Testimony of

# Mr. George Bermann

April 7, 2004

Testimony of
Prof. George A. Bermann
(Walter Gellhorn Professor of Law and Jean Monnet Professor of European Union Law
Columbia Law School, Columbia University, New York, New York)

before the Antitrust Subcommittee of the Judiciary committee of the U.S. Senate (April 7, 2004)

_____

I have reviewed the Bill, currently under consideration in this subcommittee, designed to permit legal action to be brought in U.S. court on account of alleged price-faxing and other collective anti-competitive activity by the members of OPEC (the Organization of Petroleum Exporting Countries).

U.S. courts have previously held that, while OPEC is not a foreign sovereign (or foreign sovereign instrumentality) entitled to assert the defense of sovereign immunity in US court to an action brought against it under the antitrust laws, such an action cannot proceed on account of what is known as Athe act of state doctrine.@ The act of state doctrine essentially causes courts to refrain from entertaining claims (even against non-sovereign defendants) to the extent that adjudicating them requires judging the validity of official acts taken by foreign governments in a governmental capacity on their own territory, even if those acts have effects in the US.

The proposed legislation would do several things. It would amend the Sherman Act to remove any entitlement of foreign states to invoke sovereign immunity in any suit under that Act accusing them of limiting production of oil or gas or petroleum products, fixing prices as to those products or otherwise restraining trade in them. It would reinforce this by also amending the Foreign Sovereign Immunities Act (FSIA) to establish a new exception to the principle of immunity for such claims. Finally, it would also amend the Sherman Act to render the act of state doctrine expressly inapplicable to such an action.

Let me address the issues that seem bearing most directly on the Bill=s effectiveness.

1) Congressional authority to declare a foreign state a proper defendant to a Sherman Act claims.

I do not believe that there is any constitutional or international law impediment to Congress seeking statutorily to extend, or confirm, the application of legislation such as the Sherman Act to foreign governments. Whether to do so is a political determination for Congress to make.

Nor is it necessary that, in doing so, Congress, make foreign governments subject to the full range of claims that might be brought under such a statute. Congress is free to carve out claims relating to oil, gas and petroleum products for separate treatment and to subject foreign states to liability only as to them.

2) Congressional authority to establish exceptions to common law principle of sovereign immunity to suit, such as an exception for Sherman Act violations in the oil, gas and petroleum products sector.

Having declared foreign states subject to the Sherman Act in the circumstances described, the next question is whether sovereign immunity operates as a bar to the federal (or state) courts entertaining such an action.

Sovereign immunity is a common law doctrine and, as such, subject to abrogation by Congress. In enacting the FSIA in 1976, Congress confirmed the presumption of sovereign immunity, but established certain categorical exemptions,

so that sovereign immunity would not be a defense to the assertion of jurisdiction or imposition of liability in a case falling within any such exemption. Congress has subsequently added to the list of exceptions. In no case has Congress= creation of exceptions to the FSIA been challenged on constitutional or international law grounds, and there is no reason to think that this Bill=s creation of a new exception would be vulnerable on any such grounds.

3) Congressional authority to declare the act of state doctrine inapplicable.

Like sovereign immunity in the pre-FSIA days, the act of state doctrine is a common law doctrine and thus, in principle, subject to abrogation by Congress pursuant to its exercise of legislative power over interstate commerce and foreign affairs. Congress has statutorily abrogated the act of state doctrine in a few narrow circumstances, but otherwise largely left its definition and scope of application to the courts.

There is, in my judgment, no serious impediment to abrogating the act of state doctrine in the context of the class of legal actions contemplated by the Bill before you.

It is true that the doctrine has been described by the Supreme Court as predicated on the separation of powers and, to that extent, as having Aconstitutional underpinnings.@ The basic idea is that the courts should refrain from making judgments that could seriously embarrass or disrupt our country=s foreign relations, relations for which our political rather than judicial branches are chiefly responsible. However, it is difficult to see how the prerogatives of the political branches would be impaired by such a Congressional declaration.

Congress is itself one of the political branches. The Executive is the other and, as I read the Bill, only the Attorney General of the United States and the Federal Trade Commission may bring an action covered by the Bill. (Admittedly, the FTC is an independent regulatory agency, rather than an executive branch agency, but I do not consider this decisive. It seems to me unlikely that the FTC would bring such an action without prior consultation of the State Department, the Justice Department and other relevant executive branch agencies.)

It is true that abrogation of the act of state doctrine in this field would deprive the judiciary of the right to invoke or apply that doctrine, and to that extent it limits judicial freedom. But this is not the sort of limitation on freedom that concerns the constitutional separation of powers. After all, the effect of the act of state doctrine is to cause the courts not to exercise their otherwise proper jurisdiction, and so the only effect of the act of state doctrine=s abrogation is to free the courts from that abstention. Far from disturbing the separation of powers, the abrogation serves to restore it.

The other Aleg@ of the act of state doctrine is what has come to be known as Ainternational comity,@ that is to say, respect for foreign nations. Of course, for Congress to authorize suits against foreign states, and for US courts to entertain them, risks offense to foreign states, and this is a proper concern for Congress to take into account in deciding whether statutorily to abrogate the act of state doctrine under a given set of circumstances. But if Congress addresses that question and decides, in light of countervailing considerations, in favor of abrogating the act of state doctrine, there should be no constitutional or international impediment to doing so. The act of state doctrine serves to restrain the courts in circumstances when Congress has not expressly spoken to the question of proceeding against foreign states; it does not apply when Congress has expressly so spoken.

In reflecting on whether abrogating the act of state doctrine is a politically desirable or undesirable step to take, I would be influenced by knowing whether the new Aenforcement@ section of the Sherman Act (sec. 7A(d)) means to make the Attorney General and the Federal Trade Commission the sole and exclusive plaintiffs in Sherman Act claims under the circumstances covered by this Bill. I initially read the bill as making their Astanding@ exclusive, but on re-reading the legislative language I see that that is not clear. Arguably Section 7A(d) merely adds them as possible plaintiffs, without detriment to the standing of private parties to bring civil actions under the Sherman Act. From the point of view of containing damage to foreign relations, it may be preferable for the Attorney General and Federal Trade Commission to have sole authority to enforce the Sherman Act in this sphere and for the legislation clearly to so state.

4) Other abstention doctrines.

Admittedly, the act of state doctrine is not the only potentially applicable judicial abstention doctrine. Occasionally courts invoke the Apolitical question@ doctrine and Ainternational comity@ more generally. I do not recommend, however, that either of these be addressed specifically in the legislation. Apart from the awkwardness of doing so, I am confident that courts would read any express abrogation of the act of state doctrine in the circumstances described in the Bill as equally setting aside the application of the political question doctrine and international comity under those circumstances.

As for the defense of foreign sovereign compulsion, that is arguably a substantive legal defense to an antitrust action against private parties. I do not see how it could plausibly be invoked by the foreign sovereign itself or by a group of foreign sovereigns.