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THE EXTRATERRITORIAL JURISDICTION OF THE SHERMAN ACT

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An American manufacturer may engage in business in a foreign country through a wholly owned foreign subsidiary or a foreign corporation in which he owns a majority or minority interest with one or more other competitors or investors. To what extent may he expect his conduct to be governed by the United States antitrust laws, and in particular, the Sherman Act?[1]

Initially, it is necessary to distinguish between judicial considerations of the scope and context of the words "trade or commerce . . . with foreign nations."[2] This phrase is the criterion utilized by the federal courts to determine whether antitrust violations have occurred and whether they have *jurisdiction* to enforce the antitrust laws over the persons and subject matter involved. The jurisdictional question is becoming increasingly important with the present upsurge of foreign investment and trade through the medium of subsidiaries, joint ventures and other types of business organizations formed and operated in foreign countries.

A contract, combination or conspiracy in restraint of international trade is termed a "cartel."[3] When the cartel has an affect on the "trade or commerce" or "any part of the trade or commerce among the several states or with foreign nations," the question arises whether the cartel is within the jurisdiction of the Sherman Act[4] or other American antitrust laws.[5]

Federal district courts have original jurisdiction to prevent and restrain violations of the Sherman Act.[6] Normally, jurisdiction is to be exercised according to the general principles which govern the granting of equitable relief and which provide for the imposi-

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1. For a background concerning the reasons behind corporate attempts to utilize foreign subsidiaries, and the local laws, restrictions, and economic requirements for foreign subsidiaries, see Graham, *Antitrust Problems of Corporate Parents, Subsidiaries, Affiliates, and Joint Ventures in Foreign Commerce*, 9 A.B.A. ANTITRUST SECTION 32, 33-38 (1956).

2. Sherman Antitrust Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1964).

3. *Cf.* KRONSTEIN, MODERN AMERICAN ANTITRUST LAW 249 (1958).

4. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1964).

5. See Federal Trade Commission Act § 5, 38 Stat. 719 (1914), as amended, 15 U.S.C. § 44 (1964); Clayton Act §§ 1, 3, 7, 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 12, 14, 18 (1964); Robinson-Patman Act § 2(a), 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1964).

6. 26 Stat. 209 (1890), as amended, 15 U.S.C. § 4 (1964).

tion of criminal penalties.[7] Extraterritorial jurisdiction is generally governed, in addition, by the principles of comity and territoriality in international law.[8]

Broadly, a state has competence to punish a foreigner for his acts outside of its territorial boundaries if such acts constitute a crime within the territory of the state.[9] Whether the jurisdiction of the Sherman Act, being partially penal in nature, may be based on such a proposition has been discussed.[10] A problem arises, however, because the territorial principle is normally applied to determine *who* should punish, rather than whether the act should be punished at all. In contrast, nations differ as to whether business conduct of an anti-competitive nature should be regulated.[11]

Mr. Justice Holmes, in *American Banana Co. v. United Fruit Co.*,[12] said that "the general and most universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where it is done."[13] All legislation was noted as being prima facie territorial. The Court assumed that the provisions of the Sherman Act were applicable only to those people subject to the legislation.[14] *American Banana* involved a private antitrust suit. A conspiracy tending toward a monopoly was charged because the defendants had instigated the seizure of plaintiff's facilities by the government of Costa Rica. The defendants' business arm was a wholly owned subsidiary operating abroad. The Court dismissed the complaint holding that the Sherman Act was applicable only in respect to the territorial limits over which the legislature has legitimate power. *American Banana* exempted the acts of foreign corporations or private parties consummated abroad and under requirements or directions by a foreign government even though the acts affected American foreign commerce.[15] That the conspiracy may have been entered into in the United States was given no apparent effect;[16] instead, the decision was based on the principle of international law that the acts of a sovereign within its own jurisdiction and concerning its own internal commerce will be given recognition by other states.[17]

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7. DeBeers Consol. Mines v. United States, 325 U.S. 212 (1945).

8. *Cf.* Whitney, *Sources of Conflict Between International Law and the Antitrust Laws*, 63 YALE L. J. 655, 656-60 (1954).

9. See Comment, 37 YALE L. J. 484 (1928).

10. See Haight, *International Law and the Extraterritorial Application of the Antitrust Laws*, 63 YALE L. J. 639, 643.

11. See Brewster, *Effects of the United States Antitrust Laws*, 11 A.B.A. ANTITRUST SECTION 65, 69-70 (1957).

12. 213 U.S. 347 (1909).

13. *Id.* at 356.

14. *Id.* at 355-359.

15. *Cf.* Kronstein, *Enforcement of United States Antitrust Laws Over Alien Corporations*, 43 GEO. L. J. 661, 662 (1955).

16. 213 U.S. at 359.

17. *Cf.* Hansen, *The Enforcement of the United States Antitrust Laws by the Department of Justice to Protect the Freedom of Foreign Trade*, 11

A further insight into the *American Banana* premise of Mr. Justice Holmes was presented a year later in *Strassheim v. Daily*.[18]

> Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its powers.[19]

The *American Banana* rationale was closely followed in *United States v. American Tobacco Co.*[20] An agreement, lawful under British law, between American Tobacco and its British competitor limited their business spheres to their respective countries and territories. The substantial adverse impact on competition in American commerce caused the Court to find the division of markets illegal under sections 1 and 2 of the Sherman Act.[21] Having personal jurisdiction over the American party, the Court required the abrogation of the agreement, seemingly without considering the possible adverse consequences to such party under British law.

In *United States v. Pacific & Arctic R.R. & Nav. Co.*[22] the granting of discriminatory rates to users who avoided competitors' facilities in consonance with a cartel agreement with a Canadian carrier was held to be an attempt to gain control of and to monopolize the transportation between the United States and Alaska. Despite the defendant's argument that the United States antitrust laws can have no operative effect on transportation in foreign countries, the Court found jurisdiction over the acts done within the United States and those done outside to the extent that they attempted to control transportation within. Having personal jurisdiction over the American firm, the Court voided the agreement insofar as it covered illegal acts within the United States in restraint of its trade.[23] In a subsequent decision,[24] the agents of foreign owned shipping corporations protested that the alleged conspiracy to restrain trade was not within the purview of the Sherman Act because it was formed in a foreign country. The effect of the combination on American commerce, and the fact that agents operating in the United States participated in the agreements, formed the basis for the Court's finding of jurisdiction.[25]

The Court in *United States v. Sisal Sales Corp.*[26] distinguished *American Banana*. The legislative acts of the foreign sovereign had

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A.B.A. ANTITRUST SECTION 75 (1957); Haight, *International Law and Extraterritorial Application of the Antitrust Laws*, 63 YALE L. J. 639, 643 (1954).

18. 221 U.S. 280 (1910).
19. *Id.* at 285.
20. 221 U.S. 106 (1911).
21. *Id.* at 184.
22. 228 U.S. 87 (1913).
23. *Id.* at 106; see also Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), *vacating* 289 F.2d 86 (9th Cir. 1961).
24. Thomsen v. Cayser, 243 U.S. 66 (1917).
25. *Id.* at 88.
26. 274 U.S. 268 (1927).

been solicited by the defendants and were incidental to the illegal agreement entered into "by parties within the United States and made effective by acts done therein."[27] The illegal agreement destroyed competition and monopolized the purchase, importation and sale of sisal in the United States. Since American foreign commerce in this case embodied the Mexican exports as well as the American imports, it has been noted that both countries would have jurisdiction to enforce their laws.[28] No international complications would arise unless the laws were in conflict. Under the rule in *American Banana*, comity would permit application of the foreign law. In *Sisal*, however, the acts went far beyond the Mexican laws. The question seemed to be *who* should regulate, not should the conduct be regulated.[29]

From the rationale of the courts' early decisions, it can be seen that jurisdiction was acquired by reason of acts formed or partly executed within the United States which had a substantial detrimental affect on American foreign commerce.[30] *American Banana*, although carefully limited, seemed to allow courts having jurisdiction based upon the above premise to refuse to exercise it in deference to the principle of comity. Further, the conduct of foreign corporations or parties which was completely consummated abroad was not within the purview of the antitrust laws.[31] Jurisdiction over foreign parties apparently could not be found merely because their activities *affected* American foreign commerce.

There were few further developments in the law until the landmark decision in *United States v. Aluminum Co. of America*.[32] Alcoa was found not to be a party to the group of ingot producers, non-nationals of the United States, who had formed an alliance to control the world-wide production and price of aluminum. The parties were not United States corporations or citizens and their conduct was formed wholly abroad. Nonetheless, section 1 of the Sherman Act was held to have been violated since the agreement was *intended* to substantially affect American imports. The Court reviewed the legislative history of the Sherman Act and decided that the Act could be interpreted to cover acts when they *intentionally affected* American foreign commerce. Such intended activities must, however, be coupled with actual deleterious affects before the laws could be applied.[33] Importantly, the Court considered the possible international complications involved if liability

27. *Id.* at 276.
28. See Hansen, *supra* note 17, at 81.
29. *Ibid.* See also, Brewster, *Extraterritorial Effects of the United States Antitrust Laws*, 11 A.B.A. ANTITRUST SECTION 65, 69-70 (1957).
30. *Cf.* Kronstein *supra* note 15, at 661; and see REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 70 (1955).
31. *Cf.* Kronstein, *supra* note 15, at 662.
32. 148 F.2d 416 (2d Cir. 1945).
33. *Id.* at 444-45.

could be predicated on an "affect" without an "intent."[34]

Acts intentionally affecting the foreign commerce of the United States would be within the *American Banana* rule as modified in *Sisal* and *Thomsen*. In the latter cases, the presence or absence of agents in the United States was held *not* to be controlling because an "agent is merely an animate means of executing his principal's purposes, and, for the purposes of this case, he does not differ from inanimate means. . . ."[35] Therefore, under *Alcoa*, acts done wholly abroad which purposely or intentionally affect American foreign commerce are within the jurisdiction of the Sherman Act.[36] Whether such activities violate the Sherman Act, however, is a separate consideration.

In a subsequent decision,[37] a court, after considering the "intent" aspects of the *Alcoa* rule, questioned whether the activities had the required direct and substantial affect upon trade.[38] Other courts continued to find conspiracies or combinations, analogous to *American Tobacco*, when formed or partly executed within the United States to be within the jurisdiction of the Sherman Act.[39]

The Webb-Pomerene Act[40] was, in *United States v. United States Alkali Export Ass'n*,[41] deemed not to grant immunity for a world-wide cartel which was designed to stabilize the world price of alkalis. It is essential to note that neither this act nor any other act designed to aid export traders should affect the determination of the extent of the Sherman Act jurisdiction. The Webb-Pomerene Act exempted certain associations from the antitrust laws, but further indicated the congressional intention to apply the Sherman Act to all other phases of United States foreign trade.[42]

An "affect" is a necessary element of *jurisdiction* in *Alcoa* situations; a direct and substantial "affect" is necessary for Sherman Act *violations*. The problem arises when the standards of illegality (which might be modified to promote foreign trade) are confused with the jurisdictional feature of the "affect on foreign commerce."

In *United States v. Timken Roller Bearing Co.*[43] the defendants

34. *Id.* at 443; see generally, REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, 92-114 (1955).

35. 148 F.2d at 444.

36. *Ibid.* See Kronstein, *supra* note 15 at 661-64.

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

38. *Id.* at 891.

39. United States v. Timken Roller Bearing Co., 83 F. Supp. 284 (N.D. Ohio 1949), *aff'd*, 341 U.S. 593 (1951); United States v. Nat'l Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947); United States v. Gen. Dyestuffs Corp., 57 F. Supp. 642 (S.D.N.Y. 1944).

40. 40 Stat. 516, 517 (1918), as amended, 15 U.S.C. §§ 61-65 (1964).

41. 86 F. Supp. 59 (S.D.N.Y. 1949).

42. See Hansen, *supra* note 17, at 75-78.

43. 83 F. Supp. 284 (N.D. Ohio 1949), *aff'd*, 341 U.S. 593 (1951).

argued that American foreign commerce is not affected when American exports and imports are not affected.[44] While dictum in the opinion[45] may be said to support the proposition that the *mere fact* of investment by American companies in foreign production facilities affects American foreign trade or commerce,[46] the Court may have been speaking of "affect" as an element of jurisdiction under *Alcoa*. The subsequent decision in *United States v. Minnesota Mining & Mfg. Co.*[47] seems to support the latter conclusion.

An export association or company inevitably affects American foreign commerce, but the inevitable consequences are not all unlawful restraints as envisioned or as evidenced by the congressional intent underlying the Webb-Pomerene Act.[48] A *Minnesota Mining* combination, however, of four-fifths of the manufacturers in one market to establish jointly owned factories in foreign countries to control the output is not excepted under Webb-Pomerene and has a substantial affect on American foreign commerce.[49] The *Minnesota Mining* court also noted that the establishment of a foreign factory by a single American company would not be a combination or conspiracy. Therefore, it would not violate the Sherman Act. Such an arrangement, nevertheless, would seem to have an affect on American foreign commerce.[50] Although economic and business arguments are not justification for any restraint of trade, such arguments should have absolutely no bearing on whether there is an "affect" as used in the jurisdictional sense.[51]

United States v. Standard Oil Co.[52] is noteworthy since it attempted to define the term "affect." Various activities were listed as "affecting" American foreign commerce when done within three or more nations at or about the same time by certain combinations of the world's major oil companies. Certain United States and

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44. *Cf.* REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, 78 (1955); Graham, *supra* note 1, at 43-44.

45. United States v. Timken Roller Bearing Co., 341 U.S. 593, 599 (1951).

46. See REPORT OF ATTORNEY GENERAL, *op. cit. supra* note 44, at 78; see generally Hale, *Joint Ventures: Collaborative Subsidiaries and the Antitrust Laws*, 42 VA. L. REV. 927 (1956).

47. 92 F. Supp. 947 (D. Mass. 1950). For a discussion opposing *per se* illegality of joint ventures, see Brewster, *Extraterritorial Effect of the United States Antitrust Laws*, 11 A.B.A. ANTITRUST SECTION 65 (1957).

48. *Cf.* United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947, 965 (D. Mass. 1950).

49. *Id.* at 964-65.

50. *Id.* at 963.

51. For a discussion of the effect of *Timken*, as modified by *Minnesota Mining*, see Graham, *Antitrust Problems of Corporate Parents, Subsidiaries, Affiliates, and Joint Ventures in Foreign Commerce*, 9 A.B.A. ANTITRUST SECTION 32 (1956).

52. 1960 Trade Cas. ¶ 69849 (S.D.N.Y. 1960); see United States v. Gulf Oil Corp., 1960 Trade Cas. ¶ 69851 (S.D.N.Y. 1960); see also Haight, *International Antitrust Landmarks: Consent Decrees in the Oil Cartel Case*, 6 ANTITRUST BULL. 561 (1961).

British oil companies entered into a conspiracy to control the foreign production and supply of oil, regulate American imports and divide foreign markets. The consent decree is primarily concerned with whether the activities affect foreign commerce in *violation* of the antitrust laws. Nonetheless, insight into the policy of the Justice Department with regard to jurisdiction is apparent from the recognition of certain exceptions to the enforcement of the decree. There is no violation if the defendants are either acting pursuant to a requiremement of foreign law, applicable where the transaction occurs or pursuant to an official pronouncement or request of a foreign nation where failure to comply might result in the loss of business elsewhere.

The first exception was argued unsuccessfully as a defense in *Sisal*, and bespeaks of *American Banana*. Although the *American Banana* Court seemingly refused to apply the Sherman Act on the basis that it had no jurisdiction, later cases might prompt the courts today to accede to jurisdiction, but refuse to exercise it. Nevertheless, the conduct in *American Banana* would "affect" American foreign commerce. If an intent were present, jurisdiction under the *Alcoa* ruling would then exist.

The second exception is analogous. If the "affect" and "intent" were present, the jurisdictional basis of *Alcoa* would be satisfied. If there is a pronouncement of a foreign government, however, the courts may simply refuse to exercise jurisdiction, or possibly the Justice Department chose not to prosecute. Hence, the substantive question of a Sherman Act violation would not be reached.

The jurisdictional hypothesis of *Alcoa*, as viewed in light of *Timken* and *Minnesota Mining*, seems to support the proposition that joint American investment abroad has an "affect" on foreign commerce. If either the acts were formed or partly executed in the United States or American parties were involved, service of process is possible and jurisdiction over the person is obtainable. Jurisdiction over the subject matter also exists if conduct by foreigners was intentional and had an affect on American foreign commerce, even though wholly consummated abroad. In this instance, if the foreign entity is in fact a business arm of an American party,[53] or if the foreign entity is doing business within the United States,[54] it seems that service of process and personal jurisdiction may also be obtained.[55]

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53. See Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 MICH. L. REV. 1139 (1952); Graham, *supra* note 51.

54. See Kronstein, *Enforcement of United States Antitrust Laws Over Corporations*, 43 GEO. L. J. 661 (1955); see also Hansen, *The Enforcement of the United States Antitrust Laws by the Department of Justice to Protect Freedom of United States Foreign Trade*, 11 A.B.A. ANTITRUST SECTION 75 (1957).

55. *Ibid.*

There is, of course, a substantial distinction between the *existence* of jurisdiction and the *exercise* of jurisdiction. A court may be faced with sufficient facts upon which jurisdiction may be based, and yet chose not to exercise its jurisdiction.

Difficulty is encountered in *exercising* jurisdiction in situations involving international activities or foreign nationals. In this respect, it is a well recognized equity principle that courts may order persons before them, including nationals of other countries, to do or refrain from doing acts abroad, if not contrary to the laws of a foreign state.[56] Jurisdiction over foreign nationals is a matter of procedure governed by the law of the forum. Jurisdiction is asserted by service of process in order to bring the party before the court. Such must be consistent with due process and may include a determination that such parties are doing business within the United States.[57]

As demonstrated in *United States v. Scophony Co. of America*,[58] the presence of a corporation, which is incorporated abroad, within the jurisdiction should be determined from a realistic appraisal of its overall business. In *Steele v. Bulova Watch Co.*[59] the Court noted 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."[60]

In light of this, the *United States v. Imperial Chemical Indus.*[61] decision should be considered. The court, as a part of the sanctions imposed, ordered the British defendant to assign to the American defendant the rights to certain patents. The patents had been exclusively licensed by the British corporation to another foreign corporation. Recognizing that "substantive legal questions may be raised,"[62] the court conceded that its power "to regulate is limited and depends upon jurisdiction *in personam*."[63] Noting that jurisdiction existed, the court was not deterred by the fact that it could not predict whether the English courts would give effect to the decree.[64] Subsequently, an English court granted an injunction restraining the British corporation from complying with the terms of

56. Pennoyer v. Neff, 95 U.S. 714 (1877); Massie v. Watts, 2 U.S. (6 Cranch) 345 (1810); see Hansen, *supra* note 54.

57. See Hansen, *supra* note 54, at 83-84.

58. 333 U.S. 795, 817 (1948).

59. 344 U.S. 280 (1952).

60. *Id.* at 282, *citing*, Foley Bros. Inc. v. Filardo, 336 U.S. 281, 284-85 (1949), and Blackmer v. United States, 284 U.S. 421, 436-37 (1932).

61. 100 F. Supp. 504 (S.D.N.Y. 1951), *opinion on remedies*, 105 F. Supp. 215 (S.D.N.Y. 1952).

62. United States v. Imperial Chemical Indus., 105 F. Supp. 215, 229 (S.D.N.Y. 1952).

63. *Ibid.*

64. *Id.* at 231. The case has been characterized as an attempt to enforce American antitrust laws in the jurisdiction of other countries and to intrude upon their sovereignty, see *Report of Committee on International Trade Regulation Impact on Antitrust Laws in Foreign Trade*, A.B.A. INT'L & COMPARATIVE LAW SECTION 15, 16 (1953).

the American decree.[65] A conflict was avoided because a saving clause in the American decree provided that it should not operate against a company taking action in compliance with foreign laws.[66] Similarly, a saving clause formed a part of the decree in *United States v. General Elec. Co.*,[67] so as not to place the defendant in violation of laws in foreign countries where it does business. The command to do an act in England would necessarily be limited by the laws of that country.[68]

The various difficulties arising in connection with the court's exercise of jurisdiction are no doubt troublesome. Nonetheless, it is manifest that the existence of jurisdiction is a separate consideration, not in any way related to or dependent upon any such difficulties.

From the viewpoint of international policy, as evidenced in *Standard Oil*,[69] it has never been doubted that American companies abroad must comply with mandatory foreign laws and rules of public policy[70] or that American jurisprudence recognizes and encompasses the principle of comity.[71] Courts, however, have not hesitated in abrogating contracts,[72] even though the conduct was lawful under foreign law,[73] or it required acts to be done by foreign nationals.[74] Few international conflicts are raised when only, or substantially all, American parties are involved. When the conduct of foreign nationals is regulated, or there is a substantial affect from the existence and exercise of jurisdiction by the federal courts on the policy or sovereignty of foreign governments, foreign acquiescence or cooperation becomes quite delicate.[75]

Many federal courts have seriously weighed American antitrust policies in connection with their provision of equitable relief.[76] The use of a "rule of reason" in the international application of the Sherman Act has been discussed in relation to the substantive

65. British Nylon Spinners, Ltd. v. Imperial Chemical Indus., [1951] 2 All E.R. 780.

66. *Id.* at 784.

67. 82 F. Supp. 753 (D.N.J. 1949), *opinion on remedies*, 115 F. Supp. 835 (D.N.J. 1953).

68. *Cf.* United States v. Holophane Co. Inc., 119 F. Supp. 114 (S.D. Ohio 1954).

69. United States v. Standard Oil Co., 1960 Trade Cas. 69849 (S.D.N.Y. 1960); United States v. Gulf Oil Corp., 1960 Trade Cas. 69851 (S.D.N.Y. 1960).

70. *Cf.* KRONSTEIN, MODERN AMERICAN ANTITRUST LAW 265, 267 (1958).

71. See United States v. Imperial Chemical Indus., 105 F. Supp. 215, 229 (S.D.N.Y. 1952).

72. *E.g.*, United States v. Pacific & Arctic R.R. & Nav. Co., 228 U.S. 87 (1913).

73. *Cf.* United States v. American Tobacco Co., 221 U.S. 106 (1911).

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

75. See, Brewster, *supra* note 46, at 72; Haight, *International Law and Extraterritorial Application of the Antitrust Laws*, 63 YALE L. J. 639 (1954).

76. See Hansen, *supra* note 54.

standards utilized for determining violations of that act.[77] In this respect, an American antitrust policy may be summarized:

> [T]he basic aims of the Sherman Act policy against 'undue limitation on competitive conditions' require that the words 'trade and commerce' have the same scope in their application to foreign commerce as to domestic commerce. The Sherman Act is not, of course, intended to protect foreign consumers against monopoly in their home markets. Instead its operative hypothesis should be to encourage the competitive allocation of American resources to investment either at home or abroad, depending on the usual indicia of profit, in the interest of maximizing the long-run economic welfare of the United States.[78]

Such a policy undoubtedly affects American foreign policy. Collaboration is then often necessary with other departments of the government, particularly the State and Defense Departments.[79]

CONCLUSION

It seems difficult to foresee any international cartel or other business arrangement wherein the existence of extraterritorial jurisdiction by the federal courts will be lacking. If one of the parties is an American firm, or if the acts are formed or partly executed within the United States, early decisions are authority for bringing such conduct in restraint of trade within the prescriptions of the Sherman Act.[80] If acts consummated wholly abroad "intentionally affect" American foreign commerce, the *Alcoa* ruling applies.[81] Moreover, the investment by American firms abroad, either solely or jointly, affect foreign commerce; only the absence of a contract, combination or conspiracy will insulate conduct otherwise unlawful.[82]

Service of process being required as an element of jurisdiction over the person, the courts will look at the overall business operation to meet, if at all possible, the doing business criteria.[83] Separate incorporation will not defeat the enforcement of the Sherman Act in the presence of strong public policy against restraint of trade.[84] The territorial effect of statutory law will not restrain

77. See United States v. Timken Roller Bearing Co., 341 U.S. 605, 606 (1951) (dissenting opinions); see also, Brewster, *supra* note 75, at 72-74.

78. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 79 (1955).

79. *Id.* at 92-114.

80. See United States v. Sisal Sales Corp., 274 U.S. 268 (1927); United States v. Pacific & Arctic R.R. & Nav. Co., 228 U.S. 87 (1913); United States v. American Tobacco Co., 221 U.S. 106 (1911).

81. See United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

82. See United States v. Timken Roller Bearing Co., 83 F. Supp. 284 (N.D. Ohio 1949), *aff'd*, 341 U.S. 593 (1951); United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950).

83. See United States v. Scophony Co. of America, 333 U.S. 795 (1948); see also Timberg, Antitrust and Foreign Trade, 48 U.M.W.L. REV. 411 (1953).

84. *Cf.* Timberg, *supra* note 83.

equity courts from issuing *in personam* decrees covering transactions abroad. When jurisdiction exists, under a conflict of laws proposition, a court in its discretion may refuse to exercise its jurisdiction, if its assertion would be contrary to an avowed public policy.[85]

Certainly, a national antitrust policy exists. In overall substance it demands the maintenance of a competitive business society, free from unreasonable restraints of trade or commerce. Antitrust policy has been considered in cases involving the extraterritorial application of the Sherman Act *only* after the determination of unlawfulness. Such a policy has affected the nature of the decree. No national antitrust policy, however, has affected the *existence* of our courts' jurisdiction. The result has been that decisions in definition of the scope of the extraterritorial application have been inconclusive. There is no apparent limitation upon the existence of jurisdiction. Therefore, the American businessman contemplating participation or engaged in foreign business operations is faced with the decidedly important factor that substantially no type of foreign operations will be outside of the *jurisdiction* of the Sherman Act. While no valid complaint can be made to subjecting the conduct of American companies or citizens to the act, no entirely foreign operation or transaction is immune. Moreover, the potential or actual interference with the domestic affairs of foreign governments by reason of the existence or exercise of jurisdiction has an affect upon American foreign policy.

No issue should be taken with the existence of practically world-wide jurisdiction. Lacking, however, is a national antitrust policy defining the proper exercise of jurisdiction. Such policy considerations, heretofore only considered by courts when forming decrees, must guide the Justice Department in its decision whether to bring an action and the courts when an action is filed. A well defined, national antitrust policy would permit the courts to refuse to exercise its jurisdiction. This approach is far more practical than that of proceeding to liability. Many of the hardships encountered in previous decisions would be avoided. The result would permit American businessmen to predict, with some reasonable certainty, which conduct would be subject to scrutiny.

The burden seems to be on the Congress. It is essential that a frame of reference be adopted "for clarification of the congressional intent concerning the goals of antitrust and the primary means of achieving them."[86] In this respect, paramount consideration must be given to an apparent wide application of the Sherman Act in derrogation of American business interests abroad and the policies and sovereignty of foreign governments.

85. GOODRICH, CONFLICT OF LAWS 21 (3d ed. 1949).

86. Oppenheim, *Federal Antitrust Legislation*, 50 MICH. L. R. 1139, 1143 (1952). Mr. Oppenheim sees precedent for such a declaration in the declarations of national policy in the various regulatory statutes.

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