The Conflict of Laws and the Extraterritorial Application of the Sherman Act

Lawrence William Nelson Jr.
NOTE

The Conflict of Laws and the Extraterritorial Application of the Sherman Act

I. INTRODUCTION

The former Assistant United States Attorney General, Richard McLaren, recently summarized the United States policy on the extraterritorial application of its antitrust laws. He stated that:

The role that antitrust and competition policy play in American foreign commerce - exports as well as imports - is a necessary one. Antitrust enforcement cannot ignore foreign commerce, because national boundaries have lost much of their relevance to business reality. Our enforcement efforts must be extended to unduly restrictive activities outside our borders whenever - but only to the extent that - U.S. Commerce is affected, whether immediately or prospectively.¹

As will be seen, this expression of the role the United States antitrust laws should play in international transactions is clearly supported by the case law. With few exceptions the courts have not had difficulty in applying the Sherman Act to conduct which has occurred outside the United States regardless of the actual or potential conflict of laws problems.

The justification for the extraterritorial application of the antitrust laws can be found in the broad and general language of the Sherman Act. For example, section 1 declares that "[e]very contract, combination . . . in restraint of trade or commerce among the several States, or with foreign nations . . . [is] illegal . . . ."² Thus the Sherman Act³ has been applied extraterritorially where all the prohibited conduct occurred in foreign States, or where foreign laws or courts have prevented or might prevent the execution of a United States court's order. In some cases the above action has precipitated

² 15 U.S.C. § 1 (1970) (emphasis added). Section 2 provides that: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ." Id. § 2.
harsh diplomatic protests and caused the foreign States to enact legislation to protect their nationals.

Even though many States have enacted some form of trade regulation,\(^4\) when compared to the Sherman Act, most of the statutes have been restrained in both their language and application. For example, the application of the Belgian antitrust law "is limited to exercise — 'within the territory of the Kingdom' — of a prohibited degree of dominance over supply, price or quality."\(^5\) In Great Britain trade restrictions, which are imposed in good faith to protect legitimate trade interests, even though harmful to other British commercial interests, are still lawful.\(^6\) There are, however, several States whose antitrust laws have been patterned after those of the United States and are therefore relatively comprehensive.\(^7\) Even so, the Sherman Act, with its broad language, is more expansive in its domestic and international application than any foreign trade regulation statutes.\(^8\)

II. THE EARLY CASE LAW DEVELOPMENT

The first time the Supreme Court fully considered the extra-territorial application of the Sherman Act was in American Banana Co. v. United Fruit Co.\(^9\) The American Banana Co. brought a private treble damage action charging United Fruit with monopolizing and restraining the banana trade. Specifically, American Banana alleged that United Fruit had influenced the governments of Costa Rica, Guatemala, and Panama to enact legislation to protect their nationals from the effects of United Fruit's actions in the banana trade.

---


\(^5\) Common Market and American Antitrust 109 (J. Rahl ed. 1970). Under the Belgium law, an antitrust court probably could require the production of documents located in other States but so far this has not happened and probably will not. See del Marmol & Fontaine, Protection Against the Abuse of Economic Power in Belgium: The Law of May 27, 1960, 109 U. PA. L. Rev. 922, 931 (1961). However, United States courts have not been reluctant to require such production. See section IV. infra.


\(^8\) For example, Richard McLaren has observed that "[t]oday, German antitrust policy ranks among the most vigorous outside the United States . . . ." McLaren, supra note 1.

Rica and Panama to prevent American Banana from building a railroad from its plantation to a nearby port. Then United Fruit persuaded Costa Rica to seize the plantation which was eventually sold to United Fruit.

The Court held that these facts did not state a cause of action. the situs of the act before characterizing such act as lawful or unlawful. The rationale is that it would be unjust to the actor, would conflict with the sovereignty of the foreign States, and would be contrary to the notions of comity for the United States to apply its laws in such circumstances. Since the "seizure" of the plantation was in effect ratified by Costa Rica, American Banana was also barred from recovery based on the Act of State doctrine.

In subsequent cases the courts have so limited the broad rationales of American Banana that today little of its substance remains. American Banana had adopted a "strict territorial" approach which required that jurisdiction be determined by reference to the place where the act was committed. However, these cases have subsequently abandoned this approach in favor of the "objective territorial" principle of legislative jurisdiction. In United States v.
Aluminum Co. of America (Alcoa), the objective territorial principle was firmly established as a part of the United States antitrust laws and the American Banana strict territorial approach was abandoned. In this case Alcoa was held to have violated the Sherman Act because of an agreement entered into between a Canadian subsidiary of Alcoa and several other foreign corporations. This international agreement purportedly regulated the amount of aluminum to be produced in the foreign States. Because, as a matter of law, this agreement could affect the level of imports of aluminum into the United States, Judge Learned Hand found that there was a violation of the Sherman Act. He reached this decision even though the agreement was made and performed outside the United States by foreign nationals.

Judge Hand first stated that the court would only examine whether "Congress intended to impose the [extraterritorial] liability, and whether our own Constitution permitted it to do so: . . . we cannot look beyond our own law." But, he also recognized that notwithstanding the above, there are still conflict of laws limitations to be considered.

He then proceeded to make a statement which he apparently considered dispositive of the conflicts issue.

In United States v. American Tobacco Co., 221 U.S. 106 (1911), the Court also favored the objective territorial principle when it held that a division of markets agreement between British and American tobacco producers violated the antitrust law because of its effect on United States commerce, even though the agreement was executed in England and was valid there. Id. at 172. See generally W. Fugate, Foreign Commerce and the Antitrust Laws 20-34 (1958). For a criticism of the objective principle as it has been applied to the Sherman Act see, Haight, supra note 6, at 643.

The next major case, United States v. Sisal Sales Corp., 274 U.S. 268 (1927), involved monopolization of the Sisal twine making industry. This monopoly was obtained through discriminatory legislation which the defendants were able to have passed by the Mexican government. This legislation eventually forced everyone except the defendants out of the sisal market. Notwithstanding this fact, the Court found that there had been an antitrust violation because part of the plan was entered into by parties within the United States and made effective by acts done therein. . . . The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties. Id. at 276.

18 148 F.2d 416 (2d Cir. 1945). The Supreme Court could not decide the Alcoa case because they lacked a quorum, and thus the second circuit heard the case by certification from the Supreme Court.

17 Id. at 443.

16 Judge Hand observed that:

[I]t is quite true that we are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the "Conflict of Laws." We should not impute to Congress an in-
It is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.19 However, in view of possible "international complications",20 Judge Hand would limit extraterritorial application of the Sherman Act to only those cases where there was (1) an effect on United States foreign commerce, combined with (2) an intent to control such commerce.21 Once the intent to affect commerce is shown, then the burden shifts to the defendant to prove that there was no effect.22 Other courts have gone even further than Alcoa in expanding the reach of the Sherman Act.23 For example in United States v. National Lead Co.,24 several agreements were entered into among foreign nondefendant corporations to, among other things, fix the price of goods sold between their countries. National Lead, even though not an actual party to the agreements, did encourage the agreement, and thus was found to have violated the Sherman Act because the agreements had the effect of helping National Lead by

20 148 F.2d at 443.
21 Id. at 443-44.
22 It is well established in antitrust law that a person is presumed to intend the natural consequences of his acts. See Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 243 (1899). Thus, in most cases, the defendant will have the burden of proof that his acts had no effect on commerce; an almost impossible burden to meet. This is especially true because Judge Hand, relying on Socony-Vacuum Oil Co. v. United States, 310 U.S. 150 (1940), found a presumption that any restriction on production has an influence on prices. Judge Hand was willing to do this even though Socony was a case involving domestic commerce, and not foreign commerce. The result of using the Socony presumption is that certain conduct can be proscribed without the required actual effect on foreign commerce being shown. W. Fugate, supra note 15, at 125-26.
23 See, e.g., United States v. General Electric, 82 F. Supp. 753 (D.N.J. 1949). In his case, Philips, a Dutch corporation who did no business in the United States, was found to have violated the Sherman Act because it was a party to foreign agreements restricting the amount of electric lamps sold by these foreign corporations. General Electric, although not a party to the agreement, encouraged the plan because it tended to discourage the export of electric lamps to the United States by making the foreign markets more attractive. The court first found that Philips knew or should have known of General Electric's illegal plan to dominate the United States incandescent lamp market, and secondly, that Philips actions "diliterously affected commerce" because "the agreements with IGE and Corning ... helped the General Electric plan of throttling potential sources of foreign lamp parts." Id. at 891. These proceedings caused strong diplomatic protests from the Dutch Government. See Birrell, Extraterritorial Application of Antitrust Laws, in 3 INSTITUTE ON PRIVATE INVESTMENTS ABROAD 145 (1961).
tending to restrict the amount of titanium pigments exported to the United States. The court emphasized that National Lead was part of a conspiracy which "was entered into, in the United States, to restrain and control . . . commerce of the United States,"25 notwithstanding the fact that it was not a party to the foreign agreements.

III. CURRENT TRENDS IN THE APPLICATION OF THE SHERMAN ACT

The mechanical approach of applying American antitrust standards to international situations, taken by most of the earlier cases has been followed in subsequent decisions.26 However, the courts are continuing to expand the reach of the Sherman Act. For example, in United States v. The Watchmakers of Switzerland,27 the court found that a Swiss cartel agreement which, among other things, restricted the importation of watch parts into the United States, had a substantial effect on United States trade and commerce and consequently was forbidden by the Sherman Act. The court rejected a defense that it did not have jurisdiction because the antitrust laws

25 Id. at 524-25. The court, however, failed to explain how these agreements, which did not restrict exports to the United States, had the effect of helping the National Lead Company.

26 However, the Attorney General's National Committee to Study the Antitrust Laws, after analyzing the cases, took a middle of the road approach. It concluded that:

1. We feel that the Sherman Act applies only to those arrangements between Americans alone, or in concert with foreign firms, which have such a substantial anticompetitive effect on this country's "trade or commerce . . . with foreign nations" as to constitute unreasonable restraints.

2. We believe that conspiracies between foreign competitors alone should come within the Sherman Act only where they are intended to, and actually do, result in substantial anticompetitive effects on our foreign commerce. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 76 (1955) [hereinafter cited as REPORT].

One committee member emphasized that "[s]ubstantial 'anticompetitive effects' referred to here and elsewhere in the Report mean of course 'anticompetitive effects' which are direct as well as substantial." Id. at n. 61.

While the approach taken by the REPORT is an improvement, it still presents some problems. For one thing it fails to take into account the fundamental principle that "the penal laws of a country have no extraterritorial force." 2 J. MOORE, A DIGEST OF INTERNATIONAL LAW 236 (1906). See also J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS 20-22 (7th ed. 1872); Carlston, Antitrust Policy Abroad, 49 NW. U. L. REV. 569, 578-80 (1954); Nitschke, The Antitrust Laws in Foreign Commerce, 53 Mich. L. Rev. 1059, 1061 n. 10 (1955); Note, Extraterritorial Application of the Antitrust Laws: A Conflict of Laws Approach, 70 YALE L. J. 259, 266 (1960). However the Attorney General's Report did recommend the "inclusion of 'safeguards' to protect any defendant 'from being caught between the jaws of . . . any judgment and the operations of law in foreign countries where it does its business.'" REPORT at 76 (footnote omitted). See, e.g., United States v. General Electric Co., 115 F. Supp. 835, 878 (D.N.J. 1953), where the court did give Philips, a Dutch corporation, immunity from contempt should the judgment require acts forbidden by a foreign government.

do not apply to the "acts of sovereign governments." The court found that it had "jurisdiction as to acts and contracts abroad, if . . . such acts and contracts have a substantial and material effect upon our foreign and domestic commerce."

The reach of the Sherman Act was further expanded in *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.* This private treble damage action was brought because the defendants, through rate cutting, had eliminated the plaintiff as a possible competitor for Agency for International Development (AID) shipments of fertilizer and cement between Taiwan and South Vietnam. Even though the goods were shipped from one foreign State to another, and nothing was imported to or exported from the United States, the court still found a violation of the Sherman Act. In doing so, the court appeared to have abandoned the "effects test" of the *Alcoa* case, and adopted an even broader "nexus test." The *Pacific Seafarers* court stated that:

> [T]he test which determines whether 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.

Under this test, if Americans engage in competitive practices which are legal in the foreign State, but illegal if done in the United

---

28 In dictum the court noted that "If . . . the defendants' activities had been required by Swiss law, this court could indeed do nothing. An American court would, under such circumstances, have no right to condemn the governmental activity of another sovereign nation." 1963 Trade Case at 77,456.

29 *Id.* at 77,457. Subsequent to the entry of judgment, the Swiss government "issued official regulations with respect to the issuance of export permits for parts from Switzerland." 1965 Trade Case at 80,492. Thus the court modified its earlier decree to allow the defendants to comply with these rules and regulations. The court felt that "these modifications will prevent any situation from arising such as has occurred in other litigation in the past when there was believed to be a possible conflict between a decree of a United States Court and the sovereignty of a foreign nation." 1965 Trade Case at 80,493.


31 *Id.* at 815 (emphasis added). Specifically the court held that:

> [S]ince there is an identifiable, distinctive market for American-flag shipping service where the American characteristic is dominant — a market defined as involving the transportation of AID-financed cargoes, which has a definite *nexus* with significant interests of the United States — the Sherman Act is applicable to a conspiracy to exclude newcomers from the trade. *Id.* at 816 (footnote omitted).

The *Pacific Seafarers* case represents a major expansion of the result reached in *Thomsen v. Cayser*, 243 U.S. 66 (1917). In this case, the Supreme Court found that the Sherman Act was violated where the parties conspired to monopolize trade between the United States and certain ports in Africa. Even though the agreement was not entered into in the United States, the Court found that the agreement did have a substantial effect on United States foreign commerce.
States, then they will have violated the Sherman Act if there is a "nexus between the parties and their practices and the United States."\textsuperscript{32} This would be the result even though there is "no direct and substantial anticompetitive effects."\textsuperscript{33} In \textit{Pacific Seafarers}, the court partially justified its holding by emphasizing that only Americans were involved, and ""[c]onsequently there are few possible international complications. . . ."\textsuperscript{35} On the other hand, a lack of international complications should not justify the application of the Sherman Act unless there is a "substantial and material effect upon our foreign and domestic commerce."\textsuperscript{36}

Under the United States Constitution, Article I, Section 8, Congress is given the authority to enact laws "to regulate Commerce with foreign Nations, and among the several States. . . ." Thus the application of the Sherman Act to a situation not involving United States "Commerce with foreign Nations" would be an unconstitutional extension of the authority delegated to Congress. To prevent the application of the Sherman Act in situations where there is no effect on commerce, the \textit{Pacific Seafarers} case must be limited to its particular facts (the United States subsidizing its merchant marine through AID), and even if this is done, the court may have gone too far in view of the above limitations.

While in most areas the courts seem to be constantly expanding the scope of the Sherman Act,\textsuperscript{37} several recent decisions have held that the Act of State Doctrine and "compulsion" by foreign States limit the application of the Act.\textsuperscript{38} In \textit{Occidental Petroleum Corp}.

\textsuperscript{32} 404 F.2d at 815.
\textsuperscript{33} See note 26 supra. Although the \textit{Alcoa} case had expanded the reach of the Sherman Act, Judge Learned Hand, citing the \textit{American Banana} case, still realized that "[w]e 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." 146 F.2d at 443.
\textsuperscript{34} 148 F.2d at 443.
\textsuperscript{35} 404 F.2d at 817.
\textsuperscript{36} United States v. The Watchmakers of Switzerland, 1963 Trade Case \$ 70,600 at 77,457 (S.D.N.Y. 1965).
v. Buttes Gas & Oil Co., it was charged that the defendants had conspired with several of the Trucial States, Great Britain and Iran to deprive Occidental Petroleum of their richest offshore oil concession. The court, noting that the facts in American Banana were "strikingly similar to those now before the court," held that under the Act of State Doctrine, defendant's motion for summary judgment would be granted, even though there was an effect on American commerce. The district court simply refused to examine the acts of foreign sovereigns in conspiracy with the American defendants or charges that international law had been violated.

The court in Interamerican Refining Corp. v. Texaco Maracaibo, Inc., concluded that because the Venezuelan regulatory authorities compelled the defendants to boycott the plaintiffs, this compulsion was a total defense to a charge that the antitrust laws had been violated by an illegal boycott. They realized that in this situation, "American business abroad does not carry with it the freedom and protection of competition it enjoys here, and our courts cannot impose them." Furthermore, under the Act of State Doctrine, they would not examine the legality of the Venezuelan official's acts.

Summary

It is safe to say that today the strict territorial approach of American Banana is dead. This has been replaced by the objective territorial principle as exemplified in the Alcoa case. Under this approach, if the courts find some effect on foreign commerce with the United States, then the Sherman Act is applicable. However, the Pacific Seafarers court would apparently go even further and find a violation of the Sherman Act if there were no effect on foreign — United States commerce as long as the "nexus test" was satisfied.

40 Id. at 109. See notes 9-12 supra & accompanying text.
41 See note 12 supra.
42 331 F. Supp. at 102. But see Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) where the Court stated:
To subject [the defendants] to liability under the Sherman Act for eliminating a competitor from the Canadian market by exercise of the discretionary power conferred upon Electro Met of Canada by the Canadian Government would effectuate the purpose of the Sherman Act . . . . Id. at 707-08.
See also Fugate, supra note 13, at 934, where it was observed "that private parties are ill-advised to rely upon permissive foreign laws to justify restraints upon United States Commerce."
44 Id. at 1298.
On the other hand, if the defendant can establish that his "otherwise illegal" conduct was compelled by a foreign State, then the courts have declared that this is a valid defense to a Sherman Act violation. But, these situations are not common and in most instances the courts will apply the Sherman Act extraterritorially.

IV. CONFLICTING DECREES AND THE PRODUCTION OF FOREIGN DOCUMENTS

Because of extraterritorial application of the Sherman Act, serious conflict of laws problems can and have arisen. For example, in United States v. Imperial Chemical Indus.,\(^{45}\) the court found that Imperial Chemical Industries (ICI) and DuPont had violated the Sherman Act by, among other things, entering into agreements to divide the world market relating to explosives and chemicals, thus restricting United States foreign commerce. As part of the court's decree, ICI, a British Corporation doing business in the United States, was ordered to return DuPont's British patents which DuPont had recently assigned to ICI.\(^{46}\) Judge Ryan required the return of the patents even though ICI had already granted an exclusive sublicense to British Nylon Spanners (BNS), a British corporation over whom the court did not have jurisdiction. Despite the lack of jurisdiction over BNS Judge Ryan stated:

> It does not seem presumptuous for this court to make a direction to a foreign defendant corporation over which it has jurisdiction to take steps to remedy and correct a situation, which is unlawful both here and in the foreign jurisdiction in which it is domiciled. . . . It is not an intrusion on the authority of a foreign sovereign for this court to direct that steps be taken to remove the harmful effects on the trade of the United States.\(^{47}\)


\(^{46}\) The court felt that DuPont had assigned the patents to ICI so as to remove them from "the scope of any decree which might ultimately be made by [the] court." 105 F. Supp. at 230.

\(^{47}\) Id. at 229. Even though the court stated that it was "unlawful" to restrict trade into Britain (through the use of the patents ICI had obtained from DuPont), it appears that this was not the case. In fact the court stated that "[w]e have been advised that the present policy of British patent law is to foster manufacture in the United Kingdom rather than to permit importation from abroad . . . ." Id. Thus, while it is unlawful to restrict trade into the United States, this is not necessarily unlawful in Britain. See Haight, supra note 6, at 645, where the author stated that: "It has long been established in England that if the restraint has been imposed in good faith and for the protection of legitimate trading interests it is lawful even though it may be harmful to third parties." (footnote omitted). See also Note, The British Monopolies Act of 1948: A Contrast with American Policy and Practice, 59 YALE L. J. 899, 917 (1950). This policy has been continued in the Restrictive Trade Practices Act of 1956, 4 & 5 Eliz. 2, c 68.
Judge Ryan also realized that BNS would probably bring an action in Britain asking for specific performance of its contract with ICI. However the court still did "not hesitate . . . to decree that the British nylon patents may not be asserted by ICI to prevent the importation of nylon polymer . . . into Great Britain." Judge Ryan felt that "the possibility that the English courts in an equity suit will not give effect to such a provision in our decree should not deter us from including it."

Judge Ryan's conjecture proved correct as BNS immediately brought an action in Britain to prevent the enforcement of the district court's decree and to compel specific performance. The British Court of Appeals found itself "unable to agree with" Judge Ryan's statement that it was not an intrusion on a foreign sovereign's authority for a United States court to require ICI to reassign its patents. The court emphasized that the contract between ICI and BNS was made in England between English nationals and was to be performed there. Thus, the court refused to give effect to the order of the United States court and allowed specific performance. The Chancery Division affirmed the Court of Appeals' judgment pointing out that Judge Ryan had limited "his judgement [so] that neither his judgement, nor any judgement of mine . . . will disturb the comity which the courts of the United States and the courts of England are so anxious and careful to observe." The English courts relied on a strict territorial principle of jurisdiction in reaching their decisions. Furthermore, in view of the differing economic policies of the two States, and Judge Ryan's inclusion in his decree of an "escape clause" for ICI, the English Court found that there was little incentive to apply the "notion of comity."

48 105 F. Supp. at 231.
49 Id. The court took a "nothing ventured, nothing gained" approach when it reasoned that "[i]f the British courts were not to give credit to this provision, no injury would have been done; if the holding of the British Courts were to the contrary, a remedy available would not have been needlessly abandoned." Id.
51 [1952] 2 All E.R. at 782.
52 Id. at 783-84. In closing the court noted that:
I do not conceive that I am offending in any way against the principles of comity which apply between the two countries. . . . I take some comfort from the doubts which the district judge himself entertained about the extent to which his order might go, if carried to its logical conclusion. Id. at 784.
53 [1954] 3 All E.R. at 93.
54 No provision of this judgement shall operate against [the defendant company] for action taken in compliance with any law of the United States gov-
Conflicts problems have also arisen when a United States court requires the production of documents located in foreign States\(^\text{55}\) but such production is prohibited by the local law of that State.\(^\text{56}\) Not only can the nonproduction lead to a contempt action or a dismissal of the suit, but also United States foreign relations may suffer. For example, in *In re Grand Jury Investigation of the Shipping Industry*,\(^\text{57}\) the governments of Britain, Canada, Denmark, France, Germany, Italy, Japan, the Netherlands, Norway and Sweden protested the production of foreign business records which had been ordered by a federal grand jury investigating possible antitrust violations in the shipping industry. Even though the court found that it had, "the power, authority and jurisdiction to require the production of all the documents called for in all of the subpoenas herein involved . . . .",\(^\text{58}\) it realized that such objections should "be


\[^{56}\text{See, e.g., In re Grand Jury Subpoenas Duces Tecum Addressed to Canadian Int'l Paper Co., 72 F. Supp. 1013 (S.D.N.Y. 1947), where a grand jury, investigating possible Sherman Act violations, required a Canadian Corporation, who did some business in New York, to produce documents located in Canada. Since International Paper was "found in New York," the court required production. This action by the United States Court prompted the enactment of the Business Records Protection Act of 1947, 11 Geo. 6, c.10, as amended, 14 Geo. 6, c.7 (1950), 1 ONTARIO REV. STAT. c. 44 (1960), which imposed one year's imprisonment and contempt of court penalties on anyone removing unauthorized business records from Ontario. See also Business Concerns Records Act of 1958, 6 & 7 Eliz. 2, c.42, QUE. REV. STAT. c. 278 (1964).}\]

\[^{57}\text{The Netherlands, in section 39 of their Economic Competition Act of 1956, also prohibits the production of documents to comply with foreign antitrust court orders. The British have a similar statute with respect to their shipping industry. Shipping Contracts and Commercial Documents Act of 1964, §§ 1,2, c.87.}\]

\[^{58}\text{Id. at 317-18. A protest to the Secretary of State from the Netherlands reads, in part: The Netherlands Government . . . emphasizes that it would lead to serious conflicts of jurisdiction if a Government, with or without transgression of the limits of international law, unilaterally institutes proceedings against foreign companies engaged in activities, essentially falling within the jurisdiction of their home countries. Furthermore, the activities of the United States District Court are of such a farreaching nature that they may unfavorably affect the interests of harmonious international trade, especially if other States would take counter measures or would feel encouraged by the example of the United States to take similar measures involving documentation outside their jurisdiction. Cited in Haight, The Restrictive Business Clauses in United States Treaties: An}\]
given the greatest consideration.” However, the court avoided any serious conflicts problems by not requiring the production of foreign documents at that time, finding that the investigation would not be impeded if it reserved judgement.

Similarly, in *In re Investigation of World Arrangements*, the district court was faced with objections by foreign States to the grand jury’s order for production of foreign documents in connection with antitrust violations in the petroleum industry. With respect to foreign documents, whose production was prohibited by foreign laws, the court stated that:

> [T]he disclosure of documents is a procedural matter and it has long been the rule that the “lex fori” governs the law of procedure. However, substantive law may be affected in one jurisdiction when procedural law operates in another, and this court does not particularly desire to promulgate a “procedural” order imposing serious criminal penalties under foreign substantive law.

The court then refused to allow the production of documents pending a showing by the movant of:

1. A good faith endeavor to gain consent from the foreign sovereign to remove the required documents;
2. What, if any, interest the foreign sovereign has in the movant corporation, or in the investigation; and
3. Proof of the foreign law.

For national security reasons, this grand jury, originally empaneled to consider the possibility of bringing indictments, was terminated. Instead, the government brought an action in *United States v. Standard Oil Co.*, against certain of the corporations...
which initially had been investigated by the grand jury. As to the production of foreign documents, the court required that a good faith effort be made by the defendants to obtain the requisite information and should this fail, then they would not be penalized for nonproduction. But should the government contest the defendant’s good faith efforts, then the court would hold a hearing to decide what appropriate action should be taken.  

However, when the non-production of documents will only result in civil liabilities and economic hardship, contempt proceedings may be instituted for the failure to produce documents. For example, in *United States v. First National City Bank*, the court upheld a civil contempt decree of $2,000 per day and 60 days imprisonment because German documents, needed for an investigation of criminal antitrust violations by the Bank’s customers, were not produced. The court strongly relied upon the *Restatement (Second) of United States Foreign Relations Law* which provides that:

> A state having jurisdiction to prescribe or to enforce a rule of law is not precluded from exercising its jurisdiction solely because such exercise requires a person to engage in conduct subjecting him to liability under the law of another state having jurisdiction with respect to that conduct.

When the court balanced the United States interest in investigating possible antitrust violations, against potential business harm and the “remote” chances that the defendant would suffer civil liabilities, it held that the documents must be produced. In reaching this conclusion the court emphasized that the German statute, making it a crime for certain types of people to disclose information, did not specifically include banks. Furthermore, the German corporation, to whom the documents related, was incorporated in New York. Absent these special facts, it is questionable whether the court would have required the documents to have been produced.

A similar argument, that potential civil liabilities from a breach of contract would prevent a court from requiring action which would cause such breach, was rejected by the Supreme Court in *United
In this case the lower court had required the defendant to compete in certain European States, in which it had contractually agreed that it would not. On appeal to the Supreme Court, the defendant argued that it should not be required to breach contracts which were valid in the foreign States. An equally divided Court affirmed the lower court's order requiring the defendants to compete. However, since the court was equally divided, this decision is without precedent value.

Had one of the foreign parties to the contract sued for specific performance, Holophane would have been in the same position as ICI, and this time there would be no "escape provision" included in the decree as there had been in the ICI case.

V. THE CURRENT JUSTICE DEPARTMENT VIEW OF THE EXTRATERRITORIAL APPLICATION OF THE SHERMAN ACT

It is clear that the Justice Department feels that the extraterritorial application of the Sherman Act is necessary if United States foreign commerce is to be protected. However, it realizes that at times international conflicts do arise when the antitrust laws are so applied.

In discussing the "possibility of conflict between U.S. and foreign law", Mr. McLaren has stated that:

Although we may well have some very real problems to deal with on this point, I think that the dimensions of the problem have been substantially exaggerated.

To some extent, we are dealing not with outright conflict but with problems of comity and communication between governments. I think on occasion in the past we may have been remiss in failing to explain, in advance, what action we proposed to take when it affected the interest of other countries. We have learned from these experiences.

In the past the United States antitrust policies have created hard feelings with foreign States. This policy has led some States to

---

70 See note 54 supra.
71 See text accompanying note 1 supra.
72 One commentator has observed that "[w]hile at one time there were occasional protests in foreign countries about United States antitrust actions, this is much less true today because of a more common approach to antitrust enforcement and because of machinery which has been set up to deal with possible conflicts." Address by Fugate before the Int'l Conference on Nationalism and the Multi-National Enterprise, McGill University, Montreal, Canada, Aug. 24, 1971.
73 McLaren, supra note 1.
pass specific legislation preventing the production of documents ordered by United States courts in antitrust cases.\textsuperscript{74} Also there have been strong diplomatic protests from States whose nationals have been involved in United States antitrust proceedings.\textsuperscript{75} However, the United States has responded to these complaints and recently has instituted procedures to minimize these conflicts. Consequently the United States and Canada now actively cooperate in reducing any conflict problems through a system of joint notification.\textsuperscript{76} The Justice Department has also recently instituted a "Business Review Procedure" whereby a businessman can receive a business review letter regarding the legality of proposed activities which might "harm" United States foreign commerce.\textsuperscript{77}

The Justice Department's approach is that conflicts problems can be largely reduced through communication at both the individual and State levels. While this does not solve the "theoretical" conflict of laws and international law problems, from a practical standpoint it seems to be working quite well. Compared to the past there have been relatively few actions where the government has utilized the Sherman Act extraterritorially.\textsuperscript{78} In fact, recently it has been mainly in the private treble damage area where most of the cases have occurred.

VI. LIMITATIONS ON THE EXTRATERRITORIAL APPLICATION OF THE SHERMAN ACT

A. Limitation on the Power of a State to Prescribe Legislation

Even though the Antitrust laws are well established in the

\textsuperscript{74} See note 56 supra.

\textsuperscript{75} See note 58 supra.

\textsuperscript{76} Canada-U.S. Antitrust Corporation 5 CCH Trade Reg. Rep. ¶ 50,112 (1972).

\textsuperscript{77} Antitrust and Foreign Commerce 5 CCH Trade Reg. Rep. ¶ 50,129 (1972).

\textsuperscript{78} Between 1937 and 1943 over 50 cases were brought by the Antitrust Division. Birrell, Extraterritorial Application of Antitrust Laws, in 3 Institute on Private Investments Abroad 133 (1961). See also Wall St. J. April 24, 1972, at 1, col. 6, where it is suggested that if Richard Nixon is reelected, then the United States will continue to relax the strict enforcement of antitrust policies against domestic corporations operating abroad.
United States,70 "[t]here is but little question that the American antitrust laws contain little if any generally accepted principles of law recognized by the international community of civilized nations."80 In many States, the government encourages or requires participation in such activities as price fixing or market division, activities which are considered per se anticompetitive and thus illegal under United States standards.81 This fact must be kept in mind when one considers the language of the Sherman Act; "trade or commerce among the several States, or with foreign nations." Whether Congress intended that this language should have extraterritorial application is no longer important. It is clear that the courts have and will probably continue to give such application to the Sherman Act. The Restatement (Second) of United States Foreign Relations Law seems to support this type of application, but only if certain conditions are met. Specifically, section 18 states that:

A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either

(a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the laws of states that have reasonably developed legal systems, or

(b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.82

Since the United States concept of economic regulation is not generally recognized by most States, the United States cannot justify extraterritorial application under Section 18 (a) of the Restatement.


80 Zwarensteyn, supra note 19, at 177. See also Haight, supra note 6, at 644. Violations of Sections 1 and 2 of the Sherman Act do not fall within any category of crimes which are common to such community [of civilized nations]; they are offenses created by Congress for the purpose of better regulating commerce between the states and with foreign nations, and they express the public policy of the United States on American trade and the American economy. Not even such a policy, let alone the "crime" itself, is common to other civilized societies.


82 Restatement of Foreign Relations Law § 18.
However, under section 18 (b) (iv) such application could be justified because United States economic regulations are "not inconsistent with the principles" which other States recognize. Thus, assuming that the other three requirements of section 18 (b) are met, the United States, without violating international law, has jurisdiction to proscribe certain "foreign" acts which have effects within the territory.

B. Limitations on the Power of a State to Enforce Legislation

If the United States is justified, under certain circumstances, in enacting antitrust legislation which can be applied extraterritorially, the limitations in the application of this legislation must be defined. Judge Learned Hand, in the Alcoa case, noted that these limitations "correspond to those fixed by the 'Conflict of Laws.'" The Restatement Second of Conflicts, in section 50, allows a State to exercise judicial jurisdiction over a foreign corporation which causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of these effects and of the corporation's relationship to the state makes the exercise of such jurisdiction unreasonable.

From a conflicts standpoint, jurisdiction can be exercised unless to do so would be unreasonable. The problem is, when would it be unreasonable? This question can be answered, in part, by looking to section 40 of The Restatement of Foreign Relations Law which lists the following factors which States are required by international law to consider before they exercise their power of enforcement:

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

83 See notes 4-7 supra & accompanying text.
84 As the court in Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804, 814 (D.C. Cir. 1968), noted, "it may fairly be inferred, in the absence of clear showing to the contrary, that Congress did not intend an application [of the Sherman Act] that would violate principles of international law."
85 148 F.2d at 443 (emphasis added).
86 Restatement (Second) of Conflict of Laws § 50 (1971). See also section 37 with respect to jurisdiction over individuals.
87 Restatement of Foreign Relations Law § 40. See also A. von Mehren
In addition to the above extrinsic limitations, United States courts should also consider the following limitations which result from the intrinsic nature of the Sherman Act before they hold foreigners liable. First, "the Sherman Act offense is complex, and it is usually difficult to establish the relationship of cause and effect. . . . [F]oreigners may find themselves charged in the United States with a criminal offense which they could hardly have been expected to foresee or to understand." Consequently, unless the foreigner knowingly intended to cause a direct, foreseeable and substantial effect on United States commerce, the courts should be reluctant to hold him liable. Second, the Sherman Act is intrinsically vague and uncertain. As one commentator has observed:

To the foreigner it would be an intolerable burden to require him or his lawyer to understand the intricacies of the case law under the antitrust statutes, to prognosticate whether the rule of reason applied to his activities in his own country or that what he did was a per se violation; and if the rule of reason did apply, to forecast the mental processes of an American judge educated and living in a political and economic climate fundamentally different from his own. By its very nature this type of legislation is replete with uncertainty and unsuited to extraterritorial application.

Not only should the inherent vagueness and lack of cause and effect which is present in the Sherman Act cause the courts to be reluctant in applying it to a foreigner, but also a basically different standard should be applied if extraterritorial jurisdiction is exercised. First, a higher standard of "effect on commerce" is implied from the wording of the statute itself. The Constitution makes a distinction between commerce "among" the states and commerce "with" foreign

---

& D. Trautman, The Laws of Multistate Problems, 376 (1965) where the authors observed that:

Frequently conflicts between the regulating rules of two concerned jurisdictions can rationally be resolved by examining the strength of the domestic-law and multijurisdictional policies that lead each concerned jurisdiction to select its regulating rule. In the situation where the conflicts are irreducible, the better view is that the transaction should be upheld. See id. at 406-08.

88 Haight, supra note 9, at 648-49. See also Restatement of Foreign Relations Law § 18(b) (iii).

89 Something more than the traditional antitrust "intent" notions should be necessary if this requirement is to be truly meaningful. See note 22 supra.

90 Haight, supra note 6, at 649. When the Sherman Act was passed almost 82 years ago, few if any of the congressmen could have foreseen how this Act would evolve to prohibit the wide variety of conduct, whose prohibition is taken for granted today. However, with the newly established Business Review Procedure, a foreign businessman can find out whether the Justice Department thinks his activities will violate the United States antitrust laws. See note 77 supra.
nations, which distinction is carried over into the Sherman Act. Secondly, where the foreign action involves conduct which would be a per se violation under American standards of the antitrust laws, American courts should not automatically treat this foreign conduct as a per se violation. Just because price fixing in the United States is a per se violation does not mean that price fixing in Central Africa should also be treated in the same way. Professor Areeda has emphasized "that domestic per se rules cannot be automatically transposed to international conduct affecting American exports." Courts should not take the simpler per se approach just because it is easier than applying the "rule of reason" approach to a complex international scheme. While in the past the Justice Department has been unwilling to consider the "rule of reason" in these circumstances, this view has apparently now changed.

If the above two step analysis is combined with a provision in

---

91 One commentator has noted that [a] fair construction of the English language might reasonably support a holding that there is a wider compulsion in the power to regulate what occurs "among" domestic sovereignties than there is to regulate what occurs "with" foreign nations. Whitney, Sources of Conflict Between International Law and the Antitrust Laws, 63 YALE L. J. 655, 660-62 (1954).

92 See note 81 supra.

93 P. AREEDA, ANTITRUST ANALYSIS 68 (1967). But see Katzenbach, Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law, 65 YALE L. J. 1087, 1152 n. 231 (1965), where the author stated that: I would concede that there may be circumstances where a company is so economically squeezed by conflicting national policies that there may be no practical alternative which does not violate the law of one of the countries involved. But to retract all the way to a "rule of reason" for territorial division of markets, price-fixing, and other of the more heinous "per se" offenses seems to open wide the gates.

Another commentator feels that foreign per se antitrust offenses should be the prime target for attack. See Fortenberry, Jurisdiction over Extraterritorial Antitrust Violations — Paths through the Great Grimpen Mire, 32 OHIO ST. L. J. 519, 520-21 (1971). This was also the position that the Chief of the Foreign Commerce Section of the Justice Department has taken.

The Justice Department with the advice of the State Department, attempts to give due regard to comity with other nations in antitrust enforcement, within the bounds of discretion permitted under our laws. Of course, such principles are not applicable to per se offenses where United States jurisdiction is clear. Address by Fugate before the 93d annual meeting of the American Bar Ass'n., St. Louis, Mo. Aug. 10, 1970. Since then the Justice Department has apparently changed its mind and is now willing to consider the rule of reason when deciding whether a particular type of conduct violates the antitrust laws. See Antitrust and Foreign Commerce, 5 CCH TRADE REG. REP. § 50,129 at 55,207 (1972).

94 See note 93 supra.

95 First, the court should consider the four limitations on the power to prescribe found in section 18 of the Restatement of Foreign Relations Law. Second, the courts should consider the extrinsic limitations on the power to enforce found in section 40 of
a decree which would exempt the defendant from liability where direct conflicts arise because of foreign decree or laws, then any conflict of laws problems arising from the extraterritorial application of the Sherman Act would be largely eliminated.

VII. CONCLUSION

With the possible exception of the American Banana case, no court has used a conflict of laws approach in deciding whether the Sherman Act should be applied extraterritorially. While some courts say that their actions do not violate international law, in the final analysis American domestic standards are applied, not those of international law.

Although some commentators have proposed ways that conflict of laws principles could be applied to the extraterritorial application of the Sherman Act, no court has indicated that it would be willing to follow them. The courts thus far have chosen to proscribe for-the Restatement of Foreign Relations Law and also those which are intrinsic to the Sherman Act.

96 See note 26 supra.
97 See text accompanying notes 10-12 supra.
98 See Zwarensteyn, supra note 19, at 171, where the author suggests that the courts should
First, view the case from the substantive law angle, or rather from the angle of the remedy sought: if the remedy sought is damages, then, the action will be classified as one sounding in tort, and the choice of law is determined accordingly. Conversely, if the remedy sought is punishment, then, the action being punitive in nature, will be classified as a criminal action, and the problems connected with the applicable choice of law will be determined accordingly.

See also E. RABEL, THE CONFLICTS OF LAWS 71 (2d ed. 1958).

Another commentator has condensed the approaches of Professors Falk, Baxter, Mehren, Trautman and Leflar in an attempt to find a conflict of laws theory which the court can use. See Fortenberry, supra note 93, at 540-544. See also Trautman, The Role of Conflicts Thinking in Defining the International Reach of American Regulatory Legislation, 22 OHIO ST. L. J. 586 (1961).

99 There is no simple, neat, formalistic solution to the conflict of laws problems which arise with the extraterritorial application of the Sherman Act. See E. CHEATHAM, H. GOODRICH, E. GRISWOLD & W. REBEE, CASES AND MATERIALS ON CONFLICTS OF LAWS 8 (2d ed. 1941) where the authors stated:
[T]here was a long tendency to look for simple and farreaching ideas, which could dominate and give direction in the whole field. Story purposed to find it in sovereignty. . . . In recent years there has been a growing realization by the courts as well as by the writers that conflict of laws — extending as it does over the whole field of private law — cannot usefully be compressed into a few simple ideas or principles. . . . See also Cook, The Jurisdiction of Sovereign States and the Conflict of Laws, 31 COLUM. L. REV. 368 (1931); Lorenzen, Territoriality, Public Policy and the Conflicts of Laws, 33 YALE L. J. 756 (1924). The solution, if there is one, lies in the courts appreciation of the rationale for such application combined with a balancing of the factors discussed in section VI.
eign conduct even where the effect on United States commerce is questionable. They have taken the approach that American trade regulation policies should be enforced to the utmost, even when the economic effects are minimal. If national complications do arise, the courts reason that the scope of such regulation can be cut back. After all, nothing ventured, nothing gained. Few, if any, courts will follow a conflicts approach which eliminates the "effect" test. It is hoped that the two stage analysis developed in section VI will aid the courts in determining what circumstances and factors should be examined before they will apply the Sherman Act extraterritorially.

Lawrence William Nelson, Sr.

100 See note 49 supra.