material in any way related to conversations, discussions or meetings that took place between January 1, 1972 and December 31, 1975 involving that person or any other person or any government, crown corporation, agency or other organization in respect of the production, import, export, transportation, refining, possession, ownership, use or sale of uranium or its derivatives or compounds, shall

(a) release any such note, document or material, or disclose or communicate the contents thereof to any person, government, crown corporation, agency or other organization unless

(i) he is required to do so by or under a law of Canada, or

(ii) he does so with the consent of the Minister of Energy, Mines and Resources; or

(b) fail to guard against or take reasonable care to prevent the unauthorized release of any such note, document or material on the disclosure or communication of the contents thereof.
Registration
SOR/77-836 14 October, 1977

ATOMIC ENERGY CONTROL ACT

Uranium Information Security Regulations
P.C. 1977-2923 13 October, 1977

His Excellency the Governor General in Council, on the recommendation of the Minister of Energy, Mines and Resources, pursuant to section 9 of the Atomic Energy Control Act, is pleased hereby to approve the revocation of the Uranium Information Security Regulations approved by Order in Council P.C. 1976-2368 of 21st September, 19761 and to approve, in substitution therefor, the annexed Regulations respecting the security of uranium information made by the Atomic Energy Control Board.

REGULATIONS RESPECTING THE SECURITY OF URANIUM INFORMATION

Short Title

1. These Regulations may be cited as the Uranium Information Security Regulations.

Interpretation

2. In these Regulations, “foreign tribunal” includes any court or grand jury and any person authorized or permitted under foreign law to take or receive evidence whether on behalf of a court or grand jury or otherwise.

Security of Information

3. No person who has in his possession or under his control any note, document or other written or printed material in any way related to conversations, discussions or meetings that took place between January 1, 1972 and December 31, 1975 involving that person or any other person in relation to the exporting from Canada or marketing for use outside Canada of uranium or its derivatives or compounds shall

1 See Appendix C.
release any such note, document or material or disclose or communicate the contents thereof to any person, foreign government or branch or agency thereof or to any foreign tribunal unless

(i) he is required to do so by or under a law of Canada, or
(ii) he does so with the consent of the Minister of Energy, Mines and Resources; or

(b) fail to guard against or take reasonable care to prevent the unauthorized release of any such note, document or material or the disclosure or communication of the contents thereof.

**Application**

4. Section 3 does not apply to a person unless he has such possession or control by reason of the direct or indirect acquisition by him of the note, document or material because of his being or having been

(a) engaged in the mining, exporting, refining or selling of uranium or its derivatives or compounds;
(b) appointed to a public office or appointed by a Minister pursuant to subsection 37 (1) of the *Public Service Employment Act* or employed in the Public Service; or
(c) a director, an officer, employee or agent of
   (i) a person engaged as described in paragraph (a),
   (ii) a company incorporated in Canada that is or was a parent, subsidiary or affiliate of or related to another company incorporated in Canada so engaged or to a foreign corporation so engaged; or
   (iii) the Atomic Energy Control Board, Eldorado Nuclear Limited or Uranium Canada, Limited.
Section 1 of the Sherman Act, 15 U.S.C. 1, states:

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

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: Provided, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments; in the discretion of the court.

Section 1 of the Sherman Act has since been amended as follows:

§ 1. Trusts, etc., in restraint of trade illegal; penalty

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. Every person who shall make any contract or engage in combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars, or by imprisonment not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments; in the discretion of the court.
imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
APPENDIX F


§ 8. Trusts in restraint of import trade illegal; penalty

Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who shall be engaged in the importation of goods or any commodity from any foreign country in violation of this section, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction thereof in any court of the United States such person shall be fined in a sum not less than $100 and not exceeding $5,000, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months.