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Antitrust and Foreign Commerce: Reach and Grasp

by John R. Lacey*

In recent years world trade has grown almost exponentially. Multinational corporations, of almost every size and nationality, have grown along with it.1 As more and more business transactions cross international boundaries, the reach and grasp of United States antitrust law has become a topic of critical concern to both businessmen and lawyers across the globe.2 Whether an international dealing involves exports, imports, licensing, joint venture, merger, or overseas establishment, the far-reaching, nearly all-pervasive presence of antitrust considerations must be taken into account. These may often determine not only the operation, but the very character, of transactions.

A highly-charged subject in the purely domestic context,3 with questions constantly raised as to its very purpose, antitrust law becomes even more controversial when it reaches across international borders, seeks to control activities of non-nationals, and occasionally impinges on foreign sovereigns. Moreover, the clash of competing values, perhaps inevitable in an interdependent world, becomes more intense as foreign competition policies such as that of the European Economic Community mature, as foreign governments participate more actively in commercial matters, and as the western trading nations deal more frequently with the entirely different system of the socialist countries.4

It would be impossible to do more than merely outline the broad

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scope of U.S. antitrust in this brief space. Accordingly, this limited discussion will attempt only to highlight the major statutes, cases, governing doctrine, and abundant commentary. It will also focus on a few of the problem areas and topics of recent interest with a view toward identifying some general trends in the law as well as pointing out some of the more prominent pitfalls. Unfortunately, due to the difficult, costly, and highly debatable nature of this subject, more questions will likely be raised than answered.

I.

The United States antitrust laws represent the expression of a fundamental legislative policy decision founded in the notion of protecting competition in a free and open marketplace. Justice Black set forth what is perhaps the classic statement of this policy: "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." As a basic component of national economic policy, the antitrust laws touch virtually all business activity and have been held to extend to the full reach of Congress' power to regulate commerce. The private action for injunction and/or treble damages has long been recognized as the primary vehicle for enforcing the antitrust laws and for promoting the competitive conditions they are designed to protect. It should also be emphasized, however, that government enforcement may be either civil or criminal in nature, and the latter may involve felony conviction accompanied by heavy fines and imprisonment.

Another critical consideration derives from the general, broad-brush language of the statutes. This results in a notable lack of certainty and predictability while conferring on courts and judges almost unlimited discretion. Some activities, such as price fixing, tie-ins, market allocations, and group boycotts have come to be characterized as per se illegal, requiring no further inquiry into their nature or anticompetitive impact. Other activities are judged by application of a rule of reason

6 Northern Pacific Ry. v. United States, 356 U.S. 1, 4 (1958). See also Apex Hosiery Co. v. Leader, 310 U.S. 469, 502-504 (1940) (effect on competition is the sine qua non of antitrust liability); Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359 (1933).
10 In Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), Justice Marshall observed: "It is emphatically the province and duty of the judicial department to say what the law is." A recent antitrust case noted, "In the antitrust field the courts have been accorded, by common consent, an authority they have in no other branch of enacted law." United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 348 (D. Mass. 1953).
11 Northern Pacific Ry. v. United States, 356 U.S. 1 (1958). The court went on to describe
analysis necessitating extensive inquiry into the relevant market, various economic factors, and the overall effects of the restraints. Whatever the ultimate characterization of the conduct, it is settled doctrine that the policy encouraging antitrust enforcement is also designed to discourage a court from dismissing an action where any colorable claim can be made out.\(^1\)

One of the most frequently litigated and controversial aspects of the antitrust statutes is their extraterritorial application.\(^2\) The pertinent statutes are all intended to reach foreign commerce, at least insofar as it affects United States trade. For example, the Sherman Act states: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal" (emphasis added).\(^3\)

Similar provisions are found in the Federal Trade Commission Act, which is directed at unfair methods of competition and has been held to reach even incipient anticompetitive conduct.\(^4\) Likewise, express provisions of the Clayton Act, governing mergers, acquisitions, and certain discriminatory pricing practices apply to both domestic and foreign commerce.\(^5\) Imports are specifically covered by the terms of the Wilson Tariff Act\(^6\) and the Tariff Act of 1930.\(^7\) Such illegal conduct, stating, "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Id. at 5. See generally W. Fugate, supra note 2, at 174; L. Sullivan, supra note 5, at 165.


\(^2\) Poller v. Columbia Broadcasting Sys., 360 U.S. 464 (1962); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948). In United States v. American Tobacco Co., 221 U.S. 106, 181 (1911), the Court stated, "[The Sherman Act] . . . embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed."


\(^5\) 15 U.S.C. § 45 (1970). The FTC Act is somewhat broader than the Sherman Act in that it is addressed to unfair trade practices and "Congress intentionally left development of the term 'unfair' to the Commission." Atlantic Refining Co. v. FTC, 381 U.S. 357, 367 (1965). Generally, the FTC's jurisdiction is considered concurrent where the challenged acts are also covered by other statutes. See FTC v. Cement Inst., 333 U.S. 683 (1948). See also FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239 (1972) (preferred public policy and values in § 5 of the FTC Act go beyond the letter of the antitrust statutes). For an example of extraterritorial application, see Branch v. FTC, 141 F.2d 31 (7th Cir. 1944).


\(^7\) 15 U.S.C. §§ 8-9 (1970). For analysis, see W. Fugate, supra note 2, at 393. See also
It should also be noted that these statutes are paralleled by liberal jurisdictional provisions governing venue, service of process, and overall amenability to suit. Moreover, the case law has applied all of these quite broadly. For example, a Swiss corporation which merely granted a license to a U.S. company has been found reachable, as has an Italian automobile manufacturer with dealers located in New York. In short, these statutes, together with the cases applying them, are capable of reaching a very wide spectrum of actors and activities both here and abroad.

Ironically, the first case to deal directly with extraterritorial application of the antitrust laws, *American Banana Co. v. United Fruit Co.*, held there was no jurisdiction since the various challenged acts were performed wholly abroad. Since that time, however, the tables have turned. As of 1973, the Department of Justice had filed approximately 248 cases dealing with foreign trade and had never lost on jurisdictional grounds. In *United States v. American Tobacco Co.*, for example, the Supreme Court struck down a cartel agreement providing for a division of territories and found sufficient jurisdiction over British co-conspirators.

*American Banana* was first specifically distinguished in *United States v. Sisal Sales Corp.*, in which the Supreme Court held illegal an attempt to monopolize the sisal trade partially effectuated by defendants' obtaining favorable legislation from the Mexican government. The Court's reasoning is important to an understanding of the direction future cases would take: "Here we have a contract, combination and conspiracy entered

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Fosburgh v. California & Hawaiian Sugar Refining Co., 291 F. 29 (9th Cir. 1923); Adams-Mitchell Co. v. Cambridge Distributing Co., Ltd., 189 F.2d 913 (2d Cir. 1951).


27 274 U.S. 268 (1927).
into by parties within the United States and made effective by acts done therein. The fundamental object was control of both importation and sale of sisal and complete monopoly of both internal and external trade therein."28 Sisal thus represents a major move in the direction of extraterritoriality; much of the challenged activity not only took place abroad but was assisted by favorable foreign government intervention.

While earlier cases such as Sisal fairly consistently expanded the reach of the antitrust laws, it was not until the 1945 decision of United States v. Aluminum Co. of America (Alcoa)29 that the so-called effects doctrine, which forms the heart of present-day extraterritoriality theory, was fully articulated. The litigation involved no U.S. company directly, but rather a Swiss subsidiary created by aluminum cartel members to manage and maintain their world-wide monopoly. Judge Hand stated:

We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States. (citations omitted) On the other hand, it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders which has consequences within its borders which the state reprehends. . . . The agreements were unlawful, though made abroad, if they were intended to affect imports and did affect them.30

Departing from earlier cases, Alcoa shifted the focus of the inquiry from who was involved and where the activity took place to an examination of the challenged conduct in terms of its effects on U.S. commerce and whether such effects were both direct and intended.31 While there has been much controversy over the detailed application of the doctrine, particularly with regard to the quantum of required effect and the notions of foreseeability and intention,32 the essential theory has become part and parcel of antitrust and so widely accepted in the case law as to

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28 Id. at 276. See also United States v. Baush & Lomb Optical Co., 34 F. Supp. 267 (S.D.N.Y. 1940) (upholding indictment charging a division of world markets with German competitor).
29 148 F.2d 416 (2d Cir. 1945).
30 Id. at 443-44. See Kintner & Griffin, supra note 14, at 210; Rahl, supra note 25, at 521. The lower court in Alcoa had required a finding of a "direct and material" effect. 44 F. Supp. 97, 283 (S.D.N.Y. 1941).
32 Substantial authority supports the effects doctrine in international law. See, e.g., The S.S. Lotus, [1927] P.C.I.J., ser. A, No. 10. See generally Kintner & Griffin, supra note 14; Rahl, supra note 25. Compare Jennings, supra note 14, at 175 (endorsing extraterritorial antitrust jurisdiction based on effects so long as they are not "mere repercussions") with Haight, International Law and the Extraterritorial Application of the Antitrust Laws, 63 YALE L.J. 639 (1954). The court criticized the effects doctrine as a "basic misconception regarding the international law competence of the United States." Id. at 642.

Whatever the measure, the effects doctrine is closely analogous to, and probably substantially justified by, the fundamental antitrust doctrines regarding standing. For example, in Long Island Lighting Co. v. Standard Oil Co., 521 F.2d 1269 (2d Cir. 1975), cert. denied, 423 U.S. 1073 (1976), the court described the target area test, requiring a plaintiff to show it was aimed at and actually hit: "[P]arties whose injuries may be both immediate and foreseeable
be specifically adopted in the Restatement, albeit with slight modification.\textsuperscript{33}

To fully understand the effects doctrine and its development by the judiciary, it is important to bear in mind that its assertion almost inevitably raises serious questions of enforcement jurisdiction over non-nationals and, consequently, sensitive issues of international comity.\textsuperscript{34} These problems have long confounded courts and commentators here and abroad. In general, authorities such as the Restatement suggest that extraterritorial enforcement requires consideration of such factors as the national interests of each state involved and the amount of hardship inconsistent enforcement would impose.\textsuperscript{35} Courts must inquire into the nature and location of the offense, the relation of the perpetrators and the offense to the United States, and the nature of the remedy sought.\textsuperscript{36} It is important to note, however, that these are essentially issues limited to damages and remedies rather than to liability and the underlying subject matter jurisdiction.

The clash of such competing considerations is illustrated in \textit{United States v. Imperial Chemical Industries, Ltd. (I.C.I.)},\textsuperscript{36a} in which the court found that, "... the law is crystal clear: a conspiracy to divide territories, which affects American commerce, violates the Sherman Act."\textsuperscript{37} The court then enjoined the defendant, a British company, from exercising certain rights in British patents assigned to it by the DuPont Company. I.C.I. was later successfully sued in a British court for specific


\textsuperscript{34} The underlying issue was summarized by Myers McDougal:

In an interdependent world interference by States in each other's community processes, including economic affairs, is inescapable. The question is by what principles and procedures such interference can be moderated and made reciprocally tolerable in the maintenance and expansion of an international economy.


\textsuperscript{36} \textit{Restatement}, supra note 33, § 40 and accompanying Notes and Comments.

\textsuperscript{36a} 100 F. Supp. 504 (S.D.N.Y. 1951).

\textsuperscript{37} Id. at 592.
performance by its British sub-licensee.\textsuperscript{38} In that decision, the court took an understandably dim view of the American decree which had been so framed as to require compliance in Britain by British nationals.\textsuperscript{39}

While subsequent cases have generally produced decrees framed in deference to comity considerations,\textsuperscript{40} the extraterritorial reach of the antitrust laws has grown apace and has been applied to an increasingly broader range of activities and actors. Overall, the basic antitrust theories encouraging competition apply in the same fashion to international transactions as to solely domestic ones. For example, the \textit{I.C.I.} litigation was concerned with a joint venture that was found to result in a division of territories and a lessening of competition between partners who individually possessed substantial market power.\textsuperscript{41}

In \textit{United States v. Ciba Corp.},\textsuperscript{42} the merger of two Swiss firms was challenged since it would have resulted in consolidation of their respective U.S. subsidiaries and a consequent lessening of competition in the U.S. market. Fortuitously, the Department of Justice had unquestioned jurisdiction over the subsidiaries and, as a result, was able to negotiate a consent decree providing for a spin-off of certain products without blocking the underlying merger or causing undue international friction.\textsuperscript{43} Similarly, the purchase by Schlitz of a Canadian brewer was prevented under the Clayton Act on the grounds that it would reduce merely potential competition.\textsuperscript{44}

International cartels and cartel-like arrangements that restrict access to markets and otherwise limit competition are particular targets of anti-

\textsuperscript{38} British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd., [1952] 2 All E.R. 780.


\textsuperscript{40} \textit{See, e.g.}, United States v. Holophane Co., 352 U.S. 903 (1956) (\textit{per curiam}) (defendant required to use reasonable efforts to market, but no requirement to violate any foreign patent or trademark rights).


\textsuperscript{42} [1970] Trade Cases (CCH) ¶ 73,269 (S.D.N.Y. 1970) (consent decree).

\textsuperscript{43} \textit{Id.} \textit{See also} United States v. Standard Oil Co., [1970] Trade Cases (CCH) ¶ 72,988 (N.D. Ohio 1970) (consent decree allowing purchase but requiring partial divestiture to maintain competition).

trust attack. In *United States v. National Lead Co.*, the court struck down such an arrangement between domestic and foreign titanium producers as a *per se* violation of the Sherman Act. Interestingly, the court did so in spite of a showing that the arrangement had actually produced efficiencies, a rise in output, and a price decline. The important decision in *United States v. Timken Roller Bearing Co.* voided an allocation of markets between commonly-owned companies despite a defense that the challenged agreements were merely ancillary to an otherwise legal joint venture. The case is also important for its treatment of intra-corporate conspiracy, allowing the antitrust laws to reach conduct by an offshore parent or subsidiary as long as its counterpart is located here.

In *United States v. General Electric Co.*, an agreement made abroad and specifically tailored to avoid U.S. antitrust laws by excluding the American market was struck down as having an adverse effect on competition by impinging on both import and export activities. While the final decree was framed to minimize conflict with foreign law, the significance of the case really lies in the court's refusal to narrow the effects doctrine where the parties had clearly intended not to affect U.S. commerce.

In a similar vein, but involving only U.S. nationals, is *Steele v. Bulova Watch Co.* The court, relying on what it saw as unlawful effects on United States commerce, sustained a charge of infringement of plaintiff's trademark on watches assembled and marketed almost wholly in Mexico. In *United States v. Watchmakers of Switzerland Information Center, Inc.*

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47 332 U.S. at 346-47. For a discussion of the tension in antitrust between efficiency-creating restraints and the policy of competition preservation, see R. Bork, supra note 3, at 277-79. Sullivan distinguishes the beneficial effects of cooperatives, joint sales agencies, joint research, and the like, from collateral agreements to, for example, fix prices which would be a *per se* violation. L. Sullivan, § 77, supra note 5, at 207.


51 344 U.S. 280 (1952).

52 Id. at 281-89. The Lanham Trade-Mark Act of 1946, 15 U.S.C. §§ 1051-1127, bestows jurisdiction on federal courts to award relief against trademark infringement perpetrated against a U.S. corporation in a foreign country by a citizen and resident of the United States.
both the Sherman Act and the Wilson Tariff Act were invoked against an agreement made in Switzerland, involving some U.S. producers, designed to protect an important industry and sanctioned by local (Swiss) law. While the case is most noted for its treatment of the foreign government compulsion question, it is illustrative of the expansive reach of the antitrust statutes generally. Though the activity was sanctioned by Swiss law, it was not protected by that law; it was, accordingly, open to antitrust attack.

Monopoly, such as that found in Alcoa, is the primary offensive conduct of antitrust. More often than not, however, monopolistic conduct involves other than simply monopoly or the attempt to attain it. For example, conduct may be characterized as constituting a cartel agreement, a market allocation, a predatory practice, or one of the traditional per se violations such as price fixing or tie-in.

One of the more frequently litigated areas is that concerning the legalized monopoly of the patent and the attempt to employ it to obtain greater benefits than intended by the original grant. In the leading case, United States v. Singer Manufacturing Co., an arrangement involving the use of patent pools and cross-licenses with European manufacturers was struck down. While no questions of patent validity were in issue, the court found that the various agreements together constituted an "overriding common design to exclude Japanese machines in the United
States” and thereby stifle competition.59

II.

In light of the broad extraterritorial reach of the antitrust statutes, some mention should be made of the few relatively narrow areas of exemption. It must be emphasized that, like all antitrust exemptions, these will be construed so as to allow only a highly limited application.60 In general, the exemptions are found in specialized regulated industries such as ocean shipping, governed by the Shipping Act of 1916,61 or air transport, governed by the Federal Aviation Act and various international agreements.62 The latter, of course, is currently undergoing an overhaul and dismantling specifically designed to increase competition within the industry.63

The Shipping Act is administered by the Federal Maritime Commission, which is charged with passing on rate agreements filed with it. In United States v. Far East Conference,64 it was held that the Commission has primary jurisdiction over dual-rate agreements which are properly filed. On the other hand, any fixing of rates outside of specific Commission approval has been held to raise antitrust claims.65 In addition, mergers of carriers have been found ineligible for approval and outside the scope of the statutory exemption.66 Moreover, the primary jurisdict-

59 374 U.S. at 195. See also United States v. National Lead Co., supra note 46. One of the factors in National Lead was the agreement to prohibit the export of licensed products into another company’s territory which the court interpreted as an attempt to divide markets and overreach lawful patent rights. An interesting question is whether the arrangement would have passed muster without such an express prohibition since export of a validly patented and/or trademarked item might cause an infringement abroad. At any rate, the evidence of the express agreement served to show the requisite anti-competitive intent. For discussion of proof of intent, see United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973) (circumstantial evidence is the lifeblood of antitrust). See also Manning Mills, Inc. v. Congoleum Industries, Inc., [1979-2] TRADE REG. REP. (CCH) ¶ 62,790 (3d Cir. 1979) (licensees’ allegation that patent owner cancelled at insistence of foreign licensees states a Sherman Act claim).

60 It is settled doctrine that “exemptions from antitrust coverage are strictly construed.” Federal Maritime Comm’n v. Seatrain Lines, Inc., 411 U.S. 726, 733 (1973). See also United States v. Philadelphia Nat’l Bank, 374 U.S. 321, 350 (1963), where the court stated: “[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.” But see Pan Am. World Airways v. United States, 371 U.S. 296 (1963) (preemption of antitrust by primary agency jurisdiction).


tion of the Federal Maritime Commission now results only in a stay, rather than a dismissal, of any concurrent antitrust proceedings. While valuable, and perhaps necessary, this exemption is becoming progressively more circumscribed.

The most prominent and controversial exemption from application of antitrust to foreign commerce is found in the Webb-Pomerene Export Trade Act of 1918. The Act was the result of a Federal Trade Commission study which concluded that U.S. exporters were disadvantaged by the existence of foreign cartels as well as hampered by the threat of antitrust prosecution if they attempted to organize effectively to trade abroad. The Webb Act allows agreement between exporters so long as such agreements are not in restraint of trade within the United States, do not operate so as to restrain competing domestic exporters, and do not affect domestic prices.

There has been remarkably little significant litigation over the Webb-Pomerene Act. It was not until United States Alkali Export Association, Inc. v. United States in 1945 that the Supreme Court determined that the Department of Justice could institute antitrust proceedings for violation of the Act without first obtaining a recommendation from the FTC. On remand, the trial court found that agreements between domestic exporters and their foreign competitors, allocating territories, fixing prices, and setting quotas violated the Sherman Act and lay outside the terms of the Webb Act exemption.

In United States v. Minnesota Mining & Manufacturing Co., a district court outlined what it saw as the range of permitted activities under the Act. Examining the agreement before it, the court found that the Webb exemption allowed agreements to export only through the association, to purchase only from members, to refuse to deal with non-members, to fix prices charged by foreign distributors, to limit withdrawal from the association, and to require distributors not to handle similar products of competitors. The court, however, ruled that the defendants had ex-
ceeded these bounds in their agreement concerning coated abrasives by reducing exports in favor of foreign facilities and by price discrimination against competing domestic exporters. The decree ordered the parties to reform the agreement in accordance with these findings rather than dissolve it.\textsuperscript{76} More recently, in \textit{United States v. Concentrated Phosphate Export Association, Inc.},\textsuperscript{77} the Supreme Court further constricted the Webb Act in ruling that sales by an export association, effectuated wholly through the Agency for International Development, were not "export trade" even though the commodities were ultimately delivered abroad; consequently, the sales were not protected by the provisions of the Act.\textsuperscript{78}

The Webb-Pomerene Act has been highly controversial and much criticized. Even the Federal Trade Commission admits that the Act has not lived up to the original expectations.\textsuperscript{79} Recent data for 1978 indicate that there are now only thirty registered associations, with no more than twenty-seven of these currently active.\textsuperscript{80} Exports assisted by Webb associations, as of 1976, amounted to approximately $1.725 billion out of a total of $114 billion; this is about one-third less than in 1962.\textsuperscript{81} It is also significant that, despite the original intent to aid small businesses entering export trade, Webb members today generally consist of relatively large firms.\textsuperscript{82}

Despite these facts, the Webb Act has survived repeated calls for its repeal or reform.\textsuperscript{83} Because of continuing concern over the trade deficit and a rising concern over foreign state trading companies, it is likely the Webb Act will remain essentially intact despite its shortcomings.\textsuperscript{84} Within the limits described, it remains a viable approach to participation in the export trade.

III.

As the foregoing points out, the extraterritorial application of the U.S. antitrust laws has been extensive. Extraterritoriality logically derives from the preferred position of antitrust as a basic national policy

\textsuperscript{76} Id. at 966.
\textsuperscript{77} 393 U.S. 199 (1968).
\textsuperscript{78} Id. at 209.
\textsuperscript{79} See 1967 \textit{Review}, supra note 70, at 23.
\textsuperscript{80} See \textit{Federal Trade Comm'n, Webb-Pomerene: Ten Years Later} (Nov. 1978), at 6. The author wishes to thank Richard M. Duke of the F.T.C. Bureau of Economics for supplying a copy of this report.
\textsuperscript{81} Id. at 15. See 1967 \textit{Review}, supra note 70, at 23.
\textsuperscript{82} See Webb Note, supra note 70, at 158, Table I.
\textsuperscript{83} See E. Kintner & M. Joelson, supra note 2, at 182; W. Fugate, supra note 2, § 7.15, at 248.
and from the assertion of a right to reach activities abroad which are intended to affect commerce here and actually do impact on it.\textsuperscript{85} The central question, then, becomes one of jurisdiction as U.S. antitrust law increasingly conflicts with foreign laws, foreign sovereigns, and differing policies.\textsuperscript{86} It is to this area we now turn to examine what may well be the outer limits of antitrust extraterritoriality.

The doctrine of sovereign immunity has been recognized in the courts of the United States since the earliest days of the Republic.\textsuperscript{87} The doctrine is founded upon notions of comity, of the equality of sovereign states, and of the separation of powers which lodges the conduct of foreign relations with the Executive Branch.\textsuperscript{88} While it is a corollary to the territorial principle and is fashioned to prevent interference with a foreign sovereign within its own territory, international law would generally deny immunity for activity which crosses national borders and has an effect in the forum state.\textsuperscript{89}

Numerous exceptions have been grafted onto the practical application of sovereign immunity. Perhaps the most significant has been the reliance by the courts on determinations of immunity by the Executive. In Berizzi Bros. v. S.S. Pesaro,\textsuperscript{90} for example, the Supreme Court based its resolution of the issue on the Executive's suggestion of immunity and consideration of the purpose, rather than the nature, of the conduct.\textsuperscript{91} At the same time, however, courts have recognized a major exception to immunity where there is a valid waiver, express or implied, particularly where foreign sovereigns utilize United States courts for the litigation of claims.\textsuperscript{92}

Most pertinent to this discussion has been the exception distinguishing a sovereign's public acts, \textit{jure imperii}, from non-immune, purely commercial acts, \textit{jure gestionis}.\textsuperscript{93} This distinction raises the difficult question of characterization, of determining what are truly commercial activi-

\textsuperscript{85} See note 29 supra and accompanying text.
\textsuperscript{86} R. VERNON, STORM OVER THE MULTINATIONALS (1977); Joelson & Griffin, supra note 84.
\textsuperscript{87} See Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812). See also W. Fugate, supra note 2, § 3.10, at 111 et seq.; RESTATEMENT, supra note 33, § 65.
\textsuperscript{89} See The S.S. Lotus, [1927] P.C.I.J., ser. A, No. 10. See also Haight, supra note 32; Whitney, supra note 52.
\textsuperscript{90} 271 U.S. 562 (1926). See Ex Parte Peru, 318 U.S. 578 (1943) (immunity granted on suggestion); Republic of Mexico v. Hoffman, 324 U.S. 30 (1945) (no position by State Department) (immunity denied). For a critical discussion, see Jessup, \textit{Has the Supreme Court Abdicated One of Its Functions?}, 40 AM. J. INT'L L. 168 (1946).
\textsuperscript{91} 271 U.S. at 574.
\textsuperscript{93} For example, see Bank of United States v. Planters Bank of Georgia, 22 U.S. (9 Wheat.) 904 (1824), at 907, where Chief Justice Marshall stated, "[W]hen a government becomes a part-
ties.\(^\text{94}\) Although in 1952 the State Department officially adopted the restrictive theory, denying immunity for commercial conduct, the confusion in the case law has continued and has been heightened by the Department's ongoing interference.\(^\text{95}\)

The affirmative defense of sovereign immunity has been further clouded by a conflict of laws principle, the act of state doctrine, which requires a court to recognize and give effect to foreign law even though it may be contrary to that of the forum.\(^\text{96}\) Like sovereign immunity, act of state is substantially grounded in judicial deference to the Executive in foreign affairs matters. In Banco Nacional de Cuba v. Sabbatino,\(^\text{97}\) the Supreme Court refused to inquire into the validity of Cuban expropriation decrees but, significantly, limited its holding to the expropriation situation and its rationale to Executive prerogative.

In First National City Bank v. Banco Nacional de Cuba,\(^\text{98}\) a divided court allowed a counterclaim and set-off on the basis of the Executive's expression of non-interest. Subsequently, in Alfred Dunhill of London, Inc. v. Republic of Cuba,\(^\text{99}\) a majority found no act of state preventing Cuban intervenors from returning monies mistakenly paid in settlement of im-


\(^{96}\) See Underhill v. Hernandez, 168 U.S. 250 (1897), at 252, where the Supreme Court stated: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of another within its own territory." The RESTATEMENT, supra note 33, § 41, adopts the principle but, in Comment a, points out that it is not generally recognized in international law. See Delson, The Act of State Doctrine—Judicial Defiance or Abstention, 66 AM. J. INT'L L. 82 (1972). See also Kintner & Griffin, supra note 14, at 230.


port accounts. Section III of the decision, supported by a plurality of the Justices, goes further in holding, "[i]t is fair to say that the 'restrictive theory' of sovereign immunity appears to be generally accepted as the prevailing law in this country . . . [w]e decline to extend the act of state doctrine to acts committed by foreign sovereigns in the course of their purely commercial dealing."\textsuperscript{100}

In \textit{American Banana Co. v. United Fruit Co.},\textsuperscript{101} the alternative holding was based upon act of state and the court's hesitancy to inquire into the acts of a foreign sovereign taking place within its own territory. \textit{United States v. Sisal Sales Corp.},\textsuperscript{102} of course, distinguished this holding by separating out the private antitrust conspiracy from the merely collateral acts of the Mexican government. Subsequent cases have expanded on this approach by attempting to separate private from governmental activity and distinguishing the merely passive or privately induced participation of a foreign sovereign from clear compulsion.\textsuperscript{103} The courts, however, remain inhibited by their perhaps excessive sensitivity to foreign relations matters.

Act of state, in the form of foreign sovereign compulsion, was upheld as a valid defense to an antitrust claim in \textit{Interamerican Refining Corp. v. Texaco Maracaibo, Inc.}\textsuperscript{104} wherein the court found that crude oil deliveries were clearly blocked by the direct intervention of the Venezuelan government: "Anticompetitive practices compelled by foreign nations are not restraints of commerce, as commerce is understood in the Sherman Act, because refusal to comply would put an end to commerce."\textsuperscript{105}

In the complex \textit{Occidental Petroleum Corp. v. Buttes Gas & Oil Co.},\textsuperscript{106} litigation, plaintiff alleged an antitrust conspiracy in which defendant instigated a border dispute ultimately resulting in Occidental's loss of its oil concessions. The court, relying on act of state, felt constrained to dismiss the action since any inquiry would necessitate examination of issues of ownership in the disputed territory, questions, it held, more properly addressed by the Executive as involving recognition of states.\textsuperscript{107}


\textsuperscript{101}213 U.S. 347 (1909). Again, the case has been narrowed, but never specifically overruled. See Whitney, \textit{supra} note 52, at 657 n.5; Jennings, \textit{supra} note 14, at 161; \textit{Antitrust Developments}, \textit{supra} note 14, at 365.

\textsuperscript{102}274 U.S. 268 (1927). In \textit{Sisal}, the defendants had obtained favorable legislation from Mexico in furtherance of their monopolization scheme.


\textsuperscript{105}307 F. Supp. at 1298.


It must be emphasized that *Occidental* was decided specifically on act of state grounds. Although raised as a defense, the court did not definitively address the controversial question of application of the *Parker* or *Noerr-Pennington* doctrines to the international setting.\(^{108}\) While a full examination of this issue is beyond the scope of this discussion, it would appear that, even if applied with relation to foreign governments, these parallel domestic-law doctrines have been so substantially eroded in recent years as to render the impact of their international application relatively insignificant.\(^{109}\)

In *Hunt v. Mobil Oil Corp.*,\(^ {110}\) the Second Circuit, while it followed *Dunhill*, refused to inquire into an alleged conspiracy to induce Libya to nationalize plaintiff's oil concessions. Like *Occidental*, the *Hunt* court, rather than focus on the alleged private conspiracy, hesitated to inquire into the process of nationalization which, as *Sabbatino* held, involves peculiarly local, sovereign considerations not subject to judicial review.\(^ {111}\) A strong dissent, relying on the commercial exception themes of *Dunhill*, criticized application of act of state as a mere "screen [from] accountability" for essentially private anticompetitive conduct.\(^ {112}\)

While the case law is certainly far from settled, a common thread emerges from the attempt to find the lines between conduct purely sovereign in nature and conduct which has no true basis in sovereignty.\(^ {113}\)

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\(^{111}\) See Bokkelen v. Grumman Aerospace Corp., 432 F. Supp. 329 (E.D.N.Y. 1977). The court dismissed an antitrust claim based on the defendant's obtaining cancellation of import licenses by Brazilian authorities, stating: "[d]enial of import licenses is not the type of activity that a business is capable of and is the type of activity normally considered within a government's power. Therefore, even if there is an exception to the act of state doctrine [under Dunhill], it does not apply here." 432 F. Supp. at 334. See also Mannington Mills, Inc. v.
Outlining what may well become a major vehicle for resolution of these questions, the Ninth Circuit, in *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, adopted what it called the "jurisdictional rule of reason." Noting that *Sabbatino* had not found the act of state doctrine to be constitutionally compelled, the court refused to find that the rule confers a blank-check immunity upon all conduct blessed with some imprimatur of a foreign government.

Distinguishing earlier cases and separating out the private conspiratorial activities from the sovereign conduct set up as a defense (court proceedings in Honduras), Judge Choy attempted to refine the *Alcoa* and Restatement effects test by adopting a three-part procedure requiring: 1) proof of some effect; 2) proof the effect is large enough to injure the plaintiff; and, 3) proof that the magnitude of the effect is such that, considering other nations, the assertion of extraterritorial jurisdiction is justified. In sum, the court's rule of reason, "... [does] not in any way question the 'validity' of 'foreign law or policy'... [The] legitimacy of each nation's interests is assumed. It is merely the relative involvement of each state... that is to be evaluated."

Application of such a rule can go a long way toward preserving a plaintiff's access to the courts, allowing for enforcement of antitrust policies and, at the same time, mitigating, even if not eliminating, the head-on clashes with foreign sovereigns which have so often arisen in international antitrust cases. For example, the recent consent decree in *United Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979) (holding that the mere issuance of patents is not an act of state). The defense must show that "the foreign decree was basic and fundamental to the alleged antitrust behavior and more than merely peripheral to the overall course of conduct." *Id.* at 1293.

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114 549 F.2d 597 (9th Cir. 1976). For the genesis of the jurisdictional rule of reason, see K. Brewster, *supra* note 2, at 446.

115 549 F.2d at 613.


117 549 F.2d at 613. See Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1294 (3d Cir. 1979). The court observed: "The grant of patents for floor coverings is not the type of sovereign activity that would be of substantial concern to the executive branch in its conduct of international affairs."


119 See, e.g., United States v. Watchmakers of Switzerland Information Center, Inc., [1963] Trade Cases (CCH) ¶ 70,600 (S.D.N.Y. 1962), order modified, [1965] Trade Cases (CCH) ¶ 71,352 (S.D.N.Y. 1965); Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958), infra note 121. For a recent treatment of the overall problem, see generally Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1294-1303 (3d Cir. 1979). The latter specifically adopts the *Timberlane* approach in its analysis. In a concurring opinion, Judge Adams raises an important question regarding the issues of comity and abstention in cases where application of the antitrust laws would require clearly inconsistent behavior under foreign law, stating that, "[t]o my knowledge no abstention doctrine exists with respect to con-
States v. Bechtel Corp.120 is framed so as to recognize the essential validity of the Arab countries' boycott legislation directed against Israel, allow U.S. contractors to continue to operate in the Middle East, and carry out the objectives of both U.S. antitrust and anti-boycott legislation by confining, as far as possible, the effects of the boycott.

Even with the Timberlane rule of reason, the constantly expanding reach of U.S. antitrust will make for continuing international controversy and continued lack of a real consistency in the cases. Discovery, for example, has recently resurfaced as an issue. Like other aspects of antitrust litigation, United States rules regarding the discovery and production of documents as well as the deposition of parties and witnesses are particularly broad and, in international practice, often conflict with more limited foreign rules and nondisclosure laws.121 For example, subpoenas in the government's investigation of the shipping industry were met with protests from eleven nations and the passage of criminal laws preventing compliance in Britain.122 In the massive In re Westinghouse Electric Corporation Uranium Contract123 litigation, currently underway, the attempt to obtain evidence abroad has rather consistently met with either unfavorable legislation or court decisions.

More uncertainty is promised as various aspects of the 1976 Foreign Sovereign Immunities Act (FSIA) are tested in court.124 While the Act is an attempt to settle some of the confusion in the cases by legislating the commercial activities exception postulated in the Dunhill plurality opinion, it also potentially extends that exception further than any court has previously dared to go.125 Significantly, the legislative history accompa-

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121 Discovery has long been a source of especially heated controversy. See, e.g., Interhandel Case (Switzerland v. United States), [1959] I.C.J. 6, where the Swiss government appealed to the World Court before reaching a final compromise; Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958) (applying test of good faith compliance). Cf. United States v. First Nat'l City Bank, 396 F.2d 897 (2d Cir. 1968) (applying balancing of interests test). The latter test has been adopted by the RESTATEMENT, supra note 33, § 40. See generally Note, Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation, 88 YALE L.J. 612 (1979).
125 The Foreign Sovereign Immunities Act specifically denies sovereign immunity for the
nying the FSIA indicates both that it is meant to apply in antitrust cases and that it is framed so as to avoid any substitution of the act of state defense for that of sovereign immunity. Moreover, it should also be noted that the Act was initiated, drafted and fully supported by the Executive Branch and, in particular, by the Department of State. This alone should impress any court hesitant to interfere in an area of foreign affairs traditionally considered beyond judicial review.

Conclusions

With the extraterritorial reach and grasp of United States antitrust constantly expanding and with antitrust litigation constantly increasing, the exercise of vigilance and care is essential in each and every international business transaction. While this discussion has only scratched the surface of the law, it should be obvious that hardly any activity is protected from antitrust scrutiny and challenge. Defensive antitrust, in the form of review and compliance programs, and use of local counsel are extremely important to both lawyer and businessmen. More than ever, creative lawyering will be needed as antitrust jurisdiction expands with the trade it polices and continues to clash with differing systems and values abroad. At the same time, the expanding reach of extraterritoriality offers added opportunities to employ antitrust to cure defects and redress abuses of the open and competitive marketplace.

Question and Answer Period

Mr. Lacey: Before I go to the questions I would like to mention a couple of points to tie together some of the areas that Mr. Davidow and I discussed. In the Mannington Mills case an interesting distinction was made between commercial activities of a foreign state, its agents or instrumentalities, in any case based upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. 28 U.S.C. § 1605(a)(2). The Act provides that the characterization of conduct is to be based upon the nature, not the purpose, of the conduct. Id. at § 1603(d). In transferring responsibility for these determinations from the Executive to the courts, the Act intends that the latter will have wide latitude in characterizing the activity. See Legislative History, supra note 124, at 6615. Compare cases cited in note 90 with cases cited in note 95 supra.


128 As of this writing the Act is being tested in a private antitrust action against the Organization of Petroleum Exporting Countries (OPEC). See International Ass'n of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries (OPEC), Civil No. 78-5012-AAH (Sx) (C.D. Cal.). On August 24, 1979, the court dismissed the claim against OPEC for lack of service and the claims against the individual sovereigns on the ground of their immunity from suit. The plaintiffs have stated that they intend to appeal.

made. The case involved the issuing of kitchen floor covering patents, and the court held that issuing patents for kitchen floor coverings is not the sort of activity that deeply affects U.S. foreign policy considerations. Ordinarily in cases involving a conflict with a foreign sovereign or foreign law the old doctrines of comity and abstention come into play. The Court's discussion in *Manningon Mills* is thus very important in this regard, and I recommend it to you on this point. The concurring opinion particularly uses the *Hunt—Dunhill* line of cases and talks about the possibility that comity and abstention have in effect been merged into an expanded jurisdictional test under the *Timberlane* theory.

**Question:** Can an antitrust issue arise when only one company engages in a form of business in which no other company competes, engages, or shows any desire? For example, a highly specialized limited market situation?

**Mr. Lacey:** The "Cellophane Case" comes to mind. That case involved a French patent for cellophane in the early 1950s, when it was still a fledgling industry in this country. An exclusive license had been granted to DuPont, and the Court ruled that DuPont could have the exclusive license. This form of license is in fact an allocation of territories, but the Court allowed it. The answer to your question then is that an antitrust issue could arise in that situation, but the courts may find grounds to disregard it.

**Question:** Did the state of Connecticut participate in the OPEC case? Was it asked to submit a brief?

**Mr. Lacey:** Judge Hauk issued an order to show cause in that case (*International Association of Machinists v. OPEC*). From my limited experience, I think that order was probably unique in antitrust law. He issued a series of questions which he ordered to be distributed to anyone who wanted to answer. He specially ordered that they be distributed to each state governor, attorney general, secretary of state, etc.—to virtually every state and federal agency that would have any interest in it—and asked for comments. He asked anybody who had anything at all to say about the issues to address them. The National Association of Attorneys General put together a brief through the state of Washington addressed specifically to the indirect purchaser problem, one of the very hot topics in antitrust law right now because of the *Illinois Brick* case. Under *Illinois Brick* an indirect purchaser, for example, a consumer buying from a retailer who has bought from the wholesaler who has bought from the manufacturer, cannot sue for damages for a price fix at, for example, a third removed level. The state of Connecticut filed one brief addressed specifically to that issue and another, in addition to the National Associa-

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3 No. 78-5012-AAH(SX) (C.D. Cal.).

tion brief, specifically addressed to the jurisdictional issue. I guess the best thing to say is that the court was not terribly impressed.

*Question:* Could you comment a little further about substantiality as part of the effect on U.S. trade? What degree is needed?

*Mr. Lacey:* I think, as Mr. Davidow said, there is a series of tests: foreseeability, substantiality, the degree of impact. More important to keep in mind, though, is what would happen if this were strictly a domestic situation. Think strictly in terms of this country, forget the international borders, forget the fact that there is a foreign company involved here, forget that there is foreign law involved. I think that is probably one of the keys to finding antitrust injury, which is all a matter of proof anyway. Today the rule of reason seems to be the by-word. The *per se* activities are becoming less important, particularly after the *GTE Sylvania* case. You are looking for a factual analysis, you are looking for economic proof and backing for your theory. The effect test is essentially this: you have to have proof and look at it in terms of its strictly domestic content.

*Question:* Why isn’t the Webb-Pomerene Act utilized to a greater extent?

*Mr. Lacey:* I think that judging from the FTC reports that I have seen and the commentary that I have read no one really knows why it’s not used. It’s there to be used, and I think perhaps one of the reasons it is not used is strictly a lack of familiarity and a lack of incentive to go through the process of registering with the FTC.

*Mr. Davidow:* Product differentiation is also an important reason for the Webb-Pomerene Act’s lack of use. Americans generally do not want to sell if they do not have labels. They want to make their own reputations.

*Question:* Did the court find intent in *Alcoa* or infer it from the facts as inevitable?

*Mr. Lacey:* Yes. The Court found intent, as I recall, from the facts. It inferred the intent, which is a traditional antitrust theory. The inference of intent is perfectly permissible.

*Question:* You mentioned sovereign immunity and gave two examples of buying shoes for the army or shoes for welfare. Is there a difference or does sovereign immunity cover both?

*Mr. Lacey:* That is the point of the Foreign Sovereign Immunities Act—trying to differentiate between the commercial activity and what case law, particularly *Victory Transport*, has developed. In distinguishing what are the areas of non-sovereign interests, the cases go every which way. In *Rich v. Naverra-Vacuba* the State Department traded off a sover-

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7 295 F.2d 24 (4th Cir. 1961).
eign immunity suggestion for the return of a hijacked airliner. In the *President of India*\(^8\) case dealing with grain transport contracts, the State Department's suggestion of immunity was granted, but in other cases involving the transport of grain, there was no grant of immunity because they involved strictly commercial contracts. The Foreign Sovereign Immunities Act is an attempt to take this determination out of the State Department and give it to the courts. I think the cases are just starting to develop, and it's hard to say which way they are going to go. But the attempt is to let the court characterize the activity as either a commercial or sovereign activity. You see that trend going through *Mannington Mills, Dunhill, Bokkelen v. Grumman Aerospace Corp.*\(^9\) in which import licenses issued by the government of Brazil were at issue. In that case the court said that the granting of import licenses is not the sort of activity a business can engage in. Governments do that, and therefore there is immunity. The careful weighing of the facts is the most important thing.

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\(^8\) Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198 (2d Cir. 1971).