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An Introduction to the Extraterritorial Application of the American Antitrust Laws

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NOTE

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The (Sherman Act) has a wider purpose than mere regulation of exorbitant profit. Indeed, even though we disregard all but economic considerations, it would by no means follow that such concentration of producing power is to be desired, when it has not been used extortionately. Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone. United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945).

Our antitrust laws apply to all American business operations abroad which have a direct and substantial adverse effect upon our foreign commerce of the United States, and do not apply to business operations abroad that do not have such adverse competitive effect. Foreign commerce, of course, includes our imports and exports, as well as those activities abroad. Celler, A Congressman's View of the Sherman Act, 27 ABA ANTITRUST SECTION 3, 7-8 (1965).

Since World War II total private investment abroad has risen from $14,883 million in 1945 to $86,235 million in 1966.1 Much of the increase relates to the expansion of American business abroad in the form of subsidiaries and branches. Concurrently, extraterritorial extension of the jurisdiction of antitrust laws has been used to regulate the expansion. The purpose of this Note is to provide an introduction to the scope of the extraterritorial application of American antitrust laws and to explain the extent to which this application conflicts with international law.

The scope of extraterritorial jurisdiction was delineated initially in United States v. Aluminum Co. of America.2 This and subsequent cases gave rise to the Alcoa doctrine, whereby liability can attach, even to nonnationals, if acts done outside the United States produce consequences within it, a concept which has been the law with respect to antitrust regulation abroad. The recent case of Pacific Seafarers v. Pacific Far East Line3 will be used in this Note to draw comparisons with the Alcoa doctrine. Some possible solu-

2 148 F.2d 416 (2d Cir. 1945).
tions will be suggested relative to the conflict of laws problem, and
discussion will be directed to a consideration of the extent to which
American courts apply antitrust laws abroad and how this applica-
tion conflicts with international law.

I. HISTORICAL BACKGROUND

The Sherman Antitrust Act was enacted in 1890 to protect
against harmful trusts and monopolies. Its economic purpose was
to develop a dynamic economy with a high standard of living. The
first significant antitrust case before the United States Supreme
Court which involved the question of extraterritorial application was
*American Banana Co. v. United Fruit Co.*, in which the plaintiff
alleged that the defendant, an American corporation, had induced
the Costa Rican government to confiscate the plaintiff's property.

The Court, speaking through Mr. Justice Holmes, firmly articulated
the territorial principle of jurisdiction in holding that the Sherman
Act did not apply. Under this theory, an act achieves significance
only at the place of its occurrence. As Mr. Justice Holmes stated:

> [T]he 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 be an interference with

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4 It appears that during the formulation of the Sherman Act there was little discus-
sion as to whether the Act applied to conduct abroad. However, Senator Sherman said:

It is true that if a crime is committed outside the United States, it cannot be
punished in the United States. But if an unlawful combination is made out-
side the United States and in pursuance of it property is brought into the
United States, such property is subject to our law. It may be seized. Any
party interested in the United States could be made a party. 21 CONG. REC.
2460-61 (1890).


7 In this case, the defendant was in control of the industry, and had been for some
years. The plaintiff had acquired another firm which had initiated a similar business
in Panama (then part of Colombia) in 1904. The case arose when Costa Rican sol-
diers seized possession of American Banana's plant, allegedly on the instigation of the
defendant, United Fruit Co. The plaintiff sued, alleging that the defendant had a
monopoly, that it had instigated the seizure to maintain its monopoly, and that the Sher-
man Act applied. The district court dismissed for failure to state a cause of action. 160
F. 184 (S.D.N.Y.), aff'd, 166 F. 261 (2d Cir. 1908).

8 See generally G. WILSON, HANDBOOK OF INTERNATIONAL LAW 131 (1939);
Whitney, Sources of Conflict Between International Law and the Antitrust Laws, 63
YALE L.J. 655, 656 (1954); Note, Extraterritorial Application of the Antitrust Laws,
the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.9

In response to the Supreme Court's strict adherence to the statutory directive that United States commerce be kept free from restraints,10 the lower courts developed the concept that for the Sherman Act to apply, at least some act or event — whether the actor was an alien or a national — must have occurred within the territory of the United States.11 From this evolved the modern import/export test, which required a showing that the activity had an "effect" on American commerce.12 However, slight effect was not sufficient to allow an exercise of jurisdiction; the effect had to be substantial and there must have been extensive American participation. A foreign firm whose conduct had been consummated wholly out-

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10 The general rule as to jurisdiction and contracts affecting American foreign commerce was stated in United States v. Hamburg - Amerikanische F.F.A. Gesellschaft, 200 F. 806 (S.D.N.Y. 1911), 216 F. 971 (S.D.N.Y. 1914), rev'd on grounds of mootness, 239 U.S. 466 (1916):

... we see nothing to warrant the contention that the acts should be narrowly interpreted as prohibiting contracts which are performed wholly within the territorial jurisdiction of the United States ... .

As the contract directly and materially affects the foreign commerce in this country by being put into effect here, it is immaterial where it is entered into .... The vital question in all cases is the same: Is the combination to so operate in this country as to directly and materially affect our foreign commerce? 200 F. at 807.


11 Since the American Banana case, most foreign import/export cases have included allegations of some act within the territorial jurisdiction of the United States. See United States v. Pacific Arctic Ry. & Navigation Co., 228 U.S. 87 (1913) (combination within the United States by a national and alien to monopolize domestic and foreign trade routes); United States v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945), modified and aff'd., 332 U.S. 319 (1947) (proscribed combination formed in a foreign country, but put into operation in the United States). Where most or all of the harmful acts take place outside the United States, the courts have held that the planning of such activity within the United States is sufficient to bring it within the purview of the Sherman Act. See Steele v. Bulova Watch Co., 344 U.S. 280 (1952); Branch v. F.T.C., 141 F.2d 31 (7th Cir. 1944). Moreover, the courts have applied an "act within the United States" standard where the actual realization of a conspiracy takes place in the United States, even though the conspiracy was initiated in a foreign country. Thomsen v. Cayser, 243 U.S. 66 (1917). See, e.g., United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199 (S.D.N.Y. 1929)

side the United States would not be subject to the Sherman Act.  

The courts then attempted to define "substantial effect." In *United States v. American Tobacco Co.*, a trade agreement made in London between an American and a British corporation that provided for a division of world markets was held to be invalid because their "effect" on American commerce was to dominate tobacco trade both within the United States and in foreign trade. In *United States v. Sisal Sales Corp.*, virtually all sisal imported into the United States had to come through a combination formed between Sisal Sales, an American corporation and a Mexican corporation; the defendant had eliminated all competition and had become the exclusive world distributor of the product. The agreement itself had been made within the United States, and the Supreme Court, in reversing the district court, held that the defendants were within the Sherman Act's jurisdiction.

II. **The Alcoa Doctrine**

The case which determined the present scope of the extraterritorial application of the antitrust laws was *United States v. Aluminum Co. of America*. In this case Aluminum Ltd., a Canadian corporation, entered into agreements with French, German, Swiss, and British corporations to form an international cartel known as Alliance. Defendant Aluminum Company of America (Alcoa) was found to be in violation of the Sherman Act, although it was not a party to the agreement. The lower court found that the same persons who held a majority interest in Alcoa's common stock also held a majority of Aluminum Ltd. Because of this relationship with Alcoa, which controlled 90 percent of the domestic production of aluminum, the cartel was deemed to have a substantial impact on American commerce. Even though the court of appeals recognized that almost any change in the supply of goods in Europe would have an effect on United States imports and exports, it was still questionable whether the Sherman Act itself had been violated. Judge

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13 Beausang, *supra* note 9, at 190. *See also* note 11 *supra.*
14 221 U.S. 106 (1911).
15 274 U.S. 268 (1927).
17 148 F.2d 416 (2d Cir. 1945).
18 *Id.* at 432.
19 *Id.* at 441.
Learned Hand presented two situations: (1) an agreement made abroad which is not intended to affect our foreign commerce, but which does in fact affect it; and (2) an agreement which is intended to affect our foreign commerce, but fails to do so. In the first situation, the international ramifications of an American court's attempt to hold these agreements unlawful would be such that it can be assumed that Congress did not wish to include them within the scope of the Sherman Act. For much the same reason the second situation would not fall within the scope of the Act, yet where both intent and effect are joined, such conduct comes within the principles outlined in earlier decisions. Judge Hand reasoned that since the agreements would be unlawful if made in the United States, they necessarily fell within the prohibitions of the Sherman Act, and were unlawful because of the merged intent and effect. Since Aluminum Ltd. was a party to this agreement, it was enjoined from participating in the agreement and the cartel. Thus, the doctrine arose from Alcoa that liability could attach, even to nonnationals, if the acts done outside the United States were intended to and did produce consequences within. It should be emphasized, however, that some American participation is needed. An agreement solely among foreign corporations would not justify an assertion of jurisdiction by an American court. In the cases following Alcoa, it became apparent that jurisdiction could be exercised over almost any type of American business abroad. Although

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21 148 F.2d at 444.  
22 Donovan, supra note 16, at 245.  
23 Also, neither intent to affect nor consequences on American commerce alone are enough. Id. at 247-48. Note that in Alcoa Judge Hand ruled that, once intent to affect imports was shown, the burden of proof was shifted to the defendant. 148 F.2d at 444. See Donovan, The Legality of Acquisitions and Mergers Involving American and Foreign Corporations Under the United States Antitrust Laws — Part I, 39 S. Cal. L. Rev. 526, 533 (1966).  
the statute includes "foreign commerce," the courts have pro-
pounded various standards to circumscribe its extraterritorial scope. Most cases have dealt with situations in which the prohibited re-
straint or monopoly affected goods imported to or exported from
the United States. These cases have tended to delimit the extra-
territorial jurisdiction of the Sherman Act.

As the "effect" standard in the import/export cases evolved, a
distinction was drawn between the quantum of proof necessary to
confer jurisdiction under the Sherman Act, and the quantum of
proof necessary to establish a substantive violation of the Act. After
initially requiring a substantial effect upon American foreign com-
merce in order for a court to assert jurisdiction, the contemporary
position of the courts in the import/export cases appears to be that
a "slight" effect on American foreign commerce will support juris-
diction to inquire whether there is enough evidence of "substantial
effect" to prove that a substantive violation has taken place.

States but effectuated by obtaining discriminatory foreign legislation which restricted
American foreign commerce); United States v. Aluminum Co. of America, 148 F.2d
416 (2d Cir. 1945) (involving domestic monopoly, foreign cartel agreements, and
common ownership of domestic and foreign subsidiaries); United States v. National
(division of the markets and patent pooling arrangement between American corporation
and its foreign competitor held illegal); United States v. General Electric Co., 82 F.
Supp. 753 (D.N.J. 1953) (holding that competition in American market was "deleteri-
ously affected" by foreign agreements made overseas in which American companies
participated through domestic and foreign subsidiaries); United States v. Timken Roller
(1951) (holding cartel agreement between American corporation and its chief foreign
competitor to be a violation since it limited their competition inter se in the United
States and in world markets); United States v. Imperial Chemical Industries, Ltd., 100
F. Supp. 504 (S.D.N.Y. 1951) (agreements involving patents and several jointly
owned companies abroad held invalid); United States v. Imperial Chemical Industries,
Ltd., 105 F. Supp. 215 (S.D.N.Y. 1952) (court issued injunction and directed return
of patents and divestiture of jointly owned companies).

25 "Every contract, combination in the form of trust or otherwise, or conspiracy, in
restraint of trade or commerce among the several States, or with foreign nations, is

26 See cases cited in note 24 supra.

27 In United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945),
Judge Hand held that sections 1 and 2 of the Sherman Act attached liability to wholly
foreign activities that were intended to affect, and did affect imports and exports of the
United States. In order for a violation of the law to be found, such actions had to have a
direct and substantial effect.

The Attorney General Report of 1955 sought expanded jurisdiction:
[1] It seems clear that the Sherman Act may apply, not only to conduct in this
country, but also to acts abroad, performed by American firms acting alone or
in concert with foreign firms with such substantial affects upon American
foreign commerce as to amount to unreasonable restraining attempts to monop-
olize, or monopolization. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 70
(1955).

In recent cases, the necessary intent element of Alcoa has been presumed;28 if the activity in question has any effect on imports or exports, the court will assert jurisdiction.29 If the effect on commerce is then found to be "direct" and "substantial" there may be an antitrust violation. The foreign corporation which is participating in the activity with the American corporation may be held liable;30 if it is not liable under the Sherman Act, the foreign corporation will be affected in so far as the American corporation has been enjoined from performing under their agreement or from participating in the venture.31

III. THE RECENT PACIFIC SEAFARERS CASE

A recent case focusing on the extraterritorial application of the Sherman Act is Pacific Seafarers Inc. v. Pacific Far East Line Inc.32 This case concerned a conspiracy between two shipping conferences to monopolize trade between two foreign ports; neither importation to nor exportation from the United States was directly involved.33


30 See note 12 infra.

31 South Vietnamese importers were loaned money on the condition that at least 50 percent of any foreign goods financed with such money had to be transported by American-flag ships. Plaintiffs and defendants were American shipping companies competing for business, under an American sponsored Agency for International Development (A.I.D.) program, of carrying fertilizer and cement from Taiwan and Thailand to South Vietnam. The lower court held that while the defendants attempted to secure this trade by lowering their prices pursuant to concerted action and by doing so forced the plaintiffs out of business, damages could not be awarded since the Sherman Act did not cover such foreign conduct. Thus, the court of appeals was confronted with the question of whether this conspiracy by American nationals was a "restraint of trade or commerce . . . with foreign nations," even though the activity involved the shipment of foreign goods between foreign ports. The court held that, because the restraints occurred in a market dominated by Americans and because that market was solely a creature of American foreign policy, there was a sufficient nexus between the parties and their practices and the United States as to fall within the jurisdictional embrace of the Sherman Act.
The court of appeals, in reversing the lower court, held that the appellants were engaged in foreign commerce within the meaning of section 1 of the Sherman Act. The rule to be derived from the decision is that the Sherman Act regulates the economic activity of Americans even though the relevant market is not within United States territory and does not involve the exporting or importing of goods across American borders, provided: such competing activity is proscribed by the Act, occurs within a "dominant American market," and has a direct and substantial effect on American foreign commerce.

Prior to the Seafarers decision, the Sherman Act had been applied only to conduct within or without the United States which affected the exportation from or importation of goods to the United States. When Seafarers' factual situation arose the old rationale was inapplicable; an exercise of jurisdiction required a new basis. As the Seafarers court stated: "Surely the test which determines whether the United States law is applicable must focus on the nexus between the parties and their practices and the United States, not on the mechanical circumstances of effect on commodity exports or imports."

Because Seafarers is the first case to directly question the scope of the Sherman Act where import and exports were not involved, the court of appeals had several options. It could have completely refused to extend jurisdiction to the case and avoid the question completely by deciding the case on a substituted ground, or super-imposed the rulings of the import/export cases to this situation. The fact that the court consciously overlooked such options would suggest a desire to scrutinize the new problem. It appears that the court recognized that there must be some concrete nexus to replace the clear bond to the American economy that the import/export requirement manifestly provided. 404 F.2d at 816.

Id. It is questionable what the outcome would have been if one of the defendants had been a foreign shipping line, or if A.I.D. had not been connected with the matter. The opinion suggests that A.I.D. was not a mere incident to the matter, but that it provided "a stimulus." See note 34 supra.

404 F.2d at 815. However, it could be argued that Seafarers does not represent an actual expansion of the extraterritorial scope of the antitrust laws because of the unique fact pattern presented. These unique circumstances include: (1) the contested shipping market was a product of American governmental action; (2) the A.I.D. regulation compelled American flagship participation; (3) the A.I.D. regulation was an attempt to effectuate American foreign policy; (4) all parties before the court were American nationals; and (5) the actual conspiracy was agreed upon at a meeting by the parties in the United States.

A good argument can be made that the nexus provided by the import and export of goods was not really necessary in Seafarers because of its distinguishable facts. It would seem inconsistent for several American-flag shipping lines to exclude the plaintiffs, also American shipping lines, from participation in business sponsored by a governmental agency, and then for a court to uphold those acts. Also, the dangers to be avoided because of the extraterritorial application of the antitrust laws were greatly reduced where
Recognizing that the Sherman Act's jurisdiction is greater because of the new rationale, two conclusions can be drawn. While the particular facts of *Seafarers* were conclusive to an exercise of jurisdiction, several policy considerations suggest that in the future a more expansive standard is likely. A primary concern for consideration in assessing the direction of the import/export cases is the contemporary international investment practices. While recent cases suggest that investments or acquisitions abroad would violate the antitrust laws only if there were an actual or potential competitor who is likely to be injured, it is questionable whether the same limited interpretation will continue. Impetus for an expansive reading of the foreign commerce clause of the Sherman Act is likely to flow from the increasing balance of payments problem.

Since World War II the American investor has pursued new markets in international trade with increased vigor. Besides Western Europe, the Latin American and Asian markets have increasingly attracted the American investor in the 1960's. However, the means required to exploit such markets has changed. While goods could formerly be exported from the United States at a profit, it is now economically imperative for the American investor to establish production facilities abroad to capitalize on the benefits of cheaper foreign labor and raw materials. Neither the courts, nor the executive or legislative branches of the government are insensitive to the fact that the acceleration of American investment abroad continues

the only interests affected were American. These litigants were all American shipping firms and there was no property to be affected in any foreign country by a court decree, nor was there a right granted to a foreign national which would be abridged. Moreover, it might be argued that the court took notice of the fact that the price-cutting agreement was made in the United States. These facts were the same as those which concerned the court in *Alcoa*. However, it might also be argued that the court's indirect refusal to apply the "act within the United States" standard and avoidance of alternative grounds indicates it inherently rejected the "effect" test then used, and required not only a substantial effect upon American commerce, but also restraints in a dominantly American market.

[40]See *United States v. J. Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal. 1965), aff'd per curiam, 385 U.S. 37 (1966), which substantiates that mergers involving a foreign participant which affect domestic competition will be judged under section 7 of the Clayton Act, 15 U.S.C. § 18 (1954), on the same basis as domestic mergers. Schlitz, a major beer producer in the local market, had obtained a controlling interest in Labatt, a Canadian producer, which in turn controlled General, a domestic producer that ranked near the top in three relevant market areas. The court found that while Labatt was not presently a competitor in the United States, it "had the desire, the intent, and the resourcefulness to enter the United States markets and to make General a stronger competitor in those markets." The acquisition had resulted in a "substantial lessening of actual and potential competition" in the United States in violation of section 7. *Id.* at 147. It is not clear whether the court treated this as an import/export case, but it would appear that it did not. See also *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 599 (1951).
to be a primary source of the mounting balance of payments problem. However, while some authorities have argued that the extraterritorial application of the antitrust laws, since *Alcoa*, has had a deterrent effect upon both American investment and business activity abroad, others have come to the opposite conclusion.

A second policy consideration that would support a further extension of Sherman Act jurisdiction is the underlying feeling that unless the United States supervises the conduct of its nationals carrying on business in foreign countries, no government will.

IV. CONFLICTS OF INTERNATIONAL LAW

There are two general principles of jurisdictional sovereignty which are relevant to the extraterritorial application of American

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44 But note also the argument that since Western European industrial nations are small in comparison to the United States, “[t]he main concern of Western European economists and others has not been whether there shall be restrictive practices and monopolies but rather whether each particular practice is good or bad for the nation as a whole. On the other hand the United States view is that relatively untruncated competition is indispensable to regulate economic preference.” Snyder, *Foreign Investment and Trade: Extraterritorial Impact of United States Antitrust Law*, 6 VA. J. INT’L L. 1, 7 (1965). The same is true in the merger where European laws are willing to tolerate restraints on competition provided they will nurture their incubating markets. As the international monetary problem grows more acute, it appears that the divergent aims of American and foreign laws will become more accentuated. The antitrust laws must be able to reach the foreign operations of American business as well as the domestic if the purpose of the antitrust laws is to be accomplished. *Id.* at 10. See also Donovan, *supra* note 23, at 527.

45 Jurisdiction, in a broad sense, is the power of a state to affect legal relationships. In international law it means the power to “create interests” which will be recognized by other states as valid. The world community is composed of states, all having equal rights with respect to each other. Thus, every state is free to exercise its power as it deems necessary and proper within its own territory, with a few exceptions. The jurisdiction of a state is derived from its sovereignty. Within its territory it can legislate in the area of personal and property rights or create whatever criminal responsibilities it deems necessary. Generally, the jurisdiction of a state is confined to its own territory and has no effect outside it. If it undertakes an exercise of jurisdiction outside its own territory, which is not permitted by the law of nations, the foreign courts may treat it as null and void. However, in certain circumstances a state may punish offenses or affect the rights and duties of its own nationals where ever they may be. WHEATON, INTERNATIONAL LAW 269 (6th ed. 1929). See also, Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812); 2 MOORE, DIGEST OF INTERNATIONAL LAW §
antitrust law: the territorial and the objective application principles. The territorial principle is derived from the concept that, given the equal sovereignty of states, their jurisdictions are mutually exclusive and therefore each is limited to its own territory. The territorial principle is the basis for all legislation and jurisdiction within a state; however, the courts have applied the antitrust laws to persons, acts, and property outside the United States. Concurrent jurisdiction by two states over persons, property, or acts in one of them is exactly the situation which the territorial principle seeks to avoid. Generally, a state cannot exercise jurisdiction over property in another state; an order of an American court to dispose of property or to refrain from performing a contract or an act which is valid under the laws of the locus state would be a violation of the terri-

198 (1906); Beale, The Jurisdiction of a Sovereign State, 36 HARV. L. REV. 241, 252 (1923); Carlston, Antitrust Policy Abroad, 49 NW. U.L. REV. 569, 574 (1954). It is generally accepted that a state's jurisdiction may extend beyond its own territory to its own nationals, but this power is usually limited to criminal acts. Haight, International Law and Extraterritorial Application of the Antitrust Laws, 63 YALE L.J. 639 (1954). Moreover, it is secondary to the jurisdiction of the state in whose territory the person is located at the time. See Beale supra, at 253.

Besides the territorial principle and the objective application principle, which are discussed in the text, there are also the protective principle and the universality principle. The protective principle says that a state may legislate or act with respect to conduct outside it which affects its "integrity, interests, or independence." See Article 7 of Draft Convention on Jurisdiction with Respect to Crime, 29 AM. J. INT'L L. SUPP. 435, 543 (1935) [hereinafter cited as Draft Convention]; Oliver, Does International Law Keep the Sherman Act at Home?, 29 PA. B.A.Q. 326, 330 n.9 (1958). One writer has suggested that the extraterritorial application of the Sherman Act in Alcoa was based upon the protective principle. Raymond, A New Look At The Jurisdiction In Alcoa, 61 AM. J. INT'L L. 558, 568 n.21 (1967). The United States could not use the protective principle because of the difficulty in justifying such antitrust acts as being offenses against the integrity, security, and independence of the United States. Note also that Article 7 of the Draft Convention found it necessary to include a limitation that the "Article excludes any act which is a guaranteed liberty of the alien in the State in which the act was committed." Thus, prosecutions on the basis of the protective principle for antitrust violations by an alien whose state allows the act or agreement in question seem to have no basis under international law. Draft Convention supra, at 557. The protective principle is applied to nationals in the United States and Great Britain. See Haight, supra note 45, at 640. Some nations also apply it to aliens as well. See Draft Convention supra, at 547.

In contrast, the universality principle states that a state has jurisdiction to punish certain crimes such as piracy which historically have been regarded as crimes against the law of nations, even though committed outside the territorial limits of the state. The universality principle has also been applied to certain other crimes. See Draft Convention supra, at Articles 9 and 10.

43 2 MOORE, supra note 45, at § 197; Beale, supra note 45, at 253.
44 2 MOORE, supra note 45, at § 197, citing The Appollon, 22 U.S. (9 Wheat.) 362 (1824).
40 2 MOORE, supra note 45, at § 198, citing Rose v. Himely, 8 U.S. (4 Cranch) 240 (1808). For a short discussion of territorial jurisdiction, see Beale, supra note 45, at 252.
torial principle. The objective application principle provides an exception to the territorial principle. It rests upon the well known concept that if a person initiates an act outside a territory, but that act is consummated or takes effect within it, he may be answerable where the wrongful act was actually consummated.

Considerable attention has been given to the use of these principles of jurisdiction for purposes of validating the extraterritorial application of the antitrust laws. One commentator, who considers the objective application principle to be a justification for the extraterritorial extension of American antitrust laws, has concluded that this principle was not intended to apply to antitrust laws at all. The case of *The S.S. "Lotus,"

perhaps the best enunciation of the objective application principle, states that it is applicable only when the "effect or consummation is inseparable from the act" done outside the state.

There are at least four arguments against employing the objective application principle as a justification for the extraterritorial application of the American antitrust laws. First, it has been argued that Sherman Act violations are not "crimes" which are recognized as such by other nations, but rather, they constitute a special genus created by Congress. Second, there is a readily recognizable rela-

50 2 MOORE, supra note 45, at §§ 175, 198; Haight, supra note 45, at 641.
51 2 MOORE, supra note 45, at § 202; Carlston, supra note 45, at 579; Oliver, supra note 46, at 330. See Strassheim v. Daily, 221 U.S. 280, 285 (1911).

The objective application principle was used to justify the decision in *Alcoa.* See Raymond, supra note 46, at 560-62. The author states that the rationale of *Alcoa* was adopted by *RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965). See also Raymond supra, at 568 n.21.

52 Haight, supra note 46, at 639.

53 Case of *The S.S. "Lotus,"* [1927] P.C.I.J., ser. A., No. 9. The case involved a collision on the high seas between a French-flag vessel and a Turkish vessel in which the latter was sunk with the loss of eight persons. The French officer on duty at the time of the collision was prosecuted and convicted in a Turkish court for involuntary manslaughter. The issue before the Permanent Court of International Justice was whether the Turkish authorities had jurisdiction to bring criminal proceedings against him. The court held that there was no rule of international law which said that such proceedings were within the exclusive jurisdiction of the state of registry of the vessel.

54 On these points the court, directing itself to the facts of the case before it explained the holding of the case:

The offense for which Lieutenant Demons appears to have been prosecuted was an act — of negligence or imprudence — having its origin on board the *Lotus,* whilst its effects made themselves felt on board the *Boz-Kourt.* These two elements are, legally, entirely inseparable, so much so that their separation renders the offence non-existent. *Id.* at 30.

55 In England, for example, a restraint of trade made in good faith and for a valid interest may be lawful even though it may work a harm on another person. See Mogul Steamship Co. Ltd. v. McGregor, Gow & Co., 21 Q.B.D. 544, 553 (1888). The de-
tion between cause and effect in cases of objective application which is not usually apparent in antitrust litigation.50 A classic example of the objective application principle is where X in State A shoots across the border at Y in State B. The cause (the shooting) has a direct and proximate relation to the effect (Y falling dead). Contrast this with an agreement made in London by British, French, and American firms whereby the American firm is to be the sole supplier, and the two European firms, the sole distributors of a certain type of heavy machine. In this kind of situation it is difficult to measure accurately the relationship between the agreement and any economic effect on American commerce. It can also be argued that the offenses under the American antitrust laws should not be included in offenses under the objective application principle because of the vague delineation of antitrust limitations.57 Finally, if the objective application principle is applied to the antitrust laws, the freedom granted by foreign governments to their corporations would be abridged and the results might well be chaotic.58

It has been suggested that there is a difference between an effect of an act done abroad which is "inseparable" from the act, and acts done abroad which are lawful where they occur, producing no more than an economic effect in another state. With regard to the latter case, there is no justification under international law for the off-
The former situation, however, is widely recognized in international law. Professor Brierly has analyzed this on the basis of what he calls "constructive presence" of the offender in the place of the effect. The consummation of the act has the effect of making the person "present." Brierly was careful, however, to stress that there be a direct relationship between cause and effect.

In view of the scope of the application of the antitrust laws and the conflict with both international law and the municipal law of foreign states, consideration should be given to possible solutions to the conflict.

V. Possible Solutions

It might be argued that, in view of the pervasiveness of American business abroad, the purposes of the antitrust laws could not be fulfilled unless they were given a broad interpretation. While the present interpretation of the Sherman Act includes nearly all American business activity abroad, it often conflicts with the laws of other nations and with general principles of international law. A number of possible solutions have been suggested to resolve this conflict; these fall into three general categories: adherence to a basically territorial principle, a modified objective application, and a treaties approach.

At least one commentator has suggested that the United States must reassess its position and return to the territorial principle which was applied in the American Banana case. The problem presented through the use of this solution is that a corporation having subsidiaries in the United States and abroad and a strong position with respect to a certain commodity could quite conceivably exclude any other American firm from participation in the relevant foreign market for that commodity. This position is clearly inconsistent with

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60 2 MOORE, supra note 45, at § 202.
61 J. BRIERLY, THE LAW OF NATIONS 301 (6th ed. 1963): It now appears to be universally admitted that when a crime is committed in the territorial jurisdiction of one state as the direct result of the act of a person at the time corporally present in another state, international law by reason of the principle of constructive presence of the offender at the place where his act took effect, does not forbid prosecution of the offender by the former state, should he come within its territorial jurisdiction. "Id., citing the Lotus case.
62 Id.
63 See notes 44 & 58 supra; Haight, supra note 45, at 653.
64 Haight, supra note 45, at 653.
present antitrust policy and has been rejected, as evidenced by the cases.\textsuperscript{65}

Another commentator has suggested the adoption of what he terms a modified objective application principle.\textsuperscript{66} Essentially, the courts would adhere to a territorial principle; however, in the few cases in which decrees would issue to foreign corporations, jurisdiction would be retained for a time with leave to return to the court for modification of the decree if the corporation is faced with criminal liabilities under its own state's law, or if it would be in breach of another contract or agreement as a result of the American court's decree. This solution may not provide sufficient latitude for effective regulation of American business, not only because it would limit the extraterritorial application of the Sherman Act, but also in as much as the Justice Department has found that it is often necessary to include a foreign corporation in order to effectuate the purpose of the antitrust laws.\textsuperscript{67} Also, this solution does not answer the multitude of antitrust problems inherent when an American subsidiary is actually incorporated in a foreign country. Even if considered an American corporation from the point of view of the United States, the foreign country can justly complain about an American court's exercise of jurisdiction over one of its own corporations; if considered as a foreign corporation, then the antitrust laws would really be confined to the territorial limits of the United States, with a few exceptions.

A number of suggestions have been made which are essentially modifications of the objective application principle. It has been suggested that the courts distinguish between "positive and negative effects" on American foreign commerce.\textsuperscript{68} This theory, closely following the strict objective application principle, draws a distinction between the positive effect caused as a result of a direct action and a negative effect caused as a result of a contract or an agreement to restrict the flow of goods to a country. International law recognizes a duty not to perform acts abroad which have direct and deleterious consequences within a country.\textsuperscript{69} However, since there is no legal duty to send goods into a country, one cannot be held liable for an

\textsuperscript{65} For a comprehensive discussion of the case law development, see Donovan, \textit{supra} note 16, at 242-54.

\textsuperscript{66} Oliver, \textit{supra} note 46, at 333.


\textsuperscript{68} Raymond, \textit{supra} note 46, at 567.

\textsuperscript{69} See note 46 \textit{supra}; Harvard Research, \textit{supra} note 46, at 487.
agreement which restricts the flow of those goods. Obviously, under this theory Alcoa would have come out differently. One of the major difficulties of this theory is that if there are no distinctions drawn among types of negative effects, the effect might be to lend validity to such behavior as boycotts. Also, the theory appears to ignore the fundamental difference between a unilateral or collective decision not to export to or import from a particular nation, which is not intended to affect that state's foreign commerce, and an agreement which from its inception is intended to restrict imports or exports in order to achieve some further economic purpose, such as inflation of prices or elimination of competition. This theory would also seem to argue that most cases since Alcoa should have come out the other way, which is contrary both to the trend and the policies of the antitrust application.

It has been suggested that the courts distinguish between "trade among the several states" and "trade with foreign nations," since the language of the statute draws the same distinction. It is argued that trade with foreign nations implies less restraint as opposed to trade among our own states, which all operate under the same antitrust laws. The courts have not accepted this theory. Moreover, the conflicts problem would be no closer to solution.

Still another commentator has proposed a solution which follows the idea of notice. Before the court can exercise jurisdiction, the foreign corporation acting abroad must be sufficiently aware that its acts will have "direct and substantial consequences" in another country so that it can reasonably be said that it was "put on notice" with respect to that country's law. The problem which could arise under this theory is that the courts might presume knowledge of the effects. Moreover, in all of these suggestions, the courts would be required to narrow the present extraterritorial scope of the Act, thus leaving American business abroad with a level of freedom which has

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71 Whitney, supra note 8.
72 Sherman § 1 reads: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is declared to be illegal." 15 U.S.C. § 1 (1964) (emphasis added).
73 Whitney, supra note 8, at 660. However, one is still presented with the problem of whether the courts will accept this reasoning. They have not thus far, and it seems that the extraterritorial scope of the antitrust laws is expanding, not contracting. See, e.g., Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804 (D.C. Cir. 1968), cert. denied, 89 S. Ct. 872 (1969).
74 Carlston, supra note 45, at 582.
been considered to be undesirable.\textsuperscript{75} Also, only the first of these suggestions, that of a return to the strict territorial principle, clearly solves the conflicts problem. The others, with the possible exception of the “positive/negative effect” theory, still contemplate the exercise of jurisdiction by an American court over persons and property located in other nations. At present the courts are faced with the dilemma of how to effectively apply the antitrust laws to American foreign enterprises in order to achieve the purposes of those laws and the policies of the United States, and at the same time, observe the rights of others, derived from the laws of other nations and from traditional concepts of international law.

In order to preserve the rights of others under international and municipal law, while still effectuating the purposes of the American antitrust laws, the United States might consider multilateral or bilateral treaties as a third possible approach. This approach obviates the problem of conflicts due to unilateral action on the part of the United States. First, both or all parties to a treaty generally agree on the action to be taken; second, a treaty can be drafted in such a way that it will preserve the interests of all signing parties. Thus far little progress has been achieved with bilateral treaties.\textsuperscript{76} Indeed, the bilateral treaty approach may not be an efficacious one because, although a particular matter is settled between the two signing parties, it is still open to debate among the rest of the world community. Conceivably this situation could become intolerably confusing to businessmen and counsel if all or some of these bilateral treaties had significantly different provisions.

Probably the best and most enduring solution would be a multilateral treaty including all of the major industrial and commercial nations of the world. This might be done through the machinery of some existing international institution, such as the United Nations.\textsuperscript{77} Some of the points it might cover are the types of activities

\textsuperscript{75} See note 44 supra.

\textsuperscript{76} The treaty which comes closest to this point is the Treaty of Friendship, Commerce, and Navigation, with the Italian Republic Feb. 2, 1948, 63 Stat. 2255 (1949); T.I.A.S. No. 1965 (effective July 26, 1949). Article XVIII, paragraph 3, of this Treaty states:

The two High Contracting Parties agree that business practices which restrain competition, limit access to markets or foster monopolistic control, and which are engaged in or made effective by one or more private or public commercial enterprises or by combination, agreement or other arrangement among public or private commercial enterprises may have harmful effects upon the commerce between their respective territories. Accordingly, each High Contracting Party agrees upon the request of the other High Contracting Party to consult with respect to any such practices and to take such measures as it deems appropriate with a view to eliminating such harmful effects.

\textsuperscript{77} For an example of an earlier proposal of such a multilateral treaty, see Draft Ar-
to be proscribed, the extent to which the corporation's or national's own government could enforce the treaty or national laws, and the effect which government authorization would have with respect to the validity of the acts concerned. A multilateral treaty would have the advantage of uniformity. Consideration might be given to the creation of a commission which could give rulings on matters in doubt or dispute.

International law has recognized the territorial and objective application principles of jurisdiction for centuries; in the past they have worked quite well. However, antitrust problems cannot be boiled down into one neat solution. International law and the world have never before been faced with international commerce of this scale. Traditional principles of international law are not sufficiently adaptable to meet the pressing needs of the new types of business organizations which exist today. The American antitrust laws are far different from earlier laws in two respects: first, because of the worldwide business activity of American enterprises; second, the American antitrust laws are more strict than most others, especially the European. Any solution which is suggested must take into account the trend of the cases, the plausibility of the solution, and whether the approach will preserve the interests not only of the United States, but of the rest of the world as well.

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