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THE EXERCISE OF CONCURRENT INTERNATIONAL JURISDICTION: "MOVE WITH CIRCUMSPECTION APPROPRIATE"

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I. INTRODUCTION

Much has been written about the legal bases of jurisdiction, and there have been a number of articles criticizing the assertion of jurisdiction in particular cases or in types of cases.¹ This article will examine the infrequently treated underlying problem of how a State which claims jurisdiction should exercise that jurisdiction in a case where its exercise may conflict with the legitimate jurisdiction of another State.²

One must start with the basic principle that the territorial sovereign has jurisdiction in every case. "It is an essential attribute of the sovereignty of this realm, as of all sovereign independent States, that it should possess jurisdiction over all persons and things within its territorial limits and in all causes civil and criminal arising within these limits."³ This universally recognized principle of international

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¹ E.g., Lenhoff, *International Law and Rules on International Jurisdiction*, 50 *Cornell L.Q.* 5 (1964). An extensive and scholarly discussion of the subject is found in a paper prepared by a distinguished British authority, Dr. F. A. Mann, in which a number of the decisions questioned herein are criticized by him as exceeding the jurisdiction of the United States under international law. Mann, *The Doctrine Of Jurisdiction in International Law*, 1 *Recueil des Cours, Academie de Droit International* 1 (1964).

² See also Falk, *Jurisdiction, Immunities and Act of State: Suggestions for a Modified Approach*, in *Essays on International Law* (1961).

³ *Compania Naviera Vascongado v. S.S. "Cristina"* [1938] A.C. 485, 496-97. This principle has been described by Mr. Justice White as "the deeply imbedded postulate in international law of the territorial supremacy of the sovereign, a postulate that has

law is the foundation upon which all jurisdictional doctrine must be built. Broadly speaking, conflicts arise because other legal principles permit a State legitimately to exercise jurisdiction in cases involving acts committed or situations existing in the territory of another State. Since that other State has jurisdiction as the territorial sovereign, two different States might claim jurisdiction over the same situation. Those jurisdictional principles which might lead to such a conflict and which are pertinent to this discussion are the following:

1. A State has jurisdiction when a constituent element of an offense took place within its territory. This controversial principle, erroneously referred to at times as the "effects doctrine," is frequently invoked by the United States.⁴

2. A State may subject a national to its laws wherever the national himself may be. Mr. Chief Justice Hughes, speaking for the Supreme Court, clearly announced that an American citizen living abroad "continued to owe allegiance to the United States. By virtue of the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country."⁵

3. A ship has the nationality of the State whose flag it flies.⁶ Consequently, while a ship is on the high seas the flag State has exclusive jurisdiction over it and over those on board.⁷ When the ship is within the territorial waters of a foreign sovereign, the flag State can exercise jurisdiction with respect to "all matters of discipline and all things done on board which affected only the vessel or those belonging to her"—sometimes referred to as the "internal affairs" of the ship—provided that these matters "did not involve the peace or dignity of the country, or the tranquillity of the port."⁸

4. Personal jurisdiction over a party may be employed to order the party to act or to cause action in the territory of another State.⁹

been characterized as the touchstone of private and public international law." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 445-46 (1964) (White, J., dissenting).

⁴ [T]he courts of many countries . . . which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there.

The S.S. "Lotus," P.C.I.J., ser. A, No. 10, at 23 (1927).

⁵ *Blackmer v. United States*, 284 U.S. 421, 436 (1932).

⁶ Convention on the High Seas, April 29, 1958 [1962] 13 U.S.T. & O.I.A. 2312, art. 6.

⁷ *Ibid.* See also *Boczek, Flags of Convenience* 157-58 (1962).

⁸ *Wildenhus's Case*, 120 U.S. 1, 12 (1887). In *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963), the Court referred to "the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship," citing *Wildenhus's Case*.

⁹ Other bases of jurisdiction, not pertinent to the present discussion, are the "protec-

The last situation differs from the first three, because in this fourth situation a tribunal issues an *ad hoc* order to bring about certain action abroad, whereas in the other situations general legislation is made applicable to foreign acts. In all four situations, however, there may be a conflict with foreign law or policy.

How can these conflicts be avoided? Certain situations may be governed by a treaty giving one or the other State "primary" jurisdiction.¹⁰ Even in the absence of such a treaty, some foreign authorities take the position that a State may not exercise its jurisdiction in a way that would infringe upon the jurisdiction of the territorial sovereign, and there is some indication in cases that certain of our own courts share this view. This position would certainly minimize unfortunate conflicts and may well become accepted as the rule.¹¹ On the other hand, the Second Restatement of Foreign Relations Law (hereinafter the Restatement) takes the view that jurisdiction is a fundamental attribute of sovereignty, that a State's sovereignty cannot be limited by dogma unless the principle is widely accepted and firmly established, and that there is no principle of law so accepted and established denying a State the exercise of its legitimate jurisdiction, even though such exercise may conflict with the jurisdiction of another sovereign.¹² Accepting the Restatement concept as indicative of the present state of our law, the problem to which this article is addressed is what should be done in practice to alleviate or eliminate the conflicts and hardships that can arise as a result of the exercise of conflicting international jurisdiction.

The problem straddles two disciplines—political science and law—but it has been discussed far more often in legal circles. Quite frequently it arises in the area of antitrust. A number of other countries have antitrust laws and policies diametrically opposed to ours and permit, encourage, or even require that which this country prohibits.

tive principle," *Rocha v. United States*, 288 F.2d 545 (9th Cir.), cert. denied, 366 U.S. 948 (1961), and the "universality principle," *Attorney-General v. Eichmann*, Dist. Ct. Jerusalem, Criminal Case No. 40/61, Dec. 11, 1961, reported in *Oliver, Judicial Decisions*, 56 Am. J. Int'l L. 805, 808-11 (1962). Both of these principles are recognized and followed by the United States. In addition, some other States follow the "passive personality principle." See *Ebb, Regulation and Protection of International Business* 82-84 (1964). For examples of even more extreme doctrines, see *Lenhoff*, *supra* note 1, at 7. These doctrines are not considered legitimate bases of jurisdiction by the United States.

¹⁰ E.g., NATO Status of Forces Agreement, June 19, 1951, [1953] 4 U.S.T. & O.I.A. 1792, art. VII, ¶ 3. A solution involving congressional rather than treaty action was proposed by the Working Group on Antitrust Policy in International Trade of the Committee on International Trade and Investment, Section of International and Comparative Law, American Bar Association. 1963 Proceedings, Sect. Int'l & Comp. L., ABA 70.

¹¹ See *Oppenheim, International Law* § 128 (8th ed. Lauterpacht 1955); *Mann, Anglo-American Conflict of International Jurisdiction*, 13 Int'l & Comp. L.Q. 1460 (1964).

¹² Restatement § 37, comment a (1965); *id.* § 39, comment b.

Therefore, when the United States tries to extend its antitrust laws to render "illegal" acts which were committed abroad—often acts of foreign nationals committed in their own country—the seeds of a serious conflict may have been sown. This subject was the focal point of a widely discussed report given by a committee of the International Law Association at its Tokyo Conference in 1964.¹³ The resolution which was finally adopted by the Association on this subject affirmed that "the actions of States in this field are subject to rules of international law." Significantly, however, it requested its committee not only to define the applicable rules of law but also to recommend "practical methods for eliminating, reducing or resolving conflicts between States arising out of the extraterritorial application of such legislation."¹⁴ The International Law Association wisely stressed the practical in seeking a workable solution.

The American Law Institute, on the other hand, has stated its solution, or partial solution, as a *principle of law*, set forth in black letter dogma. Section 40 of the Restatement provides:

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is *required by international law* to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as

- (a) vital national interests of each of the states,
- (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
- (c) the extent to which the required conduct is to take place in the territory of the other state,
- (d) the nationality of the person, and
- (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state. (Emphasis added.)

It is an underlying premise of this provision that both States have jurisdiction. Section 37 of the Restatement declares that "a state having jurisdiction . . . may exercise [it] . . . notwithstanding the fact that another state also has jurisdiction, except as otherwise

¹³ Report of Fifty-First Conference, Int'l L. Ass'n 348 (Tokyo 1964).

¹⁴ Id. at xxix. The corresponding resolution, adopted in 1966, asked the committee to propose "new techniques or procedures for the avoidance or resolution of such disputes." Advance Report by the American Branch of the Resolutions Adopted at the Fifty-Second Conference, Int'l L. Ass'n 5 (Helsinki 1966).

provided by the rules stated in § 40. . . ." This seems to mean that a State which has jurisdiction may exercise it only if it complies with the legal rules set forth in section 40; that if a State fails "to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light" of the enumerated factors, it has violated section 40, and is, therefore, exercising its jurisdiction illegally. Since a right of the other State is thus infringed, the latter has an international claim which could be prosecuted through diplomatic or perhaps legal channels against the offending State. Such a result is, to say the least, extremely novel. No authority is cited to support this approach. The cases referred to in the Reporters' Notes on the section deal with considerations of comity, fairness, and practicality rather than law. It would seem more in accord with the precedents of international law and the realities of international relations and judicial procedures to say, not that "each state is required by international law" to give consideration to such matters, but that each State *should* consider them, in the interests of maintaining harmony in international relations, preventing unjust hardship on parties, and avoiding the futile and injudicious act of issuing unenforceable orders.

Regardless of whether section 40 should state law or reflect practical policy, its enumeration of the factors to be considered seems woefully deficient. Although it mentions the need to consider whether there will be hardship on a party and whether the desired result can be achieved, it fails to require consideration of the broad problem of whether there will be possible international complications arising from the infringement of another's sovereignty. Section 40 speaks only of two peripheral aspects of the problem—the nationality of the person, and the place where an act to be required in the future will take place. True, it allows consideration of whether the vital national interests of the State are involved, but this would be a very rare case indeed. Furthermore, section 40 deals only with the situation where two States impose conflicting *requirements* of law. The problem is just as real, however, when a statute or a judicial decision of State *A* declares illegal an act done in State *B* by a national of State *B* that was perfectly legal there and quite possibly encouraged by State *B* at the time it was done, even though it may not have been required by law. There is yet another facet that has been overlooked in the drafting of section 40. A state may have certain deeply rooted policies or customs, infringement of which can touch a sensitive nerve of the sovereign and cause perhaps a more severe reaction than infringement of its law.

The approach to be followed in this article involves an examination and analysis of situations that have arisen in the past, in order

to see what considerations influenced the decision makers in exercising their discretion and, in some cases, what considerations should have influenced them. The techniques used to try to avoid conflict will be noted, and their effectiveness discussed. The philosophy and rationale of the decision, rather than the actual holdings, will be stressed. On the basis of such analysis, suggestions will be made as to the most appropriate and practical solutions to the problem.

In considering the situations presented below, two points should be borne in mind. First, the discussion will not involve choice-of-law problems or other matters within the realm of conflict of laws. In choice-of-law questions, the issue is whether the laws of one jurisdiction or those of another should be applied to govern the disposition of the case. In the cases to be discussed hereafter, the law to be applied, if any is to be applied, is American law, and the issue is whether, and how, to apply it. Second, except as otherwise made clear by the context, references to jurisdiction do not relate to "personal" jurisdiction over a party in order to adjudicate a dispute, but rather to "legislative" jurisdiction to apply our law or orders to a particular act or situation.¹⁵

II. EXTRATERRITORIAL APPLICATION OF STATUTES

A. *Military Base Cases*¹⁶

In successive terms, the Supreme Court adopted two contradictory approaches to the question of whether local legislation which limited the working hours of laborers should be applied to our military bases located abroad. The two approaches demonstrate the contrasting philosophies which have persisted in our courts to the present day, one of which tends to provoke international repercussions, while the other deliberately avoids them.

*Vermilya-Brown Co. v. Connell*¹⁷ raised the question whether the requirement of the Fair Labor Standards Act, which provided for maximum hours of work in interstate and foreign commerce,¹⁸ applied to labor on our military base at Bermuda. The act expressly applied to the commerce of "any . . . possession of the United States."¹⁹ The narrow question required the construction of the word "possession,"

¹⁵ Restatement § 7(2) states: "A state does not have jurisdiction to enforce a rule of law prescribed by it unless it had jurisdiction to prescribe the rule." It is in the sense of "jurisdiction to prescribe the rule" (i.e., "legislative jurisdiction") that the term "jurisdiction" is generally being used herein, as distinguished from jurisdiction over a party (i.e., "personal jurisdiction"). As to the latter, see von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121 (1966).

¹⁶ See generally Green, *Applicability of American Laws to Overseas Areas Controlled by the United States*, 68 Harv. L. Rev. 781 (1955).

¹⁷ 335 U.S. 377 (1948).

¹⁸ 52 Stat. 1063 (1938), as amended, 29 U.S.C. § 207 (1964).

¹⁹ 52 Stat. 1061 (1938), as amended, 29 U.S.C. § 203(c) (1964).

but the broader question was whether Congress meant to extend the standards of the act to labor employed on military bases abroad. The lease of the base in question had given the United States "all the rights, power and authority within the Leased Areas which are necessary for the establishment, use, operation and defence thereof, or appropriate for their control. . . ." ²⁰ At the time of the enactment of the Fair Labor Standards Act, Congress had not considered its application to our overseas military bases. In the absence of any discernible congressional intent in this matter, the Court reached the unnecessary and unfortunate conclusion that "it is difficult to formulate a boundary to [the act's] . . . coverage short of areas over which the power of Congress extends. . . ." ²¹ It held that the Bermuda base should be deemed a "possession" of the United States, and that the act applied there. ²²

Mr. Justice Jackson wrote a strong dissenting opinion in which three other Justices joined. In his dissent, he contended that the United States had not acquired, in Bermuda, "such responsibilities as would require us to import to those islands our laws, institutions and social conditions beyond the necessities of controlling a military base." ²³

The following year, the Court had a very similar case, but used a different and much wiser approach. *Foley Bros. v. Filardo* ²⁴ raised the question whether the Eight Hour Law applied to work done on American military bases in Iraq and Iran pursuant to a contract of the United States. This law provided that "every contract to which the United States . . . is a party . . . shall contain" provisions specifying an eight-hour working day. ²⁵ In holding that the Eight Hour Law did not apply to contracts for work in those areas, the Court used a very significant approach.

The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . . is a valid approach whereby unexpressed congressional intent may be ascertained. It is based on the assumption that Congress is primarily concerned with domestic conditions. We find nothing in the Act itself, as amended, nor in the legislative history, which would lead to the belief that

²⁰ 55 Stat. 1560 (1941).

²¹ 335 U.S. at 389.

²² The case treated the statute as regulating the actions of our citizens as employers when abroad as well as here, even though those employed and controlled by the act might be aliens. *Id.* at 381.

²³ *Id.* at 394.

²⁴ 336 U.S. 281 (1949).

²⁵ Eight Hour Law, ch. 174, 37 Stat. 137 (1912).

Congress entertained any intention other than the normal one in this case. . . .

. . . An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose.²⁶

The Court distinguished *Vermilya-Brown*, noting that it only involved construction of the term "possession." Mr. Justice Frankfurter wrote a concurring opinion, joined by Mr. Justice Jackson, in which he said that *Vermilya-Brown* should be overruled. He noted that in an application for rehearing of that case, the Secretary of the Army had pointed out that a number of countries had a scale of maximum wages with which our minimum-wage scale might well conflict.²⁷

In *Vermilya-Brown*, therefore, the Court had adopted an approach which, by importing American labor standards into a British Crown Colony where labor conditions and policies were entirely different, had created the danger of international complications. *Foley Bros.*, on the other hand, took the view that congressional legislation is meant to apply only within the territorial jurisdiction of the United States unless a contrary intent is evident. In particular, as that case clearly indicates, courts should not impute to Congress an intent to extend our own social and economic legislation to control aliens in foreign territory.

B. *Seamen's Acts Cases*²⁸

Although the Seamen's Acts cases are not new, they are presented here because they state principles which should have been followed later in other areas. They involve the question whether these statutes applied to foreign vessels in our ports, and whether they were intended to affect transactions which had occurred prior to the ship's

²⁶ 336 U.S. at 285-86. As the Secretary of State said only a year or two ago: "We have neither the authority nor the power—and I hope not the desire—to regulate the affairs of the rest of the world." Address by Dean Rusk, George Washington University, 52 Dep't State Bull. 1030, 1031 (1965).

²⁷ A third case involving our military bases overseas arose the same year. *United States v. Spelar*, 338 U.S. 217 (1949), raised the question whether our Newfoundland base was a "foreign country" for the purposes of the Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.), which excluded from its coverage claims arising in a "foreign country." The Supreme Court, while refusing to overrule *Vermilya-Brown*, distinguished it by saying that that case "postulates that the executive agreement and leases effected no transfer of sovereignty," 338 U.S. at 221, and it held that the Newfoundland base was a foreign country. It thus confirmed that *Vermilya-Brown* had imported our labor legislation into a foreign country having a different sovereignty. Again Justices Jackson and Frankfurter wrote concurring opinions castigating the Court for its position in *Vermilya-Brown*.

²⁸ On the subject of application of our laws to foreign ships and their personnel, see generally Raymond, *The Application of Our Laws to Foreign Merchant Ships*, 67 Dick. L. Rev. 289 (1963).

entry there. As noted above,²⁹ it has been the practice, if not the law, for the territorial sovereign to refrain from exercising jurisdiction over such vessels when the matter related only to the internal affairs of the ship. "A merchant vessel . . . is deemed to be a part of the territory of [the flag State] . . . when in navigable waters within the territorial limits of another sovereignty,"³⁰ even though the territorial sovereign may exercise its own jurisdiction if disturbances on the vessel affect the peace of the port.

The Dingley Act at one time contained the following provisions:

(a) It shall be . . . unlawful in any case to pay any seaman wages . . . in advance of the time when he has actually earned the same. . . . [Such payment] . . . shall in no case . . . absolve the vessel . . . from full payment of wages after the same shall have been actually earned. . . . (e) This section shall apply as well to foreign vessels as to vessels of the United States. . . .³¹

In *Patterson v. Bark Eudora*,³² this section was held applicable, because of its express language, to a British ship which was advancing payments to seamen in one of our ports. However, in *Sandberg v. McDonald*,³³ when a seaman on a foreign vessel had received an advance abroad, according to his contract, and tried to collect the amount again here, the Court significantly rejected the claim:

Conceding . . . that Congress might have legislated to annul such contracts as a condition upon which foreign vessels might enter the ports of the United States, it is to be noted, that such sweeping and important requirement is not found specifically made in the statute. Had Congress intended to make void such contracts and payments a few words would have stated that intention, not leaving such an important regulation to be gathered from implication.³⁴

Thereafter Congress amended the statute to provide that advance payment of wages, "whether made within or without the United States," should not absolve the vessel from full payment of the wages after they were earned.³⁵ Nevertheless, in *Jackson v. S.S. "Archi-*

²⁹ See text accompanying note 8 *supra*.

³⁰ *United States v. Flores*, 289 U.S. 137, 155-56 (1933).

³¹ Dingley Act § 10, 23 Stat. 55, 56 (1884), 46 U.S.C. §§ 599(a), (e) (1964).

³² 190 U.S. 169 (1903).

³³ 248 U.S. 185 (1918).

³⁴ *Id.* at 195. For a case where such a condition was written into the statute, see *Strathearn S.S. Co. v. Dillon*, 252 U.S. 348 (1920). See also *Bickel, Strathearn S.S. Co. v. Dillon—An Unpublished Opinion by Mr. Justice Brandeis*, 69 Harv. L. Rev. 1177, 1179 (1956).

³⁵ 41 Stat. 1006 (1920), as amended, 46 U.S.C. § 599(a) (1964).

medes," the Court, again refusing to apply the act to foreign vessels for advances made abroad, stated: "The amendment . . . made no reference whatever to foreign vessels;—left unchanged and in full force all of paragraph (e) which . . . as held in the *Sandberg* case, indicated that the prohibition . . . was intended to apply to foreign vessels only while in waters of the United States"³⁶ Once again there was a movement to amend the act further to cover the point, but there was "a storm of diplomatic protest," and the bill was killed.³⁷ There is clearly a limit of tolerance beyond which other nations will offer protest and, possibly, retaliation when the United States tries to extend its laws to situations deemed by those nations to be more properly within their own jurisdiction.

In Seamen's Acts cases where the legislative intent was unmistakably clear, the courts applied the acts to foreign vessels which were in our ports. Quite properly, however, they have resisted any interpretation which extended the coverage of the acts to matters arising abroad unless it was required by the unambiguous language of the statute. It has become clear that when there is an extension, or threatened extension, of United States jurisdiction to matters that not only are within the jurisdiction of another State but which that State believes are of primary concern to it, such action or proposed action can disturb international relations and result in diplomatic protests and other pressures in resistance.

C. Prohibition Act Cases

The National Prohibition Act proscribed "transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes. . . ."³⁸ In *Cunard S.S. Co. v. Mellon*,³⁹ it was held that this provision made it illegal for foreign ships to enter our territorial waters and ports if, as was customary, they carried liquor to be sold or dispensed to passengers and crew or as cargo for other ports, though concededly it could not be sold, dispensed, or unloaded within our jurisdiction. This decision provoked a flood of diplomatic protests. As the only maritime State with a prohibition policy, the United States was inevitably at odds with the rest of the international maritime community when it forbade their ships to enter our waters with liquor on board. The matter was finally resolved by a series of treaties with the countries involved, treaties which contained provisions permitting their vessels

³⁶ 275 U.S. 463, 470 (1928).

³⁷ *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 146 (1957).

³⁸ National Prohibition Act § 1, 40 Stat. 1050 (1917).

³⁹ 262 U.S. 100 (1923).

passing to or from our ports, or passing through our territorial waters, "to have on board alcoholic liquors listed as sea stores or as cargo destined for a foreign port, provided that such liquor is kept under seal while within the jurisdiction of the United States."⁴⁰ Such treaties, of course, superseded any prior inconsistent provisions.⁴¹

Two comments seem warranted. In the first place, Congress should have been sensitive enough to have anticipated the foreign reaction, and should have made a specific exception similar to that later incorporated in the treaties. This would have in no way infringed upon the purposes to be achieved. Second, the Court in *Cunard* should have found a way to avoid this interference with the internal affairs of a foreign ship. As the dissenting Justice stated:

[I]nterference with the purely internal affairs of a foreign ship is of so delicate a nature, so full of possibilities of international misunderstandings and so likely to invite retaliation that an affirmative conclusion in respect thereof should rest upon nothing less than the clearly expressed intention of Congress to that effect, and this I am unable to find in the legislation here under review.⁴²

D. Antitrust Cases⁴³

The earliest significant case in the antitrust field is the famous *American Banana Co. v. United Fruit Co.*,⁴⁴ in which the opinion of the Court was delivered by Mr. Justice Holmes. The parties were competing American corporations. The Sherman Act rendered illegal "every contract . . . in restraint of trade or commerce . . . with foreign nations."⁴⁵ In holding that it was inapplicable to the acts of the defendant in Costa Rica, the Court made this very important pronouncement:

In the first place the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other states.

. . . .

[While civilized] . . . countries may treat some relations

⁴⁰ See *Cook v. United States*, 288 U.S. 102, 118 (1933). See also [1923] 1 Foreign Rel. U.S. 133 (1938); 1 Hackworth, *Digest of International Law* 674-79 (1940).

⁴¹ *Cook v. United States*, supra note 40, at 118-19.

⁴² *Cunard S.S. Co. v. Mellon*, supra note 39, at 133 (Sutherland, J., dissenting).

⁴³ For an excellent treatment of this subject, see generally Brewster, *Antitrust and American Business Abroad* (1958). For another excellent book, giving the Government's position, by one having had long experience with the Antitrust Division of the Department of Justice, see Fugate, *Foreign Commerce and the Antitrust Laws* (1958). For a more complete bibliography of works dealing with the extraterritorial application of our antitrust laws, see Report, supra note 13, at 492.

⁴⁴ 213 U.S. 347 (1909).

⁴⁵ 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1964).

between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive . . . the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. . . . For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.

. . . .

The foregoing considerations 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. "All legislation is *prima facie* territorial."⁴⁶

Granted that Mr. Justice Holmes oversimplified the case when he rather casually disposed of jurisdiction over nationals by calling it "the old notion of personal sovereignty," his approach to the problem of statutory construction was nevertheless very sound. The rule he applied—that "all legislation is *prima facie* territorial"—had been established almost a century earlier in *The Apollon*,⁴⁷ and had also been used in *Foley Bros.* It is a salutary rule that is easy to apply. It is sound and logical and is flexible enough to permit appropriate exceptions. Why it has not been universally adopted as the starting point in the construction of statutes is difficult to understand.

Two years after *American Banana*, in *United States v. American Tobacco Co.*,⁴⁸ the Court held that the Sherman Act applied to an American company which had made a restrictive agreement abroad with foreign companies. With no discussion of the issue, the Court applied the act extraterritorially. This apparent departure from *American Banana* deserved careful consideration and discussion by the Court. The lack of this discussion can only be attributed to a failure of counsel properly to stress the point and to oversight on the part of the Court. It leaves an unfortunate gap in the development of our antitrust doctrines.

⁴⁶ 213 U.S. at 355-57.

⁴⁷ 22 U.S. (9 Wheat.) 362 (1824). The Court there stated: "The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens And however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the legislature have authority and jurisdiction." *Id.* at 370.

⁴⁸ 221 U.S. 106 (1911).

Extraterritorial application of the Sherman Act was confined to agreements of our own nationals until 1945.⁴⁹ In that year, the Second Circuit Court of Appeals decided *United States v. Aluminum Co. of America*,⁵⁰ which represents the extreme limit to which the courts have gone in applying our statutes extraterritorially. It is submitted that there was no legitimate basis for the assertion of jurisdiction;⁵¹ however, for the present it shall be assumed that there was the necessary jurisdiction, and attention will be focused on the question whether the court wisely exercised its discretion when it construed the Sherman Act so as to encompass the *Alcoa* case.

The *Alcoa* decision held a foreign corporation responsible for contracts, made abroad with other foreign corporations, which established for each contracting party a production quota for the aluminum it would produce abroad. The court justified its action on the ground that the production quotas were intended to affect and did affect our import trade.⁵² The decision applied the statute to foreign corporations acting abroad, even though such corporations are not mentioned in the act. This contrasts sharply with the *Sandberg* and *Jackson* cases discussed above, where the statutory provision expressly applied to "foreign vessels" but was construed as governing such vessels only while within our territorial jurisdiction.⁵³

⁴⁹ For a review of the antitrust cases involving a foreign aspect up to 1945, see Oseas, *Antitrust Prosecutions of International Business*, 30 Cornell L.Q. 42 (1944).

⁵⁰ 148 F.2d 416, 439-45 (2d Cir. 1945) (on certification from the United States Supreme Court for failure of quorum of qualified Justices).

⁵¹ See Raymond, *A New Look at the Jurisdiction in Alcoa*, 61 Am. J. Int'l L. 558 (1967).

⁵² It seems very doubtful that Congress, at the time of the enactment of the Sherman Act, gave any thought to whether the act should be applied to acts of foreign corporations committed abroad. See Dean, *Extraterritorial Application of Antitrust Laws*, 1957 Proceedings, Sect. Int'l & Comp. L., ABA 43, 49. In interpreting the act on this point, the *Alcoa* court said:

[T]he only question open is whether Congress intended to impose the liability, and whether our own Constitution permitted it to do so: as a court of the United States, we cannot look beyond our own law. Nevertheless, it is quite true that we are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers We should not impute to Congress an intent to punish all of whom its courts can catch, for conduct which has no consequences within the United States On the other hand, it is settled law—as [the defendant] . . . itself agrees—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 the state reprehends Almost any limitation of the supply of goods in Europe . . . may have repercussions in the United States if there is trade between the two [W]e shall assume that the Act does not cover agreements, even though intended to affect imports or exports, unless its performance is shown actually to have had some effect upon them.

148 F.2d at 443-44. The court also said that the agreements "were unlawful, though made abroad, if they were intended to affect imports and did affect them." *Id.* at 444.

⁵³ See text accompanying notes 31-36 *supra*.

There was no American party involved in this aspect of the case, and no act took place within our territory, as the court stated the case. There was not even a positive effect in this country, but only a possible negative effect—a potential failure to have as much aluminum shipped here by the defendant and those with whom it had contracted as might otherwise have been voluntarily shipped. This, of course, was a situation in which we could not *require* any shipment of aluminum. It would seem that there could not be a more obvious case of reaching out to deal with a matter that was clearly of primary interest to other States—those States where the agreements were made, those States where they were to be performed and where the limitation on production brought about by the quotas would become effective, and those States of which the parties to the agreements were nationals. In all those States, the agreements were perfectly legal and enforceable.

The *American Tobacco* case had started the departure from the sound precedent of *American Banana*. By employing the unfortunate philosophy of *Vermilya-Brown*, *Alcoa* greatly extended this departure and interpreted the antitrust laws as applying to matters obviously reached only at the most extreme limits of our legitimate legislative jurisdiction if not, as many believe, beyond them. The wisdom of so doing was, to say the least, very dubious.

There is a further objection to an exercise of jurisdiction based, as it was, solely on the claim of adverse effect on our foreign commerce. In this world of competitive international trade, there is seldom anything that benefits the commerce of one country that does not adversely affect the commerce of another. Something more than merely an adverse effect upon our foreign commerce should be shown if our laws are to govern extraterritorial activities of a foreign corporation. It should be remembered that if this country establishes such a principle, it can be invoked by other countries against us.⁵⁴

Assume that an American company which had previously been shipping certain goods to Canada, among other countries, made a contract to increase its production of such goods and ship all of its output to a concern in Germany—an act which would be beneficial to our foreign commerce, and a contract which was perfectly legal both in this country and in Germany. How would this country react to a decree of a Canadian court ordering the American company, over which it had secured personal jurisdiction, to cancel the contract, assigning as its reason the fact that the transaction adversely affected the foreign commerce of Canada? The doctrine in the *Alcoa* case would justify foreign legislation subjecting United States nationals to criminal and civil liabilities for such adverse effects. This country could well fall

⁵⁴ *Lauritzen v. Larsen*, 345 U.S. 571, 582 (1953).

victim to an unwise, if not unsound, legal doctrine of its own making.⁵⁵

Fortunately there were no serious international repercussions from *Alcoa*, but it served as the precedent for extreme applications of our antitrust laws in later cases, some of which instigated strenuous objections by foreign governments. *United States v. Watchmakers of Switzerland Information Center, Inc.*⁵⁶ was an antitrust suit based on contracts between Swiss corporations and other foreign corporations, made and to be performed in Switzerland and other European countries. The Swiss Government, as *amicus curiae*, made the following representations in the case:

This case is of utmost concern to the Swiss Confederation. The attempt is here being made to apply the anti-trust laws of the United States to hold illegal action taken (a) in Switzerland, (b) at the behest and with the encouragement of the Swiss Confederation and in conformity with Swiss law, (c) by the Swiss watch industry, (d) which is both government regulated and affected with a public interest. This action of the Swiss watch industry does not discriminate in any way against the United States and is not aimed only at the United States; rather this action affects the world at large. The attempt is also being made to apply the anti-trust laws to hold illegal contracts (a) made by the Swiss watch industry with watch manufacturers in Great Britain, France and allegedly in Germany and (b) which do not involve any performance in the United States.

⁵⁵ Cf. Restatement § 18, illustration 8. The German Cartel Law, which became effective on January 1, 1958, provides in § 98(2): "[T]his law applies to all restraints of competition, which have effect within the area to which the law applies, even if they are caused from outside of such area." Report, *supra* note 13, at 447. It appears that our *Alcoa* doctrine may already have been invoked by another sovereign in a way that might well plague us.

Perhaps it is significant that *Alcoa* was decided in 1945, and that a mere three years later the Supreme Court decided *Vermilya-Brown*. There seems to have existed in that immediate post-war period a judicial approach to statutory construction that invoked the literal interpretation of the words used; if there were no exceptions spelled out, it was assumed that Congress intended to exert its power to cover the greatest area legally possible. Perhaps this approach was the result of efforts by the courts to construe the war-time powers of the President and the Congress. Their attention had been focused on the extent to which governmental powers could be carried, rather than on the normal peace-time exercise of them. As already noted, in 1948, probably because of second thoughts on the question, the Supreme Court in *Foley Bros.*, though confronted with statutory language fully as broad as that of the Sherman Act (the Sherman Act said that "every contract . . . in restraint of trade" was illegal; the Eight Hour Law said that "every contract . . . to which the United States is a party" shall contain certain provisions), nevertheless returned to the principle of *American Banana*, that legislation is *prima facie* territorial. But *Alcoa* and *Vermilya-Brown* have not yet been expressly overruled.

⁵⁶ 1963 Trade Cas. ¶ 70600 (S.D.N.Y. 1962).

Such application, among other things, would infringe Swiss sovereignty, would violate international law and would be harmful to the international relations of the United States.⁵⁷

The court's reaction to this can be seen in the following extract:

If, of course, the defendants' activities had been required by Swiss law . . . an American court would have . . . 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 In the absence of direct foreign governmental action compelling the defendants' activities, a United States court may exercise its jurisdiction as to acts and contracts abroad, if, as in the case at bar, such acts and contracts have a substantial and material effect upon our foreign and domestic commerce.⁵⁸

The act-of-State doctrine prohibits our courts from examining the validity of acts taken by a foreign government within its territory.⁵⁹ It "rests . . . upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'"⁶⁰ Whether the acts were *taken by*, were *required by the law of*, were *taken at the behest of*, or even if they were merely *encouraged and regulated by* the foreign government, it would seem to make little difference as a matter of principle. For our courts to declare that acts taken by aliens in their own country are illegal when the acts were required, called for, or encouraged and regulated by their government is to imperil friendly international relations.

International protests also arose from *In the Matter of Grand Jury Investigation of the Shipping Indus.*,⁶¹ in which a grand jury was investigating the effect upon the commerce of the United States of the shipping trade of foreign corporations between Mexican and Japanese ports. The Department of State received diplomatic protests from nine nations and transmitted them to the court.⁶² As to the con-

⁵⁷ Report, *supra* note 13, at 575.

⁵⁸ 1963 Trade Cas. ¶ 70600, at 77456-57.

⁵⁹ Restatement § 41.

⁶⁰ *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-04 (1918), quoted and followed in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 417-18 (1964).

⁶¹ 186 F. Supp. 298 (D.D.C. 1960). See text accompanying notes 114 and 115 *infra*.

⁶² Report of Fifty-First Conference, Int'l L. Ass'n 577-78 (Tokyo 1964).

tention that the inquiry was improperly directed toward traffic not involving American ports, the court noted that American cotton was being shipped from Mexican ports, and that members of the congressional subcommittee considered this violative of the Sherman Act, since the foreign commerce of this country was clearly "affected."⁶³ The court cited *Alcoa* as authority for the proposition that since traffic by foreign carriers between Mexican and Japanese ports "affects" American foreign commerce, questions under the Sherman Act might be raised.

The decisions in these last two cases are subject to all the objections noted with respect to *Alcoa*. When the United States declares illegal a foreign contract between two foreign corporations, a contract which related only to action to be taken abroad in countries where it was perfectly legal, when it declares illegal arrangements made by a foreign common carrier by water, for transportation between two foreign ports, which arrangements were perfectly legal under the laws of the State of registry of the ship and under those of the ports involved, when it thus injects itself into affairs clearly within the jurisdiction of other States and of primary interest to them, it must surely cause international ill-will, protest, and ultimately retaliation.

E. *Lanham Act Cases*⁶⁴

The Lanham Act provides that "any person who shall . . . in commerce," infringe a registered trademark should be subject to the liabilities provided; "commerce" is defined to include "all commerce which may lawfully be regulated by Congress."⁶⁵ In *Steele v. Bulova Watch Co.*,⁶⁶ the defendant Steele, an American citizen, was charged with infringing the plaintiff's trademark which was registered in the United States but not in Mexico. Steele produced watches bearing the plaintiff's trademark which Steele had registered in Mexico; these watches were made and sold in Mexico. It was alleged that the defendant's activities adversely affected the plaintiff's business in the United States. The Supreme Court, however, did not rely on the "effects" doctrine but stated that "Congress in prescribing standards of conduct for American citizens may project the impact of its laws beyond the territorial boundaries of the United States."⁶⁷ The Court held that there was no conflict sufficient to support the argument that relief would "impugn foreign law."

This case must be considered along with *Vanity Fair Mills, Inc. v.*

⁶³ 186 F. Supp. at 311-14.

⁶⁴ See generally Oliver, Extraterritorial Application of United States Legislation Against Restrictive or Unfair Trade Practices, 51 Am. J. Int'l L. 380 (1957).

⁶⁵ 60 Stat. 437, 443 (1946), as amended, 15 U.S.C. §§ 1114(1)(a), 1127 (1964).

⁶⁶ 344 U.S. 280 (1952).

⁶⁷ Id. at 282.

*F. Eaton Co.*⁶⁸ In *Vanity Fair* the defendant was a Canadian corporation which held a Canadian-registered trademark and was using it in Canada. It was alleged that the mark infringed the plaintiff's mark registered in the United States, and that, in the language of the statute, its use "had a substantial effect on 'commerce which may lawfully be regulated by Congress.'" The Second Circuit pointed out that the case differed from *Steele* in two significant respects: the defendant was a foreigner, and it had a duly registered trademark in the country where the infringement took place.⁶⁹ The judges felt "that the rationale of the Court [in *Steele*] was so thoroughly based on the power of the United States to govern 'the conduct of *its own citizens* . . . in foreign countries *when the rights of other nations or their nationals are not infringed*,' that the absence of one of the above factors might well be determinative and that the absence of both is certainly fatal."⁷⁰

The court then dealt with the argument of "effect on our commerce"—the *Alcoa* principle. The act itself, the court said, gives "almost no indication of the extent to which Congress intended to exercise its power in this area"; there was, however, indication of "Congressional regard for the basic principle of the International Conventions, i.e., equal application to citizens and foreign nationals alike of the territorial law of the place where the acts occurred."⁷¹ It was held that the act was not to be given "the extreme interpretation urged upon us here."⁷² To have held otherwise would obviously have caused international complications, since an American court would have held a Canadian corporation liable in damages for having used, in Canada, a trademark which the Canadian Government had said could be used by it; the court would also have issued an injunction preventing its future use by the corporation except at the risk of being found in contempt of the American court. These decisions were a salutary retreat from the extreme position of the antitrust cases and were calculated to obviate the difficulties caused by those cases.⁷³

⁶⁸ 234 F.2d 633 (2d Cir.), cert. denied, 352 U.S. 871 (1956).

⁶⁹ In *Steele*, Mexico had revoked the trademark before the Supreme Court heard the case.

⁷⁰ 234 F.2d at 642-43.

⁷¹ *Id.* at 642.

⁷² Compare *Ramirez & Feraud Chili Co. v. Las Palmas Food Co.*, 146 F. Supp. 594 (S.D. Cal. 1956), *aff'd per curiam*, 245 F.2d 874 (9th Cir. 1957), cert. denied, 355 U.S. 927 (1958). See Ebb, *Regulation and Protection of International Business* 384 (1964).

⁷³ There have been other types of cases in which courts have refused to give our statutes extraterritorial application to foreigners. See, e.g., *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957) (Taft-Hartley Act); *Air Line Dispatchers Ass'n v. National Mediation Bd.*, 189 F.2d 685 (D.C. Cir.) (Railway Labor Act), cert. denied, 342 U.S. 849 (1951); *Ferraioli v. Cantor*, 1966 Fed. Sec. L. Rep. ¶ 91615 (S.D.N.Y. 1965) (Securities Exchange Act).

F. *Jones Act Cases*

Two Supreme Court cases decided under the Jones Act are the most helpful cases of all. The opinions in these cases develop a philosophy and point out certain considerations that should guide all decisions involving conflicting jurisdiction.

The Jones Act provides that "any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law" with a jury trial instead of the usual admiralty proceeding.⁷⁴ *Lauritzen v. Larsen*⁷⁵ posed the question whether this procedure could be invoked by a Danish seaman who was injured on a Danish ship while in a Cuban harbor. He contended that the statute gave the right to "any seaman" and could be invoked in a trial in this country. He further contended that there was a basis for applying the American law in this case because of the frequent and regular contacts of the ship with ports of the United States. *Romero v. Int'l Terminal Operating Co.*⁷⁶ raised a similar question, but the injury was inflicted within the territorial jurisdiction of the United States.

In holding that the act could not be invoked in *Lauritzen*, the Court used this very significant language:

If [the Jones Act be] read literally, Congress has conferred an American right of action which requires nothing more than that plaintiff be "any seaman who shall suffer personal injury in the course of his employment."

. . . .

While some [maritime statutes] have been specific in application to foreign shipping and others in being confined to American shipping, many give no evidence that Congress addressed itself to their foreign application, [leaving it] . . . to be judicially determined from context and circumstance. By usage as old as the Nation, such statutes have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law.

. . . .

"[I]f any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enacting. That is a rule based on international law by which one sovereign power is bound to respect the subjects

⁷⁴ 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1964).

⁷⁵ 345 U.S. 571 (1953).

⁷⁶ 358 U.S. 354 (1959).

and the rights of all other sovereign powers outside its own territory." Lord Russell of Killowen in *The Queen v. Jameson*, [1896] 2 Q.B. 425, 430.⁷⁷

In *Romero*, the Court disposed of the contention that the law of the place of the injury should govern by pointing out that such a rule "does not fit the accommodations that become relevant in fair and prudent regard for the interests of foreign nations in the regulation of their own ships and their own nationals, and the effect upon our interests of our treatment of the legitimate interests of foreign nations."⁷⁸ In this can be seen the basic philosophy behind the rule that the law of the flag State should govern the internal affairs of a ship in foreign waters, as well as the recognition of the need to respect the legitimate interests of the foreign government in order that our interests may be respected abroad. The latter consideration was presented from a somewhat different angle in *Lauritzen*, where the Court said:

[I]n dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contract which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.⁷⁹

A truly wise approach to the entire problem of exercise of conflicting international jurisdiction, stated as only Mr. Justice Frankfurter could state it, appears in the *Romero* case: "The controlling considerations are the interacting interests of the United States and of foreign countries, and in assessing them we must move with the circumspection appropriate when this Court is adjudicating issues inevitably entangled in the conduct of our international relations."⁸⁰

III. USE OF PERSONAL JURISDICTION TO COMPEL ACTION ABROAD

Discussion now focuses on an issue peculiarly within the competence of the judiciary or a regulatory agency. This is the problem that arises when the court or agency has personal jurisdiction over a party and uses its power to order the party to take certain action abroad.

In the cases discussed up to this point, involving the extraterritorial applicability of our statutes, the court in some instances could

⁷⁷ 345 U.S. at 576-78.

⁷⁸ 358 U.S. at 384.

⁷⁹ 345 U.S. at 582.

⁸⁰ 358 U.S. at 383.

be limited by the language of the statute itself, which, if specifically framed to that end, could demand its extraterritorial application. In the cases to be discussed in this section, the issue before the tribunal was whether, and if so how, to exercise its power to enjoin or command future specific acts abroad by a party over whom it had personal jurisdiction. Statutory language and legislative history, which a court might feel required application of a statute to a specific fact situation, do not dictate the details of judicial discretion in ordering future action. Such orders can, and should, be tempered in the light of possible international complications, hardship on private parties, and the limits of practicality. Surprisingly, however, it is in this field of *ad hoc* orders to take action abroad where the courts and regulatory agencies have provoked the most serious diplomatic complaints and retaliative action by the foreign governments whose sovereignty has been affronted.

A. *Extreme Antitrust Orders*

The most notorious case, not only in this particular area, but also in the whole field of the exercise of conflicting international jurisdiction, was the case of *United States v. Imperial Chem. Indus., Ltd.*⁸¹ The court had personal jurisdiction over the American defendant, Du Pont, and over the British defendant, I.C.I. It found that Du Pont, I.C.I. and others had violated our antitrust law by agreeing to divide the territory of the world for purposes of selling nylon. Under the agreement, Du Pont had assigned all British exploitation rights in its nylon patents to I.C.I., which itself thereafter agreed to grant an exclusive license to another British corporation, British Nylon Spinners, Ltd. (Spinners), that was not within the jurisdiction of the American court. The court felt that it had to end the allocation of territory to maintain competition in world markets, and therefore that it had to get Du Pont back into the nylon business in Great Britain. To accomplish this, the court ordered cancellation of the patent assignments to I.C.I., and reversion of the British patent rights to Du Pont. This would, of course, prevent I.C.I. from giving Spinners the exclusive license as their contract required. Although the court ordered Du Pont to make the patents generally available for licensing in Great Britain, the effect of the order as a whole would be to destroy the exclusive character of the patent rights which Spinners had secured by its contract. The contract was legal and enforceable in England, where it was made and to be performed. The American court order thus caused Spinners hardship by depriving it of its rights without having had its day in court, and by forcing Spinners to bring suit if it wished to avoid the effect of the American court order. Of course, the order

⁸¹ 105 F. Supp. 215 (S.D.N.Y. 1952).

simultaneously subjected I.C.I. to the probability of being sued by Spinners.

Spinners did bring suit in England against I.C.I. and obtained an injunction prohibiting that company from parting with the British patents; the court also ordered specific performance of I.C.I.'s contract to grant an exclusive license to Spinners.⁸² This left I.C.I. under the order of an American court to take certain action, and under the order of a British court prohibiting it from taking such action and directing it to do what the American court had forbidden it to do.

There could be no clearer case of hardship on a private party, were it not for the saving clause of the order of the American court:

No provision of this judgment shall operate against [the defendant] . . . for action taken in compliance with any law . . . of any foreign government or instrumentality thereof, to which [the defendant] . . . is at the time being subject and concerning matters over which under the law of the United States such foreign government or instrumentality thereof has jurisdiction.⁸³

While this may have at least partially protected I.C.I. from hardship,⁸⁴ it did not avoid the encroachment upon British sovereignty or the resulting pointed comments of the British judges.⁸⁵

⁸² *British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd.*, [1953] 1 Ch. 19, permanent injunction granted, [1955] 1 Ch. 37.

⁸³ Quoted in [1953] 1 Ch. 19 at 24 n.4.

⁸⁴ A better technique in this regard is found in the anti-cartel decrees in the oil cases, which provided:

The injunctions . . . shall not apply in the following cases:

- (1) Where [the action is taken] . . . pursuant to requirement of law of the foreign nation or nations within which [such action] . . . take[s] place;
- (2) Where [the action is taken] . . . pursuant to request or official pronouncement of policy of the foreign nation or nations . . . and where failure to comply with which request or policy would expose [the defendant] . . . to the risk of present or future loss of the particular business . . . which is the subject of such request or policy.

United States v. Standard Oil Co. (N.J.), 1960 Trade Cas. ¶ 69849, at 77340 (S.D.N.Y. 1960). See similar decrees in *United States v. Gulf Oil Corp.*, 1960 Trade Cas. ¶ 69851 (S.D.N.Y. 1960); *United States v. Texaco, Inc.*, 1963 Trade Cas. ¶ 70819 (S.D.N.Y. 1963). This form of decree has the advantage of specifically stating that it is not applicable when there is conflicting law, and thus avoids even the appearance of infringement on the sovereignty of the other state. Such a decree also recognizes that there might be conflicting policy as well as law.

⁸⁵ In *British Nylon Spinners*, the judge said that the plaintiff had established "a prima facie case for saying that it is not competent for the courts of the United States . . . to interfere with those rights or to make orders, observance of which by our courts would require that our courts should not exercise the jurisdiction which they have and which it is their duty to exercise in regard to those rights." [1953] 1 Ch. at 26. The court, in that case, also observed that "the American court assumes jurisdiction in personam against a party amenable to its jurisdiction to compel it by contract to modify the rights which the law of another confers on it in that other country [and

Another consideration overlooked by the American court was that it was ordering action to be taken by a foreign corporation in the country of its incorporation and in which country another interested party was located—a party which was not before the American court and which was in a position to take action to frustrate the order. It should have been apparent that the court was in no position to assure the effectiveness of its order. It is demeaning as well as futile for a court to issue an order that is bound to meet resistance and which it has not the power to enforce.

In *United States v. Holophane*,⁸⁶ the defendant, an American corporation, was charged with having conspired with a British company and a French company, neither of which was before the court, to divide the world market in specialty glass. Holophane, by agreements entered into abroad, had agreed not to compete with the other two in the areas allocated to them abroad, and it in turn was given the American market. These agreements were found to be contrary to our antitrust laws. The trial court ordered Holophane to terminate its exclusive marketing agreements and directed it "to use reasonable efforts . . . to promote the sale and distribution of [its] . . . products" in the territories which the agreements assigned to the other two companies.⁸⁷

The effect of the order in this case was precisely the same as that in *I.C.I.* In both cases the party before the court was ordered to act abroad in violation of its contract with a foreign party, a contract that was legal where it was made and where it was to be performed. Thus the court raised the possibility of a suit abroad with its attendant hardships and conflicts. In both cases there was an exercise of jurisdiction in personam to attempt to extinguish or at least modify rights of aliens abroad who were not before the court and whose rights would seem to have depended on foreign law. Such use of jurisdiction in personam was quite unwarranted. In both cases the court issued an order which it was in no position to enforce abroad. In both cases the court could have declared the contracts illegal under United States law and thus established the liability of the American defendant in this country. The foreign corporations would then have been free to compete in the United States, if indeed it is the purpose of our anti-trust laws to encourage foreign competition here.

thus would] . . . interfere with the municipal law of England." *Id.* at 21. Finally, another comment is worth noting: "Applied conversely, I conceive that the American courts would likewise be slow (to say the least) to recognize an assertion on the part of the British courts of jurisdiction extending, in effect, to the business affairs of persons and corporations in the United States." *Id.* at 24.

⁸⁶ 119 F. Supp. 114 (S.D. Ohio 1954), *aff'd*, 352 U.S. 903 (1956). With regard to the *Holophane* case, see Oliver, *supra* note 64; Note, 42 Cornell L.Q. 390 (1957).

⁸⁷ 1954 Trade Cas. ¶ 67679, at 69183 (S.D. Ohio 1954).

B. *Order to Produce Documents Located Abroad*⁸⁸

An order to produce records from abroad obviously raises the problem of conflicting jurisdictions if the State where the records are located has a law or policy forbidding their removal from the State. Such a local objection to removal usually stems from one of the three basic causes. In the first place, the State may have a law prohibiting the removal of certain records in which there is a public interest, such as bank records. Second, there are some States, notably Switzerland, which have a general policy prohibiting bank records and certain corporate records from being examined without special permission of the State. They could not be subpoenaed without such permission even for use by a court in Switzerland. Third, the State may be fundamentally opposed to the substantive objective of the proceeding for which the records are wanted because it feels the proceeding exceeds American jurisdictional competence under international law, will result in an infringement on that State's sovereignty, or is aimed at matters which it considers of primary concern to itself and of little or no concern to the United States. It therefore may refuse to permit records to be taken out of its territory.⁸⁹

Whether one agrees with the laws and policies of these States or not, one cannot ignore their position. An order for production of records from abroad in a situation where such a conflict of law or policy exists will most certainly result in international complications. It is an order that can be enforced, if at all, only by contempt proceedings, and it can easily become an unenforceable order if the other State adheres to its law or policy.

*In re Grand Jury Subpoena Duces Tecum Addressed to the Canadian Int'l Paper Co.*⁹⁰ was a case in which a grand jury was investigating the newsprint industry in Canada to determine if there were violations of the antitrust laws of this country. Canadian companies were ordered to produce their records from Canada. There was an immediate protest from the Canadian Government to the State De-

⁸⁸ See generally Magnusson, *The Need for International Agreement on Obtaining Evidence from Foreign Countries*, 26 Fed. B.J. 232 (1966); Note, *Limitations on the Federal Judicial Power to Compel Acts Violating Foreign Law*, 63 Colum. L. Rev. 1441 (1963); Note, *Subpoena of Documents Located in Foreign Jurisdiction Where Law of Situs Prohibits Removal*, 37 N.Y.U.L. Rev. 295 (1962); Comment, *Ordering Production of Documents from Abroad in Violation of Foreign Law*, 31 U. Chi. L. Rev. 791 (1964).

⁸⁹ The Legal Advisor of the Department of State commented in 1959 that "there are a number of friendly foreign governments, foreign officials, and even foreign courts, which believe strongly—or even passionately, I may say—that [it is] . . . a violation [of international law] and infringement [of sovereignty]" to apply our antitrust laws extraterritorially to foreigners. Address by Loftus E. Becker, Antitrust Law Section of the New York State Bar Association, Jan. 29, 1959, reproduced in 40 Dep't State Bull. 272-73 (1959).

⁹⁰ 72 F. Supp. 1013 (S.D.N.Y. 1947).

partment.⁹¹ When this failed and contempt proceedings were threatened for failure to comply with the order, the Government of Ontario took steps to put its policy into law: it passed the Business Records Act,⁹² which barred the production of certain business records for use in foreign courts. After this enactment, any further order by the American court would, of course, have been futile. The case illustrates the extent to which the policy of a foreign country may be carried if we persist in trying to concern ourselves with matters of primary concern to a foreign jurisdiction.⁹³

The Supreme Court adopted a technique to overcome such a difficulty. In *Société Internationale v. Rogers*⁹⁴ (usually referred to as the *Interhandel* case), the Attorney General held certain property pursuant to the law relating to enemy-alien property, and the former owner filed suit to reclaim the property, as permitted by the statute. The contention of the government was that the corporation which had owned the property (*Interhandel*), admittedly a Swiss corporation, was in fact controlled by German interests, and therefore the property was enemy property. *Interhandel* denied this. To prove its contention, the government secured an order that *Interhandel* produce its records from Switzerland for inspection. As already noted, the Swiss law is perhaps the most strict in the western world regarding the inviolability of corporate records, and they cannot be produced, much less taken abroad, without the consent of the proper government official, which in this case was not secured.

Although the Supreme Court held that it was error to nonsuit the plaintiff for failure to comply with the order to produce the records, it also pointed out that a failure to order their production "would undermine congressional policies," for Congress had amended the statute to reach enemy assets masquerading under "innocent fronts" because of its "deep concern" with this problem. It held that the production order was justified, that *Interhandel* could "plead with its own sovereign for relaxation of penal laws or for adoption of plans which will at the least achieve a significant measure of compliance with the production order [and that it could be required] . . . to make all such efforts to the maximum of [its] . . . ability. . . ." ⁹⁵ The Court

⁹¹ Report, *supra* note 62, at 565.

⁹² Ont. Rev. Stat. ch. 44 (1960).

⁹³ For other cases in which the policy was so strongly held that it was transformed into law or government mandate when American court orders infringed on it, see text accompanying notes 103, 118, and 119 *infra*. See also the reference to the Yugoslav Criminal Code in *Montship Lines, Ltd. v. Federal Maritime Bd.*, 295 F.2d 147, 156 (D.C. Cir. 1961).

⁹⁴ 357 U.S. 197 (1958).

⁹⁵ *Id.* at 205. This suggestion that the Swiss Government might be willing to cooperate was particularly startling, for that Government had already championed the cause of its national not only by diplomatic representations to our Department of

justified its position by what it deemed was the mandate of an overriding congressional policy, and, of course, in such a situation, the courts must follow where Congress leads. The Court expressly stated that its decision should not be considered a governing precedent in other cases where such an overriding policy was absent:

We do not say that this ruling would apply to every situation where a party is restricted by law from producing documents over which it is otherwise shown to have control. . . . [W]e hold only that accommodation . . . to the policies underlying the Trading with the Enemy Act justified the action of the District Court in issuing this production order.⁹⁶

Unfortunately, however, the case has been treated as a governing precedent by lower courts with no consideration of whether, in the particular case, there was a congressional policy strong enough to be deemed an overriding vital national interest.⁹⁷

The technique of *Interhandel*, though employed for the first time by the Supreme Court in that case, was not wholly new. Six years earlier, there was *In re Investigation of World Arrangements*,⁹⁸ a proceeding in which a grand jury was investigating alleged violations of antitrust laws by the oil companies. Subpoenas were issued to foreign corporations to produce their records from abroad. There was immediate reaction from the companies and, in some cases, from governments. The defendants claimed that certain foreign governments prohibited the removal of the required papers from their territory. The court reserved its opinion on this point pending a showing that the party concerned had in good faith attempted to get the consent of the foreign government to remove the papers and had been refused. Evidence was then introduced that the British Government controlled one of the defendants and that it had directed the company officials, for economic and security reasons, "not to produce any documents which were not in the United States of America and which do not relate to business in the United States . . . without, in either case, the authority of Her Majesty's Government."⁹⁹ The court construed this as a claim of sovereign immunity and granted the claim.¹⁰⁰

State, but by bringing a suit against the United States in the International Court of Justice, asking that we be enjoined from proceeding further in the matter. *Interhandel Case (Switzerland v. United States)*, [1959] I.C.J. 6.

⁹⁶ 357 U.S. at 205-06.

⁹⁷ See note 126 *infra*.

⁹⁸ 13 F.R.D. 280 (D.D.C. 1952).

⁹⁹ Report, *supra* note 62, at 569-70. Pertinent extracts from correspondence, statements by officials, debates in Parliament, etc. are reproduced *id.* at 569-73.

¹⁰⁰ 13 F.R.D. at 288-89.

The grand jury proceeding was then considered at the highest level of the United States Government, was discontinued,¹⁰¹ and a civil antitrust action was begun against the same defendants. Again the government requested the production of documents "whether located within or outside of the United States, including documents in the files of subsidiaries."¹⁰² Meanwhile, however, The Netherlands, following a formal protest against a subpoena duces tecum issued to one of its nationals in the grand jury proceeding, had enacted the Economic Competition Act, which prohibited compliance with any "measures or decisions" of a foreign State which related to restraints on competition or to market control in The Netherlands.¹⁰³ The court, faced with this development, nevertheless ordered the production of all records requested by the government, and required that the companies show that they had, in good faith, tried to secure waivers of any limitations imposed by foreign governments upon their removal.¹⁰⁴ It should be noted that here there was no consideration of whether there was an overriding congressional policy which would support this *Interhandel* technique, although the case was decided almost six months after the *Interhandel* decision.

It seems obvious that this approach can only result in international repercussions detrimental to our best interests. An order such as that in *Interhandel* asks a litigant to violate the law of another State, or at least to use his best efforts to avoid its provisions. This is hardly in the best judicial tradition, and better techniques must be available.

Two tax suits brought by the Internal Revenue Service involved the contention that production of bank records from Panama, as the government was demanding, would be illegal under Panamanian law,¹⁰⁵ but in both cases the proof of the foreign law was faulty and the courts ordered the records produced. In the first case, *First Nat'l City Bank v. Internal Revenue Serv.*,¹⁰⁶ the court said that, if shown to be illegal, "the production . . . should not be ordered"; it further directed that if it came to a question of contempt for failure to comply, the trial court should "explore . . . the ability of the Bank to comply

¹⁰¹ Ebb, op. cit. supra note 72, at 307: "The Grand Jury was dismissed on the Government's motion . . . after consultation with President, Cabinet officials, and with the Chairman of the Joint Chiefs of Staff."

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ *United States v. Standard Oil Co. (N.J.)*, 23 F.R.D. 1 (S.D.N.Y. 1958).

¹⁰⁵ When there is a contention that compliance with a court order would violate foreign law, the foreign law must be proved as an issue of fact. There seems to have been an unexplained failure of such proof in a number of cases. In both of the cases being discussed here, the proof was faulty at the initial hearings.

¹⁰⁶ 271 F.2d 616 (2d Cir. 1959), cert. denied, 361 U.S. 948 (1960).

without subjecting its personnel to criminal sanctions under Panamanian law."¹⁰⁷

The second case, *Application of Chase Manhattan Bank*,¹⁰⁸ involved a rehearing at which further evidence of Panamanian law was offered, and the illegality of removal of the records was shown. The court then said that "the law appears to be clear that a Court should not order any party to act in such a way that it would violate the laws of a friendly foreign power."¹⁰⁹ Another solution was sought. The court told the government that, with the cooperation of the bank, it should try to get authority from the Panamanian courts to have the documents copied for use in the American proceeding. An expert witness testifying on the law of Panama had said that he saw no reason why the courts of Panama would not grant such a request. This disposition of the case was upheld on appeal.¹¹⁰

These cases demonstrate a much more preferable technique and philosophy than *Interhandel*. Both subscribe to the doctrine that "a Court should not order any party to act in such a way that it would violate the laws of a friendly foreign power," and, as the appellate court added in *Chase Manhattan Bank*, "just as we would expect and require branches of foreign banks to abide by our laws applicable to the conduct of their business in this country, so should we honor their laws affecting our bank branches which are permitted to do business in foreign countries."¹¹¹

*Ings v. Ferguson*¹¹² went even further. When it was contended that the production of records from Canada would be illegal under Canadian law, the court refused to order their production by a Canadian bank.

Upon fundamental principles of international comity, our courts dedicated to the enforcement of our laws should not take such action as may cause a violation of the laws of a friendly neighbor or, at the least, an unnecessary circumvention of its procedures. Whether removal of records from Canada is prohibited is a question of Canadian law and is best resolved by Canadian courts.¹¹³

The court ordered the subpoenas quashed and suggested the issuance of letters rogatory to get the information, which would put the issue of production of the records before a Canadian court. This seems a

¹⁰⁷ Id. at 620.

¹⁰⁸ 191 F. Supp. 206 (S.D.N.Y. 1961).

¹⁰⁹ 192 F. Supp. 817, 818-19 (S.D.N.Y. 1961).

¹¹⁰ 297 F.2d 611 (2d Cir. 1962).

¹¹¹ Id. at 613.

¹¹² 282 F.2d 149 (2d Cir. 1960).

¹¹³ Id. at 152.

logical procedure designed to avoid the difficulties which have been pointed out above. It deserves far more attention than it has been given.

Orders to the shipping industry to produce records from abroad have caused tremendous difficulties, still unresolved. *In the Matter of Grand Jury Investigation of the Shipping Indus.*¹¹⁴ involved the issuance of such subpoenas to over 150 shipping firms. There were protests by the defendants and by the embassies of Canada, Denmark, France, Germany, Great Britain, Italy, Japan, The Netherlands, Norway, and Sweden.¹¹⁵ The court said there could be no objection to producing documents that were physically in the United States, and it so ordered, but as to documents of foreign corporations located abroad, it reserved its opinion until the matter had progressed enough to ascertain the actual need for such an order. Temporizing is sometimes the best means of dealing with difficult problems.

The shipping industry has had similar problems with the Federal Maritime Board, now the Federal Maritime Commission. When the industry was ordered to file copies of every contract, here or abroad, relating to "commerce of the United States," eleven countries filed diplomatic protests against the order.¹¹⁶ Two of the carriers brought federal suits to enjoin its enforcement.¹¹⁷ The outcome of these suits was a determination that the Board had a legitimate interest in these documents, even though located abroad; but before the production order was compiled with and before further steps were taken, the Board went out of existence.

When the Maritime Commission replaced the Board, certain members of Congress unsuccessfully attempted to achieve the same goal through legislation. The Commission, however, forced the issue by calling upon carriers to produce documents from abroad. Protests were received by the Department of State from the Governments of Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Japan, The Netherlands, Norway, Sweden and the United Kingdom, asserting that such an order violated their respective jurisdictions, and that they would have to restrain their nationals from compliance.¹¹⁸ Great Britain, indeed, enacted a statute which provided that if

¹¹⁴ 186 F. Supp. 298 (D.D.C. 1960).

¹¹⁵ Report, *supra* note 62, at 403-05, 577-78.

¹¹⁶ *Id.* at 578-82. The countries were Denmark, Finland, Germany, Great Britain, India, Italy, Japan, The Netherlands, Norway, Sweden and Yugoslavia.

¹¹⁷ *Montship Lines, Ltd. v. Federal Maritime Bd.*, 295 F.2d 147 (D.C. Cir. 1961); *Kerr S.S. Co. v. United States*, 284 F.2d 61 (2d Cir. 1960), judgment vacated, 369 U.S. 422 (1962).

¹¹⁸ 3 Int'l Legal Materials 1129-32 (1964) (statement of Ass't Sec'y of State Johnson).

any person in the United Kingdom has been or may be required to produce or furnish to any court, tribunal or authority of a foreign country any commercial document which is not within the territorial jurisdiction of that country or any commercial information to be compiled from documents not within that jurisdiction; and . . . the requirement constitutes or would constitute an infringement of the jurisdiction which, under international law, belongs to the United Kingdom, [then certain specified Ministers of the Crown] . . . may give directions to that person prohibiting him from complying.

. . .¹¹⁹

Criminal penalties were included for noncompliance with any such directions.

The entire matter thereafter was discussed in the Organization for Economic Cooperation and Development, and an agreed Minute was issued by that organization and by the United States, in which fourteen nations agreed to use their good offices to facilitate the production of certain statistical information by their shipowners. The United States agreed to consult with the other governments before using the information in formal proceedings before the Commission.¹²⁰

These shipping cases involved policy differences between the United States and the other major maritime countries as to whether private shipping should be subject to governmental regulation. Fortunately, the United States finally recognized that "in the case of both our exports and our imports, there is a concurrent jurisdiction, which we . . . are prepared to discuss."¹²¹ Recognition of this concurrent jurisdiction is the key to an appropriate solution in such circumstances, for a great deal of friction has been caused by the failure to appreciate that there is concurrent jurisdiction, and to realize that the other country will not stand idly by if it feels its sovereignty and jurisdiction are infringed. Consideration of the issue in the Organization for Economic Cooperation and Development, though leaving many problems still unsolved, has appropriately removed the resolution of the basic policy differences from the realm of judicial and administrative action to that of diplomacy.¹²²

¹¹⁹ Shipping Contracts and Commercial Documents Act of 1964, c. 87; 3 Int'l Legal Materials 962-64 (1964). For a case which arose before passing of this statute, see *United States v. Anchor Line, Ltd.*, 232 F. Supp. 379 (S.D.N.Y. 1964).

¹²⁰ 52 Dep't State Bull. 188 (1965).

¹²¹ 3 Int'l Legal Materials 1129 (1964) (statement of Ass't Sec'y of State Johnson).

¹²² See 52 Dep't State Bull. 549 (1965). For a discussion of the overall problem of maritime "conference" rates and the present method of handling the matter, see Geren, *Diplomatic Adjustment by the Maritime Nations*, 54 Dep't State Bull. 78 (1966).

C. *Order to Cause Action Abroad by Party Not Before Court*

This section involves cases in which an American corporation, over which the tribunal had personal jurisdiction, was ordered to compel its foreign subsidiary, over which the tribunal had no jurisdiction, to act in a manner contrary to the law or policy of the jurisdiction where the subsidiary was located.

The first case involved a ruling by the United States Treasury Department that its Foreign Assets Control Regulations were applicable to foreign subsidiaries of American companies. Accordingly, the Ford Motor Company felt compelled to order its Canadian subsidiary not to consider the sale of vehicles to Communist China, although Canadian policy was to promote such trade. This caused an immediate reaction in Canada, and the Minister of Finance made the statement that "Canadian law and Canadian law alone is to prevail over persons or corporations carrying on business in Canada." The internal pressures on the Canadian Government were so serious as a result of this incident that President Eisenhower felt obliged to advert to the matter in an address to the Canadian Parliament, saying that "although they may raise questions in specific cases respecting control of an industry by American citizens, these industries are, of course, subject to Canadian law." The Prime Minister and the Leader of the Opposition in Canada both publicly hailed this statement as an assurance that Canadian sovereignty in the matter was now admitted, but the United States Treasury still claims the right to control such acts of subsidiaries.¹²³

Ambassador Merchant of the United States and Ambassador Heeney of Canada, designated as a working group by President Johnson and Prime Minister Pearson, were charged with reporting on a number of problems between the two countries. In their report of June 28, 1965, they strongly recommended "that the two governments examine promptly the means, through issuance by the United States of a general license or adoption of other appropriate measures, by which this irritant to our relationship may be removed, without encouraging the evasion of United States law by citizens of the United States."¹²⁴ The diplomatic approach was properly invoked and should be pursued further in this type of situation. The order of the Treasury Department was quite inappropriate. It did not, of course, apply to the Canadian subsidiary, but it did apply to the parent company here; thus, the United States, by use of its power over the parent, sought to control the actions of the subsidiary abroad. In short, personal juris-

¹²³ Ebb, *op. cit.* supra note 72, at 113-14. See 31 C.F.R. §§ 500.201, .329(a)(4) (1967).

¹²⁴ 53 Dep't State Bull. 193, 202 (1965).

diction was employed to govern a situation in Canada over which we had no legislative jurisdiction, and to cause action to be taken there which contravened official Canadian policy.

The Canadian position was made clear in a statement by its Minister of Justice and Attorney General, although made in connection with a different proceeding:

Our objections to an action such as this are three-fold: That it is concerned not so much with a strict compliance with United States laws in the United States as it is concerned with actions in Canada of Canadian companies which actions are in accord with Canadian laws and Canadian commercial policy; that compliance . . . may bring these companies in Canada into conflict with Canadian laws and policy; and thirdly that the only way effect could be given to such [regulations] is if American directors of United States companies give instructions to directors of Canadian companies to do something in Canada which is not in accord with Canadian business or commercial policy but is dictated by American policy. Nothing could more clearly illustrate the objectionably extraterritorial effect of the action taken. . . . The situation, as it strikes us, can be put this way: that these cases reach into affairs that we regard as relating to our sovereignty. These cases involve on the part of the United States more interference, and apparent assertion of a right to interfere, in commercial projects in Canada than is fitting or acceptable between two friendly but independent countries.¹²⁵

This case may have involved a factor of overriding vital national interest which justified the action taken.¹²⁶ Our Government may have

¹²⁵ Remarks of E. Davie Fulton, Minister of Justice and Attorney General of Canada, regarding an analogous technique in the antitrust proceedings against the so-called "Canadian patent pool," CCH Antitrust Law Symposium 39, 46-47 (1959).

¹²⁶ The term "overriding vital national interest" is difficult to define. According to Restatement § 40, comment b, "vital national interest" means "an interest such as national security or general welfare to which a state attaches overriding importance." However, "general welfare" suggests certain current legislative programs which would hardly qualify as overriding vital national interests. If they are to override all other considerations and control, even if it means infringing the jurisdiction of another friendly sovereign and perhaps violating the law of nations, they must rise at least to the national security level. To illustrate, while there is a strong national policy favoring strict enforcement of the antitrust laws in this country, this is a very different thing from saying that there is an overriding vital national interest in their enforcement that demands exertion of our power to this end against foreign nationals for acts done in foreign countries, even though it means impairment of our international relations and imposition of private hardships. On the other hand, the national policy, in agreement with our Allies, of obtaining our reparations from our World War II enemies by seizing and applying to our claim the assets of enemy nationals that were found in this country might well qualify, and indeed was regarded as an overriding vital national interest in the *Interhandel* case. See text accompanying notes 94-97 supra.

felt that all shipments of automotive material to Communist China had to be stopped at any cost. If that was the case, the better technique would have been to have initiated the discussions between the two countries at the outset.

The latest case in this field, *United States v. First Nat'l City Bank*,¹²⁷ involved a jeopardy assessment for federal income taxes allegedly due from Omar, S.A., a Uruguayan corporation. Although the income involved was received here, Omar had since withdrawn from the United States and transferred its monies to the Montevideo branch of the First National City Bank of New York (Citibank). The branch, though not a separate corporation, was a "separate entity" under New York law. Pending personal service on Omar, the government asked that the funds held by Citibank for Omar in Montevideo be frozen. Service, for this purpose, was made on Citibank in New York. The district court ordered the freezing on the theory of an attachment.¹²⁸ Under New York law, however, accounts in foreign branches were not collectible at the New York office unless the foreign branch had breached its contract by refusing payment. The court of appeals held that under these circumstances the Montevideo account of Omar was not within the jurisdiction of the New York federal court. Citibank was liable to Omar only at Montevideo, and there was nothing in New York to be reached by the attachment. "Absent an explicit indication to the contrary, there should not be attributed to Congress an intent to give the courts of this nation, in this highly sensitive area of intergovernmental relations, the power to affect rights to property wherever located in the world."¹²⁹

The Supreme Court reversed, holding that since the New York headquarters of Citibank admittedly could give orders to the Montevideo branch, it was appropriate for the district court to order the New York headquarters to have its branch hold the monies due Omar "pending service of process on Omar and an adjudication of the merits."¹³⁰ New York law provided that personal jurisdiction might be exercised over a nondomiciliary who was outside the jurisdiction if he had transacted any business in the state and the cause of action arose therefrom. There was provision for out-of-state service of process in such a case.¹³¹ Personal service on Omar had not been obtained at the time of the hearing.

A dissenting opinion by Mr. Justice Harlan, joined by Mr. Justice

¹²⁷ 379 U.S. 378 (1965). For a criticism of this case, see Keeffe, *Practicing Lawyers' Guide to the Current Law Magazines*, 51 A.B.A.J. 594 (1965).

¹²⁸ *United States v. Omar, S.A.*, 210 F. Supp. 773 (S.D.N.Y. 1962).

¹²⁹ *United States v. First Nat'l City Bank*, 321 F.2d 14, 24 (2d Cir.), *aff'd en banc*, 325 F.2d 1020 (2d Cir. 1963).

¹³⁰ 379 U.S. at 385.

¹³¹ N.Y. Civ. Prac. Law §§ 302(a), 313 (McKinney 1963).

Goldberg, is directly in point. After noting that "the Court does not decide the *quasi in rem* issue on which the District Court relied," the dissent proceeded:

The Court upholds the freeze order on the basis that the District Court, pending acquisition of personal jurisdiction over Omar, had authority to enjoin Citibank (over which it did have personal jurisdiction) from allowing its Montevideo branch to transfer the funds to Omar.

There can be no doubt that the enforcement powers available to the District Court were adequate to accomplish that much of the end in view But "jurisdiction" is not synonymous with naked power. It is a combination of power and policy. . . .

The real problem with this phase of the case is therefore this: Granting that the District Court had the naked power to control the Montevideo account by bringing to bear coercive action on Citibank, *ought* the court to have exercised it? Or to put the question in the statutory terms, was the court's order "appropriate" for the enforcement of the internal revenue laws?¹³²

The opinion further noted that Omar's property "has been taken from its control by a court having jurisdiction neither over the corporation nor over the property. . . ." ¹³³ It then proceeded to deal with the propriety of the freeze order, pointing out that unless funds to pay the government's claim could be realized, the freeze should not be ordered.

The government contended that, acting under the New York statute, personal jurisdiction could be obtained over Omar, judgment could be rendered, and an order entered to pay the judgment from the funds in Montevideo. It was contended that, if this failed to get the funds, a court officer could be sent to Montevideo to make a direct demand on the bank. If the branch failed to release the funds, this would make the debt payable in New York, where it could be garnished. But the dissent pointed out that in international practice, States do not recognize tax judgments of foreign courts, and it would probably be improper for the branch of Citibank to pay the judgment. If this were so, the debt could not be garnished and the freeze order would have been issued improperly. Furthermore, Citibank, "an innocent stakeholder," would be put to undue hardship, and should have doubts resolved in its favor. "It would subject Citibank to the possibility of double liability if Uruguay did not recognize the United

¹³² 379 U.S. at 387-88.

¹³³ *Id.* at 392.

States' judgment, and multiple liability if Uruguay permitted actions for slander of credit.¹³⁴ If the law of Uruguay was unclear, only a suit for the deposit could determine the issue, and

it may be impossible for Citibank to establish Uruguayan law before it is too late. If the Government manages to levy on the account, and only afterwards is it established that the bank was liable to Omar, Citibank would be left to sue the United States for recoupment, an eventuality for which no provision has been made and which the Government stated at the oral argument of this case that it would oppose.¹³⁵

The dissent also noted that problems between states of the Union are different from those between two nations, and it noted the possible danger of reciprocal treatment or retaliation by the other nation. It stated:

The Court should not lose sight of the fact that our modern notions of substituted service and personal jurisdiction were developed within a framework of States whose various processes are governed by the Due Process Clause and whose judgments must be given full faith and credit by the other States within the federal structure. Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field, both as a basis for asserting federal judicial power with respect to property in foreign countries and for permitting property in this country to be tied up by foreign courts.¹³⁶

It seems regrettable that this most recent pronouncement by the Supreme Court supports a view of the exercise of congressional and judicial jurisdiction which extends to the limits of congressional and judicial power, and thus harks back to *Vermilya-Brown Co. v. Connell*,¹³⁷ if, indeed, it does not substitute altogether power for jurisdiction. Although the courts had personal jurisdiction over Citibank, there was no jurisdiction at all to affect the contractual relationship between Omar and the Uruguayan branch of Citibank, a "separate entity" in Montevideo. The distinction between personal jurisdiction of a tribunal over a party and legislative or judicial jurisdiction over an act or situation abroad, should be scrupulously maintained. It is unwise if not improper to seek to accomplish by indirection what is forbidden and impossible by direct action. Furthermore, as Mr. Justice Harlan

¹³⁴ Id. at 401-02.

¹³⁵ Ibid.

¹³⁶ Id. at 403-04.

¹³⁷ 335 U.S. 377 (1948). See pp. 678-80 *supra*.

pointed out, it would very probably be a violation of the legal obligation of the branch of Citibank under Uruguayan law to pay the tax judgment.

IV. BASIC CAUSES OF IMPROPER OR UNWISE EXERCISE OF CONFLICTING JURISDICTION

In the light of the foregoing, it is suggested that three basic circumstances probably combine to account for much of the trouble that has been encountered in the exercise of conflicting international jurisdiction.

First: The most basic difficulty seems to have been a failure to recognize the problem or, if it was recognized, to appreciate its significance and ramifications. The legislative, judicial, and executive branches of the Government (save the Department of State and a few relatively small groups) have all been concerned, by and large, with domestic affairs. Their thinking is conditioned to deal with matters that are wholly within the territorial confines of the United States, where they have full authority to make, interpret, or enforce the law that will govern the situation. Domestic issues of conflicting jurisdiction are presented in the context of conflicts between the laws of the states of the Union, and in the framework of the full faith and credit clause of the Constitution, the substantially uniform jurisprudence and the similar policies of the states involved, and the common sovereignty of the United States of America. An issue of possible conflict with the law or policy of a foreign jurisdiction, however, involves the recognition of the sovereignty of that other State, its independence of and equality with all other sovereignties including our own, its different laws, policies, and concepts of jurisprudence, and its right and ability to control persons and matters within its own territory.

Relatively few judges are trained or experienced in international law, and it is not easy for judges to think in terms of issues and conditions with which they are unfamiliar, particularly when the case appears to present a situation very much like those in the domestic field with which they are familiar. Furthermore, counsel selected for their competency in, let us say, the field of antitrust law are frequently not fully competent in the field of international law. Certain of the decisions which indicate a failure to comprehend the problems in the area of conflicting international jurisdiction are probably the result of counsel's failure to present the matter properly to the court, introduction of dubious points, admissions which eliminate the ground on which a position should have been taken, or other confusion of the pertinent issues.

Second: On certain occasions there seems to have been confusion between jurisdiction in personam over a party before a tribunal and

jurisdiction over an act committed abroad or over subject matter located abroad. Our doctrines regarding jurisdiction in personam (which have in recent years undergone a marked liberalization) should not be invoked to justify the exercise of jurisdiction over the act or subject matter. A clear expression of the basis of jurisdiction over the foreign subject matter in each case where extraterritorial application of a statute or order is involved would be an excellent way to channel such application in an appropriate direction and to subject it to wise limitations.

Third: A fundamental rule of statutory construction has too often been disregarded. It is not arbitrary, but is based upon the soundest assessment of the nature of the problem we are discussing. "All legislation is *prima facie* territorial."¹³⁸ Too frequently, especially in the antitrust field, the approach has been that of *Vermilya-Brown*: "[I]t is difficult to formulate a boundary to [the] . . . coverage [of a statute] short of areas over which the power of Congress extends. . . ."¹³⁹ As has been pointed out above, Congress seldom focuses on the issue of the extent of geographical coverage of a statute. That body deals primarily with situations within the United States. When a statute is intended to apply extraterritorially, it is almost always made clear in the language of the statute. Therefore, as *Foley Bros.* stated, "The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . . is a valid approach whereby unexpressed congressional intent may be ascertained."¹⁴⁰

This rule is applicable, in slightly modified form, to cases involving the imposition of our laws upon foreign merchant ships in our ports. Unless the peace of the port is disturbed, the ship should be treated, in respect to matters pertaining to its internal affairs, its crew, and its passengers, as if it were the territory of the State whose flag it flies. In such situations our legislation is *prima facie* to be applied only to our own territory, not to this quasi-territory of a foreign State.

V. CONCLUSION: A SUGGESTED APPROACH TO THE EXERCISE OF CONFLICTING JURISDICTION

What should be the approach to the problem of how to exercise one's jurisdiction when such exercise may conflict with the jurisdiction of another sovereign? What considerations should be taken into account and weighed by a governmental body, be it executive, legislative,

¹³⁸ *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909).

¹³⁹ *Vermilya-Brown v. Connell*, *supra* note 137, at 389.

¹⁴⁰ *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949).

or judicial, which is faced with the question of whether, and how, to exercise its jurisdiction in such circumstances?

Apart from cases in which a vital national interest demands certain action even though it may infringe upon another sovereign, impair our foreign relations, and cause hardship to private parties, the decision maker, in addition to considering statutory language and policy, should weigh the following considerations.

1. The three basic causes of improper or unwise exercise of conflicting jurisdiction, mentioned above, should, of course, be borne in mind.

2. The possible effect of the proposed action upon the other sovereign and upon our foreign relations should be considered. The decision should be framed in the light of the position taken by the other sovereign, its vital national interests, laws, policies and customs, and its interest in its own nationals. Any infringement of strong public policies and ancient customs of the other State, whether or not enacted into law, will most certainly cause a reaction from the other government. Basic policy differences should be dealt with through diplomatic channels. Attempts to deal with matters which reasonably are thought by the foreign sovereign to be its primary concern likewise will cause a reaction. Not only should one avoid ordering acts to be taken in a foreign country which would be illegal under its law, but every effort should be made to avoid treating as illegal those acts of citizens of the foreign State committed within its borders and legal under its law, particularly when they have the encouragement of the foreign sovereign.

3. Another point that must be considered, although it will usually arise only in connection with a court order, is the possibility of hardship on some private party. Hardships may range from a minor inconvenience to a severe criminal penalty, but if there is any reasonable way to avoid it, no should be placed in the position of being under different and conflicting requirements of two States, each of which may be able to enforce its own order. In addition, the court should take great care not to adversely affect the rights of a party not before it.

4. Consideration should be given to the ability of the issuing authority to make its order effective. It is injudicious and futile to issue an order which will probably meet resistance and cannot be enforced. Furthermore, the manner in which an order might have to be enforced may reflect the inadvisability of issuing it in the first place: if it can be enforced only by action which will produce consequences that are even more undesirable than the failure to issue the order, it clearly should not be issued.

5. Finally, perhaps the best test of all is to consider what this country's reaction would be if another State issued the same order against us or one of our nationals. We therefore should act toward the other State as we want and expect it to act in dealing with us.¹⁴¹ Are we prepared to have our position established as a sound jurisdictional doctrine and an example of a wise exercise of discretion?

The present Undersecretary of State, former Attorney General of the United States, writing as a professor of law, said in 1956: "Within the world community . . . the fact that formal power is distributed geographically, rather than functionally, makes necessary mutual assistance and reciprocal self-restraint in its exercise."¹⁴² This is the underlying philosophy of all that has been said above. Reflection upon this political fact, and an appreciation of the related principle of governmental operation which inevitably follows therefrom, will lay the basis for avoiding, or at least mitigating, the complications that have heretofore developed in our exercise of jurisdiction when it conflicted with that of another sovereign. Self-restraint is the key to the satisfactory handling of the situation. The considerations to be borne in mind when dealing with such a problem will be of no value unless the governmental body which is to make the decision is prepared to exercise appropriate self-restraint, and not carry its action to lengths that will be counter-productive. It is a question of balancing the various considerations, and exercising discretion wisely and judiciously.

¹⁴¹ "We do justice that justice may be done in return." *Russian Socialist Federated Soviet Republic v. Cibrario*, 235 N.Y. 255, 258, 139 N.E. 259, 260 (1923).

¹⁴² Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 *Yale L.J.* 1087, 1110 (1956).