

APPLICATION OF UNITED STATES ANTITRUST LAWS TO FOREIGN TRADE AND COMMERCE— VARIATIONS ON AMERICAN BANANA SINCE 1909*

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The continued growth of American investment abroad which commenced after World War II, the accompanying expansion of foreign investment in the United States, and the uncertain international trade picture which has developed in the 1970's make timely an assessment of the extent of the application of the Sherman Act¹ and other antitrust laws² to the trade and commerce of the United States with foreign nations.³

In volume and types of foreign investment in either direction, and in volume and complexity of litigation, we have come a long way from the simpler setting of the 1909 *American Banana Co. v.*

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¹ 15 U.S.C. §§ 1-7 (1970). 15 U.S.C. § 1 (1970) provides in relevant part: "Every contract combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . with foreign nations . . ." is illegal. 15 U.S.C. § 2 (1970) makes it a crime for a "person . . . [to] monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . with foreign nations . . ."

² The Wilson Tariff Act of 1894, §§ 73-77, 15 U.S.C. §§ 8-11 (1970), one of the other antitrust laws, is a less comprehensive statute than the Sherman Act. It is often applied in antitrust cases in combination with the Sherman Act. It has been said that the statute makes explicit the prohibitions of the Sherman Act in the field of foreign commerce. *United States v. General Elec. Co.*, 80 F. Supp. 989, 1017 (S.D.N.Y. 1948). The Wilson Tariff Act is directed specifically at abuses of the import laws of the United States, but it is well settled that both Acts can be applied to restraints on import trade. *United States v. R.P. Oldham Co.*, 152 F. Supp. 818, 821 (N.D. Cal. 1957).

Under § 73 of the Act, 15 U.S.C. § 8 (1970), every combination conspiracy, trust, agreement, or contract made by or between two or more persons importing any article from any foreign country is illegal if "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 imported into the United States or of any manufacture into which such imported article enters. Criminal sanctions apply to violations.

³ The value of American direct investments abroad totaled \$86.0 billion at year-end 1971, up \$7.8 billion from year-end 1970. 52 Bureau of Economic Analysis, U.S. Dep't of Commerce, *Survey of Current Business* 21 (1972). The value of foreign direct investments in the United States increased from \$7.4 billion at year-end 1961 to \$13.7 billion at year-end 1971. 53 Bureau of Economic Analysis, U.S. Dep't of Commerce, *Survey of Current Business* 29 (1973).

United Fruit Co. case.⁴ Nevertheless, the holding in *American Banana* that the Act of State doctrine bars a claim for antitrust injury flowing from foreign sovereign acts allegedly induced and procured by the defendant, was relied on as recently as 1971 as the basis for dismissing a complaint in a treble damage suit involving facts which the court found "strikingly similar" to those in *American Banana*.⁵ Justice Holmes used language in *American Banana* which, being regarded as expressing the restrictive territorial view of subject matter jurisdiction under the Sherman Act, has cast its shadow over later cases.

As our "trade or commerce with foreign nations" has become larger in volume, and more complicated in relationships, the courts, in case after case, have, however, found facts additional to those in *American Banana* so that a wider scope could be given to the extraterritorial reach of our antitrust laws, without forthrightly disagreeing with the restrictive view expressed in *American Banana*.

In brief, it can now be said that as far as subject matter jurisdiction is concerned,⁶ "the Sherman Act covers restrictive or monopolistic activity which either occurs 'in' the course of American domestic, or export or import commerce, or which 'affects' such commerce," and that "[t]he Act applies regardless of where the restrictive conduct occurs, even if it is entirely abroad, provided the necessary relation to U.S. commerce is present." Those essential "effects are not by any means always present . . . and it is necessary to analyze each case on its particular facts to see whether American Law could reach" such case.⁷

Given this necessity to analyze each case on its particular facts, there are certain factors that have recurred in cases throughout the years that provide us with "guidelines" as to what circumstances may be found to have the requisite effect. At this juncture, it is possible to group cases in certain categories.

This article will attempt, by grouping cases into rough categories, to provide an overview of how far we have gone from the restrictive territorial view expressed in *American Banana*, and to raise the question, perhaps not yet answerable: has the United States

⁴ 213 U.S. 347 (1909). See text at notes 14-18 *infra*.

⁵ See *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972), discussed in text at notes 70-72 *infra*.

⁶ Throughout this article it will be assumed that there is jurisdiction over the person, and the discussion will be confined to jurisdiction over the subject matter.

⁷ Rahl, *Relationship of U.S. to EEC Antitrust Law*, in *Current Legal Aspects of Doing Business in Europe* 82 (L. Theberge ed. 1971). See also Beausang, *The Extraterritorial Jurisdiction of the Sherman Act*, 70 *Dick. L. Rev.* 187, 191 (1966): "An 'affect' is a necessary element of [subject matter] jurisdiction . . . ; a direct and substantial 'affect' is necessary for Sherman Act violations."

arrived at the point of ultimate reach of its laws, from the strict legal viewpoint, as well as from the standpoint of "what is good" for its "foreign trade or commerce"?

I. FOREIGN TRADE OR COMMERCE TO WHICH THE SHERMAN ACT⁸ APPLIES

In general terms, "trade or commerce with foreign nations" consists of the export from the United States or the import into this country of goods, and of transportation to or from United States ports. But such commerce may extend even farther—it may consist of certain services—since the Constitution authorizes the Congress to "regulate commerce with foreign nations."⁹ When United States vessels are used in trade between foreign ports of goods owned and shipped by foreigners, a service—transportation in United States vessels—is being sold, and that is also "commerce" in the sense of the Constitution and of the Sherman Act.¹⁰

By its very nature, foreign commerce inevitably involves acts abroad, as well as acts at home. It may also encompass acts of United States citizens in foreign countries as well as at home, and acts of aliens in this country, as well as in their own and other countries. It is now settled law that the Sherman Act was intended to apply even to acts of aliens in foreign countries¹¹ in certain circumstances. But the Act applies to the activities of none of the "persons" here described, no matter where their activities in foreign commerce take place, unless those activities actually restrain trade, or have an anti-competitive effect on United States trade or commerce. Since most of the antitrust cases with foreign commerce aspects have arisen under the Sherman Act, the focus of this article is predetermined, but incidental mention will be made of other antitrust laws.

Although Congress intended that the Sherman Act should have such an indicated broad sweep in foreign commerce, an added factor, the comity between nations under public international law, places certain practical limitations on the reach of United States law.¹² Where activities in foreign commerce appear to violate

⁸ 15 U.S.C. §§ 1-7 (1970).

⁹ U.S. Const. art. I, § 8. See *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 362 (1824).

¹⁰ See *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968), cert denied, 393 U.S. 1093 (1969).

¹¹ See *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), where jurisdiction was asserted over a Canadian corporation for a conspiracy hatched in Canada. See text at notes 28-35 *infra*.

¹² See the statement by Justice Holmes in *American Banana*, discussed in text at notes 14-17 *infra*, that it would be "an interference with the authority of another sovereign, contrary to the comity of nations" for another jurisdiction to apply its own laws to acts done outside its

United States laws, consideration is given also to foreign policy and economic consequences¹³ by the courts in fashioning decrees. We shall first discuss the varying situations in which the Sherman Act has or has not been found applicable in cases involving foreign trade or commerce, and then examine the extent to which economic and international political considerations affect enforcement.

II. EXTRATERRITORIAL REACH OF UNITED STATES ANTITRUST LAWS TO ACTS DONE ABROAD

A. *By United States Citizens*

There are limits under international law to the extraterritorial reach of a nation's law even where acts of its own citizens are involved. The first Supreme Court case involving the extraterritorial reach of United States antitrust laws is generally regarded as the classic example of a factual situation which is outside the reach of our antitrust laws. In that treble damage suit under what was then section 7 of the Sherman Act,¹⁴ *American Banana Co. v. United Fruit Co.*,¹⁵ both parties were United States corporations. The acts complained of took place in territory over which Costa Rica claimed sovereignty. While the main facts of the case are almost too well-known to bear repetition, their recital in successive cases has been streamlined to the point that some details which help to distinguish *American Banana* from those later cases have been lost sight of.

One important detail which should not be lost sight of is that plaintiff, American Banana Co., had never engaged in the banana export business, but had merely acquired, shortly before bringing suit, a plantation and railroad concession in an area where defendant, United Fruit, was already well established. On the other hand, defendant had, over a period of years, built up, through various predatory acts, an almost exclusive monopoly of the banana export trade between Central and South America and the United States.

The only damages claimed in the complaint were (1) for injury to plaintiff's plantation, business and railroad, inflicted by the Costa

jurisdiction. Such considerations, Justice Holmes said, "would lead, in case of doubt, to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power." 213 U.S. at 356. See the much more recent case, *Occidental Petroleum*, discussed in text at notes 70-72 *infra*.

¹³ See *United States v. General Elec. Co.*, 115 F. Supp. 835 (D.N.J. 1951), discussed in text at notes 73-83 *infra*; *United States v. Watchmakers of Switz. Information Center, Inc.*, 1965 Trade Cas. ¶ 71,352, at 80,490 (S.D.N.Y. 1965), discussed in text at notes 107-10 *infra*.

¹⁴ Currently 15 U.S.C. § 15 (1970).

¹⁵ 213 U.S. 347 (1909).

Rican government which, allegedly at defendant's instigation, had seized plaintiff's property shortly after plaintiff had acquired it, and (2) for injury resulting from the securing of control by defendant and its associates of the banana market.¹⁶

Since plaintiff had never engaged in the banana export trade, and had not made extensive preparations to do so, the allegations of injury to plaintiff resulting from defendant's acts in securing control of the trade, standing alone, were found to be too indefinite and uncertain to state a cause of action.¹⁷ Thus, it remained for plaintiff to prove that defendant violated the Sherman Act by persuading the Costa Rican government to seize plaintiff's property. The Court declared it impossible to make such a finding, stating:

[I]t is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It [the sovereign] makes the persuasion lawful by its own act.¹⁸

In other words, the actions plaintiff alleged caused it injury, though influenced by defendant, were committed by a foreign sovereign, whose acts within its own jurisdiction are lawful by definition.

B. *By United States Citizens and Aliens*

It would be a mistake to read *American Banana* as declaring that the mere fact that acts are done abroad makes the Sherman Act inapplicable, as a careful reading of that case and a close reading of section 1 of the Act demonstrate.

It appears that the Court in *American Banana* took the view that Congress did not intend the Sherman Act to apply to acts performed outside the United States. But there is language indicating that any statements giving that impression were intended to be limited to the facts of this particular case. After stating that "all legislation is *prima facie* territorial," Justice Holmes later states: "We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute *so far as the present suit is concerned*."¹⁹ He then upheld dismissal of the com-

¹⁶ See *American Banana Co. v. United Fruit Co.*, 166 F. 261, 264 (2d Cir. 1908).

¹⁷ *Id.* While, as the court pointed out, in order to state a cause of action for damages under the Sherman Act, it is not necessary to aver an injury to an existing business, it is necessary in such a case to state facts showing an intention and a preparedness to engage in business.

¹⁸ 213 U.S. at 358.

¹⁹ *Id.* at 357 (emphasis added).

plaint on the ground that defendant's acts in Costa Rica had not violated the Sherman Act, but he did not expressly reach the question of an effect on United States commerce. As the development of the law in later cases has shown, the thrust of section 1 of the Sherman Act is that acts in "restraint of trade or commerce . . . with foreign nations" are unlawful.

C. *Kinds of Acts Having an Effect*

The key factor in the determination of Sherman Act jurisdiction of a combination or contract made in a foreign country and effectuated in the United States is whether it adversely affects the foreign commerce of the United States. This principle is illustrated by *United States v. American Tobacco Co.*,²⁰ in which a number of American and two English corporations engaged in the tobacco trade were held to have restrained United States foreign trade and to have created a monopoly in violation of sections 1 and 2 of the Sherman Act.²¹ The agreements between the English and American companies, which were made in England, divided up world markets in the tobacco trade. Imperial, one of the English companies, agreed to limit its business to the United Kingdom, and the other English company, British-American Tobacco, was also involved in the trade restrictions. The Court stated that by these contracts the two English corporations became co-operators in the combination which constituted an unlawful restraint of trade under sections 1 and 2 of the Sherman Act.²² The Court regarded the effect on United States trade as the decisive factor for the application of the Sherman Act in a situation where the acts in question were committed outside the United States. In *Thomsen v. Cayser*,²³ the Supreme Court expressly based its findings of a violation of the Sherman Act, by foreign shipowners and their American agents who had combined to restrain trade, on the ground that the combination formed in a foreign country and put into operation in the United States affected United States trade.

D. *Legal Basis of Application of United States Laws to Aliens*

In *American Tobacco* and *Cayser*, alien defendants were affected by the decisions. The issue arises of the applicability of the

²⁰ 221 U.S. 106 (1911).

²¹ 15 U.S.C. §§ 1, 2 (1970).

²² 221 U.S. at 182-83.

²³ 243 U.S. 66 (1917). Under subsequent legislation, the Maritime Commission now has power, under certain circumstances, to immunize such groups of carriers from antitrust suits. Shipping Act of 1916, 46 U.S.C. § 814 (1970).

antitrust laws to acts of aliens. It was not actually discussed in those cases, but it may be asked: Did Congress intend to attach liability to acts of aliens committed beyond the borders of the United States? Is the imposition of such liability upon aliens compatible with principles of international law?²⁴ General words such as those in the Sherman Act must not be interpreted so as to conflict with principles of international law. Congress did not intend to "punish all whom its courts can catch, for conduct which has no consequences within the United States."²⁵

The "consequences," *i.e.*, the effect on United States foreign commerce, is the criterion of liability of aliens under the antitrust laws, even if the activities take place abroad. It is now "settled law that . . . any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within . . . its borders which" that nation declares illegal.²⁶ This classic statement defining the extent to which the antitrust laws may be applied to actions committed abroad expresses the objective territorial principle of modern international law, as distinguished from the limited territorial principle expounded in *American Banana*.²⁷

In *United States v. Aluminum Co. of America (Alcoa)*,²⁸ the court held that it was the intent of Congress to apply the antitrust laws to acts of aliens abroad under certain circumstances. In this case, the Government alleged that Alcoa, an American corporation,

²⁴ "International law" is defined as "the rules that determine the rights and obligations of states and international organizations." Restatement (Second) of Foreign Relations Law of the United States § 1, comment *a* (1965).

The recognized customs prevailing between states . . . are reflected not only in international practice *per se* but also in international treaties and agreements, in the general principles of law recognized by states, in judicial and arbitral decision, and in the works of qualified scholars.

1 M. Whiteman, Digest of International Law § 1, at 1 (1963).

²⁵ *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945) (*Alcoa*). *Alcoa* is cited in Restatement (Second) of Foreign Relations Law of the United States § 18, reporters' note 2. Section 18 itself provides in pertinent part:

A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if . . . (b)(i) the conduct and its effects are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have legally developed legal systems.

For comment on this provision, and a comparison of it with the guideline proposed on this subject in Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), see ABA Antitrust Developments 1955-1968, at 46-49.

²⁶ *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945).

²⁷ See Timberg, *United States and Foreign Antitrust Laws Governing International Business Transactions*, in *A Lawyer's Guide to International Business Transactions* 623-24 (W. Surrey & C. Shaw ed. 1963).

²⁸ 148 F.2d 416 (2d Cir. 1945).

and Aluminum Limited (Limited), a Canadian company, had conspired with foreign producers of ingots to restrain interstate and foreign commerce of the United States in violation of the Sherman Act, by entering into restrictive cartel agreements made abroad. Quotas were imposed on imports of ingots into the United States.²⁹

The court found that Limited had joined in the cartel arrangement with the other foreign companies, and reversed the trial court's finding that no Sherman Act violation had occurred.³⁰ The court reasoned that the cartel agreement would clearly have been unlawful if it had been made in the United States, and that such an agreement would be unlawful, although made abroad, if it was intended to affect, and in fact did affect, imports into the United States. The court found that since the parties to the cartel had expected that the agreed restriction upon production would have an effect upon imports into the United States, the requisite intent was present.³¹

E. Aliens as Co-conspirators and Defendants

In *Alcoa*, an alien member of the conspiracy, Limited, was before the court as a defendant. In some cases, the facts describe both American and foreign conspirators, while only the Americans have been made defendants. Since it is necessary to consider the acts of the co-conspirators in order to prove the conspiracy, it has been argued that if the alien corporate co-conspirators are not before the court as defendants, the court does not have jurisdiction to consider their conduct abroad relating to the commerce of foreign nations.³² This was argued by American corporate defendants in *United States v. National Lead Co.*,³³ in which the Government sought to enjoin the alleged unlawful division of the world into exclusive trade areas to suppress all competition in the titanium trade by the defendants and alien co-conspirators.

The court responded to the argument that it lacked jurisdiction by stating that the activities of the foreign conspirators could not be

²⁹ Id. at 442.

³⁰ Id. at 443-45.

³¹ Id. at 444.

³² The failure in the earlier cases to bring foreign conspirators before the courts as defendants was often due to the difficulty of serving them with process. This problem has been considerably eased in civil actions due to the promulgation of Fed. R. Civ. P. 4(i), which embodied the recommendations on service of process abroad made by the Commission on International Rules of Judicial Procedure in 1963. See Fourth Annual Report, H.R. Doc. No. 88, 88th Cong., 1st Sess. (1963). For a recent example of the successful application of Rule 4(i), see *Hoffman Motors Corp. v. Alfa Romeo S.p.A.*, 244 F. Supp. 70 (S.D.N.Y. 1965).

³³ 63 F. Supp. 513 (S.D.N.Y. 1945), aff'd, 332 U.S. 319 (1947).

isolated. These activities were all integral parts of one conspiracy to restrain world commerce, which included the foreign commerce of the United States, and thus were within the jurisdictional reach of the Sherman Act.

Unquestionably, if the gravamen of the complaint were to impeach the Aussig [Czechoslovakian] agreement as such, or the BPT-Laporte [Canadian] quota arrangement as such, the point would be well taken. But that is not the gist of the complaint. On the contrary, it has been alleged and proved that a conspiracy was entered into, in the United States, to restrain and control the commerce of the world, including the foreign commerce of the United States. The several agreements relating to manufacture and trade within the European markets are but some of the links in the chain which was designed to enthrall the entire commerce in titanium.³⁴

The court issued an injunction and ordered cancellation of the agreements between the three American defendants and the foreign corporate co-conspirators.³⁵

III. APPLICATION OF UNITED STATES ANTITRUST LAWS TO ACTS OF ALIENS OR CITIZENS WHOLLY OR IN PART IN THE UNITED STATES AFFECTING FOREIGN TRADE OR COMMERCE

In *United States v. Sisal Sales Corp.*,³⁶ violation of both the Sherman Act and the Wilson Tariff Act was charged by the Government in a bill to enjoin an alleged combination by several American corporations, one Mexican corporation, and certain individuals to secure a monopoly on the importation and sale of sisal³⁷ in the United States. The monopoly had been created in a series of arrangements by defendants entered into in the United States. Defendants had also arranged in Mexico to make one of them exclusive selling agent for the official Mexican agency which was the sole buyer of sisal from Mexican producers. Defendants had exerted influence to obtain passage by the Mexican and Yucatan governments of discriminatory laws favorable to the conspiracy. These

³⁴ 63 F. Supp. at 524-25.

³⁵ *Id.* at 532-35. The order was affirmed with minor modifications by the Supreme Court, which stated that the decree was of "commendable fairness having especial regard to the needs of the case." 332 U.S. at 335.

³⁶ 274 U.S. 268 (1927).

³⁷ Sisal is a kind of hemp fiber used in making twine.

steps led to the destruction of all competition in the sisal trade in the United States.³⁸

The trial court dismissed the case, regarding *American Banana* as controlling.³⁹ The Supreme Court reversed, finding the circumstances in *Sisal* "radically different" from those in *American Banana*, where all the relevant actions took place abroad.⁴⁰ In *Sisal*, the contract and conspiracy were entered into in the United States, and made effective by acts committed in this country. The Court pointed out that in this case, the United States complained of a violation of its laws, committed within its own territory by parties subject to its jurisdiction, and not of actions carried out by another government at the instigation of private parties as in *American Banana*. It was true, the Court noted, that the parties were aided in their scheme by Mexican legislation; however, it was by their own deliberate acts "here and elsewhere [that] they brought about forbidden results within the United States,"⁴¹ under the Sherman Act and the Wilson Tariff Act. While in *Sisal* the action by the Mexican government was but one incident of a larger scheme of restriction of trade by the defendants, in *American Banana* the action by the Costa Rican government was the sole action which comprised the alleged Sherman Act violation.⁴²

IV. DEFENSES RAISED BY DEFENDANTS IN EXTRATERRITORIAL ANTITRUST SUITS

The decisions in *Alcoa*, and in the cases that immediately followed,⁴³ firmly established that it is "settled law" that liability under United States antitrust laws may be imposed upon persons, including aliens, for activities carried on wholly or partially abroad, provided their transactions and activities were intended to affect imports and did affect them. In each successive case there is nevertheless the problem of determining the precise applicability of this principle to the varying factual situations. Over a period of

³⁸ 274 U.S. at 273.

³⁹ *Id.* at 268. The district court opinion was unreported.

⁴⁰ *Id.* at 275.

⁴¹ *Id.* at 276.

⁴² The situs of the actions which are said to violate the antitrust laws is not the decisive factor in determining jurisdiction. Whether acts take place in the United States or abroad, the main question is their effect on United States trade. Thus, in 1955, a court relied on *Sisal* in awarding treble damages to a plaintiff where the acts effectuating the conspiracy took place partly inside and partly outside the United States. *Sanib Corp. v. United Fruit Co.*, 135 F. Supp. 764, 766 (S.D.N.Y. 1955).

⁴³ See, e.g., *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284 (N.D. Ohio 1949), *aff'd as modified*, 341 U.S. 593 (1951); *United States v. General Elec. Co.*, 82 F. Supp. 753 (D.N.J. 1949); *United States v. National Lead Co.*, 63 F. Supp. 513 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947).

years the courts in their decisions have woven a tapestry whose subtle shadings have been determined by the often ingenious arguments advanced by defendants to demonstrate in what way their conduct or characteristics and situations made this principle inapplicable to them. Furthermore, the courts have been faced with the practical problem of determining to what extent, under international law, their decrees affecting aliens could and should be enforced.

A. *Intent to Affect United States Trade or Commerce*

If as has been said, persons must have intended by their conduct abroad to affect United States trade or commerce before they may be held liable for violating United States antitrust laws, it is necessary to define "intent" in this context. It is not a specific intent to violate the antitrust laws that is required.⁴⁴ The intent that is meant here is the intent to enter into an agreement, the natural consequences of which would be to affect United States commerce. Intent is found in the fact that the person who entered into the agreement knew or should have known that the effect would naturally follow from the performance of the agreement.

In *United States v. General Electric Co.*,⁴⁵ one of the defendants, a foreign corporation, N.V. Philips' Gloeilampenfabrieken (Philips), defended on the ground that it lacked the necessary intent for liability under the Sherman Act. In that case Philips and certain American corporations, including General Electric Co., had entered into patent licensing agreements containing territorial restrictions and into worldwide cartel agreements in furtherance of General Electric's incandescent lamp monopoly.

Philips had also complained that it had been "haled before the court because of agreements it entered into in its native land which were entirely legal there." Philips urged the adoption of a rule that foreign corporations, which, like itself, are engaged in business abroad, may enter into agreements among themselves or with American corporations or with individuals "freely and without fear of anti-trust suits [in the United States], so long as what they do is not done wilfully to restrain United States trade and does not have a direct and substantial effect upon it."⁴⁶ Philips apparently believed that since it was a foreign corporation, the jurisdiction of the American court was more tenuous over it than over an American corporation, and therefore a stricter standard of intent should be required for it to be liable under the Sherman Act. The court was not persuaded by such arguments. Philips was found in violation of the

⁴⁴ *United States v. General Elec. Co.*, 82 F. Supp. 753 (D.N.J. 1949).

⁴⁵ *Id.*

⁴⁶ *Id.* at 890.

Act under the normal standard of intent. Philips had acted with the requisite intent for violation of the Act in that it had lent itself to the General Electric plan of stifling potential sources of foreign lamp parts and in that it had known or should have known that the real purpose of the licensing with territorial restraints was to keep Philips out of the United States market.⁴⁷

B. *Excuses for Conduct*

Variants of the lack of wilful intent defense are arguments that although the effect of the agreement was to restrain trade, the conduct was excusable because it was "ancillary" to an allegedly "legal main transaction," or that the action could be excused as "reasonable" in light of conditions abroad which made profitable operations difficult. But again, such defenses are not acceptable if the agreements do in fact restrain trade. Two types of "legal main transactions" presented as a defense in an antitrust conspiracy case involving an American corporate defendant and foreign co-conspirators were an alleged "joint venture" and a "legitimate" licensing of a trademark.

In this case, *United States v. Timken Roller Bearing Co.*,⁴⁸ the defendant and the foreign co-conspirators, British Timken Ltd. (British Timken) and Société Anonyme Française Timken (French Timken), were all in dominant positions, Timken in the world and the co-conspirators in their respective countries, in the tapered roller bearing industry.

At the time of the suit, the American company owned approximately a thirty percent financial interest in British Timken, and an English businessman, Dewar, a twenty-four percent interest. In 1928 these two parties organized French Timken, owning all of its stock. American Timken was under separate control from the other two companies, so that American Timken and the other two companies were potential competitors. From 1928 on, however, the three Timken companies were parties to agreements which (1) allocated trade territories among themselves, allocated use of the trademark "Timken" to each of the parties in their respective territories, and required that the co-conspirators not manufacture and sell bearings except under the mark "Timken;" (2) fixed prices; (3) provided for cooperation to protect each other's markets and to eliminate outside competition; and (4) provided for participation in cartels to restrict imports to and exports from the United States.⁴⁹

⁴⁷ Id. at 891.

⁴⁸ 83 F. Supp. 284 (N.D. Ohio 1949), aff'd as modified, 341 U.S. 593 (1951).

⁴⁹ 83 F. Supp. at 287.

The Supreme Court affirmed the trial court's rejection of the joint venture defense, stating that "[t]he fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws."⁵⁰ The defendants were legally separate corporations and persons and could not justify suppression of competition by labeling their project a joint venture. In theory, a joint venture is a single entity, and arguably it could not violate the Sherman Act, which is addressed to a contract, combination or conspiracy, and thus necessarily involves two or more persons. The trademark contracts were found to be subsidiary to the central purpose of allocating trade territories, contrary to Timken's contention that the restraints of trade were only incidental to them.

The defendants in *Timken* also argued that the steps taken by the co-conspirators to eliminate competition among themselves in England, France and the United States were reasonable in view of foreign trade conditions such as tariffs and restrictive quotas which made it impossible to conduct, in any other manner, a profitable business in England, France and elsewhere.⁵¹ This argument was strenuously rejected by the Court, particularly in view of the finding that, contrary to defendant's contention, competition was possible and would have occurred had it not been for the restraints imposed.⁵²

Defendants in *United States v. Minnesota Mining & Manufacturing Co.*⁵³ also argued unsuccessfully that agreements in restraint of trade were reasonable because of foreign business conditions.⁵⁴ In this case, a group of American manufacturers controlling eighty percent of the export trade in coated abrasives combined to establish jointly-owned factories in England, Canada and Germany. They refrained from exportation of their products from the United States to countries where the products of the foreign plants could be sold more profitably than the American-made goods.⁵⁵ The trial court agreed that if American trade was impossible because of lack of profitability, then the restrictive actions would be legitimate "[f]or the very hypothesis is that there is not and could not be any American foreign commerce in that area which could be restrained or monopolized."⁵⁶ However, the defendants' argument here failed because they did not allege impossibility of foreign trade without restrictions, but merely that foreign trade would be inconvenient

⁵⁰ 341 U.S. at 598.

⁵¹ *Id.* at 599.

⁵² *Id.*

⁵³ 92 F. Supp. 947 (D. Mass. 1950).

⁵⁴ *Id.* at 958.

⁵⁵ *Id.* at 959.

⁵⁶ *Id.* at 958.

and impractical, and a violation of section 1 of the Sherman Act was found.⁵⁷

1. *Acts Acquiesced in or Compelled by a Foreign Government*

In the early *American Banana* case⁵⁸ the ruling was that the antitrust laws are not applicable in a treble damage suit to acts lawful in a foreign country, committed in that country, and performed or ordered by the foreign sovereign. In numerous cases after *American Banana* the courts have found facts which relieved them from the necessity of applying the strict territorial jurisdiction theory propounded in that early case. There is also the ruling in *Sisal*⁵⁹ that the mere fact that a foreign government has been induced to pass discriminatory laws which favor the maintenance of a monopoly in a product imported into the United States from that country is no defense to a charge of combining to monopolize such trade.

Going beyond *Sisal*, the fact, standing alone, that a person whose acts in a foreign country are in restraint of United States commerce is proceeding pursuant to a law of that foreign country likewise does not make such acts legal under United States law. In *Continental Ore Co. v. Union Carbide & Carbon Corp.*,⁶⁰ defendant Canadian corporation, Electro Metallurgical Co. of Canada (Electro), argued that its acts were protected because they were performed according to Canadian law. Electro acted as exclusive agent under a regulation of the Canadian government which provided that no vanadium products were to be purchased for use of Canadian steel firms except through its exclusive agent. Acting under the control and direction of its parent, Union Carbide, Electro refused to purchase any vanadium from plaintiff Continental Ore, thus barring plaintiff from the Canadian market. The actions by Electro and Union Carbide were alleged by plaintiff to be restraints on trade in violation of the Sherman Act.

The district court⁶¹ and court of appeals⁶² ruled in favor of Electro on the ground it was acting as an agent of the Canadian Government. The Supreme Court reversed.⁶³ Electro, in refraining from buying from Continental Ore, was acting in a manner permitted by Canadian law. However, the Court found nothing to indicate that such law in any way compelled discriminatory purchasing,

⁵⁷ Id. at 961.

⁵⁸ 213 U.S. 347 (1909).

⁵⁹ 274 U.S. 268 (1927).

⁶⁰ 370 U.S. 690 (1962).

⁶¹ The district court opinion was unreported.

⁶² 289 F.2d 86 (9th Cir. 1961).

⁶³ 370 U.S. 690 (1962).

stating that "it is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme."⁶⁴

2. *Government Compulsion, Sovereign Immunity and Act of State as Defenses*

Even where, as a practical matter, a foreign government approves and lends support to private activities in its country which affect United States trade, such approval cannot convert an essentially private conspiracy into a system of governmental regulation shielded from antitrust liability by the doctrine of sovereign immunity. In *United States v. Watchmakers of Switzerland Information Center, Inc.*,⁶⁵ the defense of sovereign immunity was urged unsuccessfully in such a situation. In that case, the United States alleged a conspiracy between several Swiss and American companies and trade associations, some of whom were named as defendants, and some as co-conspirators only, to impose unreasonable restraints on the foreign and domestic trade and commerce of the United States in violation of section 1 of the Sherman Act and section 73 of the Wilson Tariff Act.

The conspirators were manufacturers and sellers of Swiss watches and watch parts, together with their trade associations. The basis of the complaint was a private agreement called the "Collective Convention," executed in Switzerland, by Swiss organizations. The Convention bound the Swiss signatories and their subsidiaries in the United States. It was intended to protect the Swiss watch industry from foreign inroads and was intended to, and did, restrict unreasonably the manufacture of watches and watch parts in the United States, and restrain United States imports and exports of watches and watch parts for both manufacturing and repair purposes. Various other restrictive practices were charged. The Swiss Government, indicating its approval of these private arrangements, passed legislation in aid of the Convention signatories. For example, any signatory who breached any of the Convention's provisions was, under Swiss law, subject to private sanctions provided in the Convention, and nonsignatories were subjected to certain price and other regulations.

⁶⁴ Id. at 707. See *United States v. Learner Co.*, 215 F. Supp. 603 (D. Hawaii 1963), which relied on *Sisal* and *Continental* in refusing to dismiss an indictment under the Sherman Act, where restrictive agreements by two American corporations with Japanese cartels were legal under Japanese laws. The defendants argued that the indictment stated no offense, apparently contending that acts committed in dealing with a foreign country are not illegal if legal under the law of the foreign country.

⁶⁵ 1963 Trade Cas. ¶ 70,600, at 77,414 (S.D.N.Y. 1962).

Defendants claimed that the court should not assume jurisdiction over their activities because American antitrust laws cannot be applied to acts of sovereign governments. They apparently based this defense on the fact that the agreements were entered into and became effective in Switzerland, and were sanctioned by Swiss law.⁶⁶ In rejecting defendants' claim of lack of jurisdiction, the court stated that the defendants' activities were not *required* by Swiss law. They were agreements formulated privately without compulsion on the part of the Swiss Government. The court reasoned that although those agreements were "recognized as facts of economic and industrial life by that nation's government," that form of governmental action did not convert them into agreements required by that foreign country's law.

If, on the other hand, a foreign government actually compels a person to act as he does, and such act might otherwise violate United States antitrust laws, such compulsion is a complete defense to an antitrust case based on the act compelled. Furthermore, the "Act of State" doctrine prevents the court from inquiring into the validity of the law of the foreign state under which the person acted. This defense was successfully raised by defendants in *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*⁶⁷ Plaintiff Interamerican charged that it was unable to obtain Venezuelan crude oil necessary for its refinery in New Jersey because of defendants suppliers' refusal to deal with it. Summary judgment was granted to the defendant suppliers, however, because the Venezuelan government had forbidden sales of its oil which would reach Interamerican, directly or indirectly. By its ruling the court carried the "scant authority" of the dicta in *Continental Ore* and *Swiss Watchmakers*, as to when compulsion is a defense, one step farther, referring to the "antitrust exception" in the case of acts of a foreign sovereign in its own jurisdiction. The court reasoned that sovereignty includes the right to regulate commerce within the nation and stated:

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

⁶⁶ The complaint was dismissed as against one of the American corporations on technical grounds, and as against one of the Swiss defendants found not to have been a signatory, but the court found that the other defendants had restrained United States foreign and domestic trade as to watches and watch parts in violation of § 1 of the Sherman Act and § 73 of the Wilson Tariff Act. 1963 Trade Cas. at 77,452.

⁶⁷ 307 F. Supp. 1291 (D. Del. 1970).

sovereigns. By its terms, it forbids only anticompetitive practices of persons and corporations.⁶⁸

The court denied plaintiff's request to conduct an inquiry into the validity of the Venezuelan laws. For the court to rule on the validity of foreign laws would be interference in a matter of foreign policy, a political question, outside the province of the court.⁶⁹

Some 60 years after the decision in *American Banana* refusing to question the act of a Central American sovereign—and a continent away, with the scene laid in the Persian Gulf—the District Court for the Central District of California, in *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*,⁷⁰ refused to question the sovereign acts of three foreign powers—the ruler of the Trucial State, Sharjah; Great Britain, acting through its Foreign Office; and the Government of Iran, acting through its National Iranian Oil Company—and ruled for the defendant in a private treble damage suit for \$1,000,000 brought by plaintiffs, Occidental Petroleum Corp. and its wholly owned subsidiary Occidental of Umm al Qaywayn (Occidental), concessionaire of the ruler of Umm al Qaywayn, against the concessionaires of the ruler of Sharjah, Clayco Petroleum Co. (Clayco) and Buttes Gas & Oil Co. (Buttes) and its officers, Boreta and Smith.

In this case, plaintiff Occidental Petroleum alleged that defendant had stimulated a border dispute between those Persian Gulf states in order to displace plaintiff from its oil concession. The dismissal by the court was based on the act of state doctrine.⁷¹ The facts were found to be "strikingly similar" to those of *American Banana*. The court stated that it is clearly established that the holding of *American Banana* that has endured is that the act of state doctrine bars a claim for antitrust injury flowing from foreign sovereign acts allegedly induced and procured by the defendant. In a footnote, the court observed that although there had been acts or alleged acts of sovereigns in both *Sisal* and *Continental*, those cases "based liability on market conduct in the context of governmental permission [whereas in *Occidental*] the conspiracy . . . pleaded is made up exclusively of the inducement of sovereign acts."⁷² This

⁶⁸ Id. at 1298. For a discussion of the implications of this case, see Note, 69 Mich. L. Rev. 888 (1971).

⁶⁹ 307 F. Supp. at 1298. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 430-32 (1964).

⁷⁰ 331 F. Supp. 92 (C.D. Cal. 1971), aff'd, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950 (1972).

⁷¹ 331 F. Supp. at 113. The court remarked that ". . . inquiries by this court into the authenticity and motivation of threats of foreign sovereigns would be the very sources of diplomatic friction and complication that the act of state doctrine aims to avert." Id.

⁷² Id. at 109-10 n.28.

observation makes it plain that even in cases where acts of sovereigns are concerned, the line is very sharply drawn.

V. REMEDIAL RELIEF FOR EXTRATERRITORIAL SHERMAN ACT VIOLATIONS

In fashioning a remedial decree in an extraterritorial antitrust case, a court must consider many of the same factors of international law, comity among nations and economic policy as are necessary for determination of whether acts of a foreign sovereign were involved in such a manner as to put the case beyond the reach of the antitrust laws in the first place. The court is put in a position in which it must order remedial steps to be taken by a foreign person or corporation. The foreign defendant may become entangled with the law of its own nation in trying to obey the American court.

In *United States v. General Electric Co.*,⁷³ personal jurisdiction over the alien corporation, N.V. Philips' Gloeilampenfabrieken, had been obtained by service on its officers, who had taken refuge in the United States to escape the Nazis. The court had filed its opinion in 1949. In 1953, when the court framed the judgment to implement the decree, it took into account the special situation of the alien defendant, by excepting Philips from certain of the provisions applicable to the other defendants, which would "expose its European business to ruptures not necessary or required for the relief sought in this action."⁷⁴

Nevertheless, Philips was held to many of the remedial provisions. It was enjoined from contracting with any co-defendant or any other United States manufacturer of lamps, lamp parts or machinery in any manner which would require Philips to participate in a plan limiting importation or exportation of such goods to or from the United States.⁷⁵

Each defendant, including Philips, was ordered to dedicate its existing lamp and lamp part patents to the public, thus compelling completely royalty free use of the patents. The court justified this harsh measure on the ground that licensing fees would inhibit competition because of the narrow profit margin on the production of lamps. It also stated that in view of the fact that General Electric had achieved and maintained its dominant position in the industry largely through patent control, the requirement that it contribute its existing patents to the public was a justifiable dilution of that control bringing about greater competition in the industry.⁷⁶

⁷³ 82 F. Supp. 753 (D.N.J. 1949), discussed in text at notes 45-47 supra.

⁷⁴ 115 F. Supp. 835, 856 (D.N.J. 1953).

⁷⁵ Id. at 842.

⁷⁶ Id. at 843ff.

Philips objected to its inclusion in the dedication requirement, contending that it was only peripherally associated with the conspiracy. It argued that binding it to this requirement constituted an attempt by the court "to regulate the economic policies of foreign nations where conduct proscribed by the antitrust laws is perfectly legal."⁷⁷ The court disagreed, stating that it could and should require Philips to dedicate its American patents in order to remedy that company's violations of the antitrust laws. Requiring Philips to comply with this order would not ensnarl Philips with foreign courts, because only American patents were subject to the dedication requirement.⁷⁸

The decree also required defendants to grant immunity from suit to any patent licensee who might elect to have lamp machinery manufactured for it by a foreign manufacturer.⁷⁹ Philips objected to being compelled to place itself in the complicated situation of being required to grant immunity from suit on its foreign patents which might arise in foreign courts.⁸⁰ The court relieved Philips from the immunity-from-suit provision of the decree, stating that the dedication of its American patents was sufficient remedy for Philips' actions in suppression of trade.⁸¹ In one of the saving clauses in the decree the court stated:

Philips shall not be in contempt of this judgment for doing anything outside of the United States which is required or for not doing anything outside of the United States which is unlawful under the laws of the government, province, country or state in which Philips or any other subsidiaries may be incorporated, chartered or organized or in the territory of which Philips or any such subsidiaries may be doing business.⁸²

The exemption of Philips from the immunity-from-suit provision is indicative of the court's desire to avoid interfering with foreign litigation.⁸³ This problem did not arise in applying the dedication-of-patent order to Philips, because American patents are entirely within the court's jurisdiction.

Another case in which the court showed an awareness of the

⁷⁷ Id. at 846.

⁷⁸ Id.

⁷⁹ Id. at 851.

⁸⁰ Id.

⁸¹ Id.

⁸² Id. at 878.

⁸³ This provision was deemed warranted by the court "as a safeguard to its [Philips'] protection from being caught between the jaws of this judgment and the operation of laws in foreign countries where it does its business." Id.

limitations on the remedies that can be effectively provided when aliens are involved is *United States v. Imperial Chemical Industries, Ltd.*⁸⁴ Imperial Chemical (ICI), a British corporation, and several American corporations (including E.I. duPont) were charged with joining in agreements dividing up world markets in the chemical trade in violation of section 1 of the Sherman Act.⁸⁵ Several foreign corporations not named as defendants were alleged to have been parties to some of these agreements. In 1939, under one of these agreements, duPont granted an exclusive license to its British nylon patents to ICI, with the right to grant sub-licenses. In 1947, ICI sublicensed British Nylon Spinners, Ltd. (BNS) to manufacture nylon yarn. BNS, a British corporation, was a non-party in the suit in question. The effect of these licensing agreements was to keep the patented products manufactured in the United States by duPont out of the British market, and to keep the British products out of the United States. Two years after the commencement of the anti-trust suit in 1944, the duPont-ICI licensing agreement was cancelled and duPont assigned its British patents to ICI. In March 1947, ICI granted BNS exclusive licences under the assigned patents. The court found a violation of the Sherman Act.⁸⁶

The court decree ordered the compulsory licensing of all the United States patents involved in the conspiracy. This licensing order was not imposed on ICI's British patents.⁸⁷ However, the court ordered that ICI grant immunity under its foreign patents, despite the fact that ICI had introduced at trial testimony of an expert on British law to the effect that a provision for granting immunities is contrary to British public policy and that the British courts would not enforce such a provision contained in the judgment of a court of a foreign jurisdiction.⁸⁸

The court expressly recognized there might be difficulty in enforcing this order, since it dealt with regulation of patent rights granted by a foreign corporation. However, the court thought that the in personam jurisdiction it had over ICI was sufficient basis for the order. It hoped the British courts would honor its decision as a matter of comity. "[T]he effectiveness of [our decree] depends upon the recognition which will be given to our judgment as a matter of comity by the courts of the foreign sovereign which has granted the patents in question."⁸⁹

⁸⁴ 105 F. Supp. 215 (S.D.N.Y.), enforcing 100 F. Supp. 504 (S.D.N.Y. 1952).

⁸⁵ 15 U.S.C. § 1 (1970). See 100 F. Supp. at 509.

⁸⁶ 100 F. Supp. at 594.

⁸⁷ The Government had not asked that ICI be directed to grant compulsory licenses to its British patents, thus indicating an awareness that there was an issue of limitation of remedies.

⁸⁸ 105 F. Supp. at 228.

⁸⁹ Id. at 229.

A further weakness in the decree was that it ordered ICI not to assert its British patent to prevent the importation of nylon polymer and yarn from the United States into Great Britain. BNS, which was not a defendant, had acquired some of these patent rights from ICI. The court stated that BNS was aware of the nature of the conspiracy and knowingly took advantage of the circumstances. The court said it would not limit the scope of what it thought was a proper decree "because of the possibility that the English courts" would not give effect to it.⁹⁰ The court did not have long to await the anticipated reaction in England. In 1952, in *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.*,⁹¹ BNS sued ICI for specific performance of the 1947 ICI-BNS agreement in which ICI promised to grant BNS exclusive licenses under all the patent rights which ICI acquired from duPont in certain designated territories. The English court denied that comity required recognition of the American court's decree. It enjoined by interlocutory decree the divestiture pursuant to the American decree by ICI of any of the patent rights it had obtained from duPont in 1946 until final judgment was reached in the English specific performance case.⁹²

The English court disagreed with the statement in the American decision that "[i]t is not an intrusion on the authority of a foreign sovereign for this court to direct that steps be taken to remove the harmful effects on the trade of the United States."⁹³ BNS had acquired enforceable rights to the patent licences in its 1947 contract with ICI, and these rights were "English in character." The American courts were not competent to interfere with these rights. The English courts have a duty to protect these patent rights.⁹⁴ In 1954, specific performance of the contract between BNS and ICI was granted.⁹⁵ The court noted that BNS had not been a party before the American court.

Despite the British court's decision denying effect to the American decree in the ICI case, the Supreme Court, in *United States v. Holophane Co.*,⁹⁶ affirmed, a few years later, a lower court decision ordering Holophane Co., an American corporation, to compete in

⁹⁰ Id. at 231.

⁹¹ [1952] 2 All E.R. 780 (C.A.).

⁹² Id. at 781.

⁹³ Id. at 782.

⁹⁴ Id. at 783.

⁹⁵ *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.*, [1954] 3 All E.R. 88 (Ch.).

⁹⁶ 352 U.S. 903 (1965), aff'g per curiam 119 F. Supp. 114 (S.D. Ohio 1954). For a discussion of the conflicts between different sovereign states which decisions such as *Holophane* tend to perpetuate and increase, see Oliver, *Extraterritorial Application of United States Legislation Against Restrictive or Unfair Trade Practices*, 51 Am. J. Int'l L. 380, 382-85 (1957).

foreign markets including even the territories where it had entered into noncompetition agreements with foreign co-conspirator corporations. The decree did, however, provide that this should not be construed as requiring the exportation by the defendant of any products which would violate valid foreign patent or trademark rights of the co-conspirators.⁹⁷ By the use of such language, the court manifested an awareness of the possibility that a foreign court would not cooperate with its decree, as was the case in ICI.

Foreign policy considerations led an American court in 1965 to modify an earlier decree⁹⁸ which conceivably could have interfered with a foreign sovereignty in *United States v. Watchmakers of Switzerland Information Center, Inc.*⁹⁹ The defense of sovereign immunity had been unsuccessfully raised by the defendants, the court finding that the agreements had merely been permitted, and not required, by Swiss law.

The court had retained jurisdiction of the case, as is the usual practice, to enable the parties to apply for modification of any of the provisions of the judgment. The defendants had indicated their intention to appeal from this final judgment. However, the Government requested modification of the judgment which would satisfy the defendants. Among the grounds for the modification was the fact that the Department of State had indicated to the Department of Justice that a resolution of this litigation, "on a basis consistent with United States antitrust laws, . . . would be advantageous from the standpoint of American foreign policy."¹⁰⁰ The court, in referring to ICI and BNS, stated:

[T]hese modifications will prevent any situation from arising such as has occurred in other litigation in the past when there was believed to be a possible conflict between a decree of a United States court and the sovereignty of a foreign nation. In the main the modifications relate to peripheral areas of the judgment which might have been construed to have bearing upon the sovereignty of the Swiss Confederation.¹⁰¹

This type of international *contretemps*, sprinkled as it is on each side with expressions of understanding for the problems of the other, and for a corporation "caught between the jaws" of the judgment of

⁹⁷ 1954 Trade Cas. ¶ 67,679, at 69,183 (S.D. Ohio), enforcing 119 F. Supp. 114 (S.D. Ohio 1954).

⁹⁸ See 1963 Trade Cas. ¶ 70,600, at 77,414 (S.D.N.Y. 1962), discussed in text at notes 65-66 *supra*.

⁹⁹ 1965 Trade Cas. ¶ 71,352, at 80,490 (S.D.N.Y. 1965).

¹⁰⁰ 1965 Trade Cas. at 80,492.

¹⁰¹ *Id.* at 80,493.

the courts of one country and the operations of laws in foreign countries where it does its business, prompted Beausang to call for a "national antitrust policy defining the proper exercise of jurisdiction" which, as we have seen, is practically unlimited in its worldwide scope. Finding no quarrel with the apparent lack of limitation upon the existence of jurisdiction, the author declared, however, that policy heretofore only considered by courts when forming decrees, "must guide the Justice Department in its decision whether to bring an action and the courts when an action is filed."¹⁰² He concluded that the burden seems to be on Congress to adopt a frame of reference.

The 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws appears to take the view that the problem is capable of resolution without new legislation, and that it may be left to the sound discretion of the courts. "[W]e must assume, as *Alcoa* suggests, that Congress did not intend the 'general words' of the Sherman Act to be read 'without regard to the limitations customarily observed by nations upon the exercise of their powers.'"¹⁰³

CONCLUSION

The foregoing discussion has been confined principally to cases which have arisen under the Sherman Act, or the Sherman Act in combination with the Wilson Tariff Act of 1894, as amended, because the leading cases in the foreign trade and commerce field have arisen under those acts.¹⁰⁴ It is these decisions which have carved

¹⁰² Beausang, *The Extraterritorial Jurisdiction of the Sherman Act*, 70 Dick. L. Rev. 187, 197 (1966).

¹⁰³ Report of the Attorney General's National Committee to Study the Antitrust Laws 76-77 (1955).

¹⁰⁴ The fact that there has not been more litigation in the foreign trade and commerce area under the Clayton Act, 15 U.S.C. §§ 12-27 (1970), is understandable. The Clayton Act applies to "commerce among the several states and with foreign nations," 15 U.S.C. § 12 (1970), but the language of the various substantive provisions is not so broadly phrased as that of the jurisdictional provision. For example, in order for § 7 which encompasses corporate mergers, acquisitions and joint ventures to be applied, there must exist a probable effect of substantially lessening competition or tending to create a monopoly *in the United States*. 15 U.S.C. § 18 (1970).

For discussions of this subject, see Graham, Herman & Marcus, Section 7 of the Clayton Act and Mergers Involving Foreign Interests, 23 Stan. L. Rev. 205 (1971); Scott & Yablonski, Transnational Mergers and Joint Ventures Affecting American Exports, 14 Antitrust Bull. 1, 11-16 (1968).

There has likewise been only limited litigation in the foreign area under the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1970) (FTC Act), which prohibits "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." 15 U.S.C. § 45(a)(1) (1970). "Commerce" is defined to include "commerce among the several States or with foreign nations." 15 U.S.C. § 44 (1970).

For a well-known case concerning the extraterritorial application of the FTC Act, see

out a body of law which defines the reach of the Sherman Act with a degree of certainty, at least as to the types of circumstances under which the Act may apply. The area of less certainty is the more practical one, of the extent to which our court decrees should attempt to order acts done abroad, and the extent to which such orders will or can be enforced.

Changes in world trade conditions, bringing on an increase in tariffs and quota restrictions, could finally make competition impossible and bring about the situation envisaged by the court in *United States v. Minnesota Mining & Manufacturing Co.*,¹⁰⁵ making it impossible to export to a particular country or area at a profit so that there would be no American foreign commerce in such area which could be restrained or monopolized.

Crises in international trade can give birth to unexpected measures involving the United States Government in business arrangements which in more settled conditions would never have been suggested. Such measures can in turn influence antitrust enforcement. Unsettled world conditions have even led the United States Government to take steps which have been challenged in court as an unconstitutional attempt to exempt from the antitrust laws the Voluntary Restraint Arrangements on Steel, in the negotiation of which the United States Department of State played an active role.¹⁰⁶ The question of a violation of the Sherman Act was not before the court. Commentators have, however, expressed the view that our antitrust laws apply to this type of restrictive agreement.¹⁰⁷ The fact that such steps are taken is an indication of how international economics could influence enforcement decisions and types of defenses proffered in antitrust suits with international aspects. The Arrangements on Steel led one commentator to remark that "[t]he role played by the Department of State may well, as a practical matter, preclude U.S. Government action against the foreign steelmakers."¹⁰⁸ He did, on the other hand, envisage a possible treble damage suit

Branch v. FTC, 141 F.2d 31 (7th Cir. 1944). See also Ward, *The Federal Trade Commission and Unfair Methods of Competition in Foreign Commerce*, 40 ABA Antitrust L.J. 806, 809 (1971), predicting that "routine Commission fact-gathering activities and other enforcement-related programs involving foreign trade will expand and change, as foreign commerce has developed."

¹⁰⁵ 92 F. Supp. 947 (D. Mass. 1950).

¹⁰⁶ *Consumers Union of U.S., Inc. v. Rogers*, 352 F. Supp. 1319, 1323-24 (D.D.C. 1973). The court there stated that the executive has no authority under the Constitution or acts of Congress to exempt the Voluntary Restraint Arrangements on Steel from the antitrust laws, and that such arrangements are not exempt. Since the question of whether or not a violation of the Sherman Act was present was not before the court, the parties were urged to re-examine their positions in light of the court's memorandum.

¹⁰⁷ Maw, *United States Antitrust Law Abroad—The Enduring Problem of Extraterritoriality*, 40 ABA Antitrust L.J. 796, 801-05 (1971).

¹⁰⁸ *Id.* at 801.

against the foreign steelmakers by an American purchaser of foreign steel whose supply of cheaper foreign steel was cut because of export limitations, and posed the question: "[M]ust the sponsorship giving rise to the defense [of Act of State] be that of the U.S. Department of State rather than that of a foreign government as in *Swiss Watch?*"¹⁰⁹

¹⁰⁹ Id.

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