EXTRATERRITORIAL JURISDICTION IN THE SPHERE OF ANTITRUST

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by

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EXTRATERRITORIAL JURISDICTION IN THE SPHERE OF ANTITRUST.

INTRODUCTION

The term 'extraterritoriality' has been described as 'the intrusion of the jurisdiction of one country into another, or the subjection of residents of one country to the laws and policies of another country.'[1] The Federal antitrust laws of the United States have presented the classic case of extraterritorial application, and, until the past two decades at least, only the American antitrust laws were applied in the regular course of administration to restrictive and monopolistic practices not localised entirely within the territory of an enforcing state.

This may have been due to a number of varying factors,[2] but in any event it is felt that no apology is needed for examining the genus of extraterritorial antitrust jurisdiction from the standpoint of its most

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1. Foreign Ownership and the Structure of Canadian Industry -- Report of the Task Force on the Structure of Canadian Industry (Chairman, M.H. Watkins) at p. 310 Privy Council Office, January 1968.

2. For example, that the United States antitrust laws are more venerable than those of any other state. For further comment, see Oliver, The Range and Effect of the Antitrust Laws of the United States, Report of the 51st Conference of the I.L.A., Tokyo 1964, at p. 511.

predominant species. America has in many instances provided the international blueprint for the organization and structure of national economic affairs, and it is fair to say that the problems which have confronted the United States as the result of the diligent protection of her foreign commerce from international cartels and monopolies epitomise the difficulties which have just in recent years begun to confront the other highly-industrialised countries of the Western World.

The efforts of the United States to maintain competition in her import and export commerce has, of course, raised many contentious problems, not only for international law and policy, but also in the international sphere -- 'the foreign commerce application of the American antitrust laws has offered one of the most vivid illustrations of the projection of one state's regulatory scheme into affairs of concern to other states.'[3]

It is the object of this study to attempt to disentangle some of the inconsistencies and legal anomalies surrounding this projection. In the furtherance of this aim, this paper will focus on the international jurisdictional aspects of the subject, and attention will not be paid either to the mechanics of violation of the

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3. Katz and Brewster, International Transactions and Relations, c. 9, p. 550 (1960).

antitrust statutes[4] or the corresponding judicial criteria for the determination of illegality in any particular case.[5]

Accordingly, a discussion of the relevant case law and legislation in Chapter One will be followed by an analysis of existing international law principles of jurisdiction and their applicability to the type of problems arising in connection with the enforcement of restrictive business practices legislation. A survey in Chapter Three of the international complications engendered by United States extraterritorial jurisdiction will precede a section dealing specifically with the manner in which such extraterritoriality affects the United States' closest neighbour -- Canada. Lastly, in Chapter Five, a variety of solutions, both existing and potential, will be discussed and evaluated in the context of the

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4. For example, participation in cartels, the antitrust aspects of foreign plant investments, be they joint venture or merger, the use of wholly or partly-owned subsidiaries for foreign operations. For general information on these aspects, see particularly Oppenheim, Weston, Federal Antitrust Laws, Cases and Comments (3rd ed. 1968).

5. That is, _per se_ unreasonableness, as exemplified by the decision in _United States_ v. _Socony Vacuum Oil Co._, 310 U.S. 150 (1940), or alternatively antitrust's 'rule of reason' -- See, for example, dicta in _Standard Oil Co._ v. _United States_, 221 U.S. 1 (1911) and _American Tobacco Co._ v. _United States_, 221 U.S. 106 (1911). For further information, see Oppenheim, Weston, _supra_ fn. 4, and Kronstein, Miller, Dommer, Major American Antitrust Laws (1965).

preceding study.

The problems in attempting to present a disinterested analysis of the more important aspects of United States extraterritorial jurisdiction in this area are not inconsiderable; on occasion, in the face of a conglomeration of conflicting data, the writer must admit to identifying somewhat with Wellington's classic 'I don't know what effect they will have upon the enemy, but by God they terrify me.'[6] Whilst not wishing to extend the enemy analogy to the reader, it is hoped that the following study provides a moderately clear exposition of the issues involved.

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6. Ascribed to the Duke of Wellington, on a draft of troops sent to him in Spain, 1809 -- The Oxford Dictionary of Quotations, p. 564 (2nd ed. 1968).

CHAPTER I

LEGISLATION AND CASE LAW

I. THE SHERMAN ACT -- SUBSTANCE, RATIONALE, AND JURISDICTIONAL FEATURES.

The authority granted to Congress by the Constitution 'to regulate Commerce with foreign Nations'[1] includes the power to proscribe activity which has a detrimental effect on the foreign commerce of the United States. Pursuant to this authority, Congress has enacted various antitrust statutes which apply to foreign commerce, statutes which have been officially described as a 'distinctive American means for assuring competitive economy on which our political and social freedom and a representative government in part depend.'[2]

Whilst other antitrust statutes contain provisions relating to foreign commerce,[3] the scope of this paper will be limited to a discussion of the jurisdictional

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1. U.S. Const. Art. 1, s. 8, cl. 3.

2. Report of the Attorney-General's National Committee to Study the Antitrust Laws (1955), U.S. Government Printing Office, p. 1. [Hereafter cited as Att.-Gen's Report.]

3. These include: Clayton Act, 15 U.S.C. ss 12-27 (1964) -- prohibits agreements not to deal in the goods of a competitor which tend to lessen competition or create a monopoly and acquisitions of stock or assets of another company, the effect of which may be to lessen substantially competition or create a monopoly; Wilson Tariff Act, 15 U.S.C. ss. 8-11 (1964) -- s. 73 of which specifically outlaws restraints operating on the import

reach of the Sherman Act of 1890,[4] the parent antitrust statute, under the provisions of which the most important antitrust prosecutions involving foreign elements have taken place.

The American antitrust laws are of the prohibitory, rather than the supervisory type. The Sherman Act itself is entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', and by Section 1, 'every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce amongst several states, or with foreign nations'[4a] is declared illegal, and every person making such an arrangement guilty of a misdemeanour punishable by fines, or imprisonment or both. Section 2 also provides that 'Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce amongst the several states, or with foreign nations' shall

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trade of the United States; Webb-Pomerene Act (Export Trade Act), 15 U.S.C. ss. 61-65 (1964) -- limited exception to the Sherman Act: in general authorizes American companies solely engaged in export to band together in selling for export, the Act authorizing such companies to fix the prices and co-operate in shipping their products to foreign countries; Federal Trade Commission Act, 15 U.S.C. ss. 41-58 (1964) -- prohibits unfair methods of competition in interstate commerce, and violations of the antitrust laws are deemed to be unfair methods of competition for purposes of said Act.

4. 15 U.S.C. ss. 1-7 (1964). 4a. Emphasis added.

also be guilty of a misdemeanour punishable as under Section 1. In addition to the criminal sanctions, which, of course, must meet the requirements of proof of intent and of other elements beyond a reasonable doubt before a jury, Section 4 authorizes enforcement through civil proceedings brought by the United States (represented by the Department of Justice) for a decree in equity. Such cases are not triable by jury and the criminal burden of proof is not required. Equitable decrees may require affirmative, corrective action, as well as cessation of objectionable conduct; the ultimate sanction for disobedience to the decree is punishment for civil contempt of court. In the general administration of antitrust laws, both criminal and civil proceedings are resorted to, but it is through civil proceedings and decrees in equity that affirmative, acceptable courses of conduct are required for the future.[5]

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5. Once its investigations uncover evidence warranting a charge of violating the Sherman Act -- or any of the other statutes -- the United States Department of Justice must decide whether to proceed by criminal prosecution or civil action. A criminal case can lead to punishment of offenders for past offences, and it is considered appropriate in those cases where the law is clear and the facts indicate a flagrant offence and plain intent to restrain trade unreasonably -- the deterrent efficacy of the Act requires such criminal prosecutions. In order, however, to remedy the situation rather than merely punish the guilty, an additional civil action is often instituted, whereby a decree containing injunctions regulating the future conduct of the industry can be obtained, and it is for this reason that the Department of Justice frequently brings concurrent civil and criminal prosecutions.

The Sherman Act also provides, under Section 7, that any person 'who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act' may sue the defendant for threefold damages and costs, whilst Section 8 of the Act explicitly includes foreign corporations as among the 'persons' sought to be governed by it.

The underlying rationale of the application of the antitrust laws to foreign commerce is the same as that regarding interstate commerce, that is, as the District Court of the Southern District of New York said in 1945 in United States v. National Lead Company[6] (later affirmed by the Supreme Court),[7] the major premise of the Sherman Act is that 'the suppression of competition in international trade is in itself a public injury or at any rate suppression is a greater price than we want to pay for benefits it sometimes secures.'[8]

On a somewhat more specific plane, Brewster has stated that the basic objectives of United States policy in the application of the Sherman Act to foreign arrangements are threefold: firstly, to prevent national boundaries from providing a 'safehaven' from which it is

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6. 63 F. Supp. 513 (S.D.N.Y. 1945).

7. 332 U.S. 319, 67 Sup. Ct. 1634, 91 L. Ed. 2077 (1947).

8. Supra, fn. 6, at p. 525.

possible for Americans to flout laws designed for the protection of domestic competition in the United States; secondly, to prevent arrangements made abroad from depriving American consumers of the benefits of free competition among importers and between domestic and foreign sources of supply; and thirdly, to prevent foreign restraints from excluding United States exporters and investors from competitive access to foreign markets.[8a]

It is Section 1 of the Sherman Act which has been principally considered in the important international cases. From an analysis of the wording, it may be noted that this section contains three specific concepts, declaring 'illegal' (1) 'every contract, combination... or conspiracy', (2) 'in restraint of', (3) 'trade or commerce with foreign nations', and it is this last concept which is the jurisdictional feature of the statute. It is under the aegis of this section that the American courts, in assuming jurisdiction over foreign commercial activities, have imparted to American antitrust law an extraterritorial application of a most radical kind.

Some clarification is perhaps necessary at this stage, however, *vis-à-vis* the precise meaning of the term 'jurisdiction' as it is used in the context of this paper.

8a. See Brewster, Law and United States Business in Canada, c. 3, p. 15 (Canadian-American Committee Publication, 1960).

In any discussion of the extraterritorial application of the antitrust laws, a fundamental distinction must be drawn at the outset between jurisdiction over the person and jurisdiction over the subject-matter for, as Whitney has commented,[9] a principal source of confusion has lain in the tendency to assume that if the former exists, the latter must follow. Clearly, there can be no exercise of effective power by the United States Courts unless the defendant is subject to _in personam_ jurisdiction within American territory; conversely, the United States courts may have jurisdiction over the person of the defendant, but lack jurisdiction over the particular act of that defendant. This basic distinction between 'judicial' and 'legislative' jurisdiction embodies in its turn the dichotomy existing between the competence to apply law and the competence to make or prescribe law, a distinction which is recognized by the _Restatement, Second, Foreign Relations Law of the United States 1965_.[10] It is to the problems involved in this latter aspect, that is, _to the reach of the legislative power_ -- the legal systems-- of the United States, that this paper is directed. In other words, may it be said that the American courts have jurisdiction to prescribe punishment for conduct in foreign

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9. Whitney, Sources of Conflict Between International Law and the Antitrust Laws, 63 Y.L.J. 655, at p. 656 (1953-54).

10. Restatement, Second, Foreign Relations Law of the United States (1965), s. 40.

areas which may be thought to violate the antitrust statutes ? The whole question of personal jurisdiction, involving the concepts of venue and service of process,[11] whilst an extremely practical consideration, does not fall within the specific ambit of this study.

II. THE SHERMAN ACT -- EXTRATERRITORIAL APPLICATION.

The judicial decisions involving the extra-territorial reach of the substantive law under the Sherman Act have all resulted from complex litigation involving multiple problems. Large-scale monopolies and cartels do not operate merely within the territory of one state. They involve agreements between both United States and foreign firms, the network of understandings and controls operating in several different countries. Thus, they may be too far flung for a strictly territorial antitrust law to control effectively. In attempting to cope with this problem, the United States Courts have not hesitated to reach out after such trust arrangements. As a matter of

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11. For information on these aspects, and for authoritative writing on the whole sphere of the United States antitrust laws, see the following publications: Fugate, Foreign Commerce and the Antitrust Laws (1958); Brewster, Antitrust and American Business Abroad (1958); Neale, The Antitrust Laws of the U.S.A. (1960); Kronstein, Miller, Dommer, Major American Antitrust Laws (1965); Oppenheim, Weston, Federal Antitrust Laws: Cases and Comments (1968); Antitrust Developments (1955-1968), Supplement to Report of the Attorney-General's National Committee to Study the Antitrust Laws 1955 (1968).

giving the essential framework of the application of the antitrust laws to foreign commerce, reference will be made to some of the leading cases which show the development of the jurisdictional doctrine and the basis upon which the antitrust laws are applied to acts and activities in American foreign trade.

From Bananas to Aluminum.

The traditional statement of limitation of American antitrust jurisdiction under the Sherman Act to the territorial jurisdiction of the United States stems from Justice Holmes' opinion in the case of American Banana Co. v. The United Fruit Company,[12] a private treble damage action decided before the Supreme Court in 1909. The plaintiff complained that the United Fruit Company, a competitor, had, as part of its monopoly policy, instigated the Costa Rican Government to seize both United's plantation and its railway link with the coast. He claimed threefold damages under Section 7 of the Sherman Act. The Court decided that the defendant could not be held liable for the acts of a foreign sovereign government, even if those acts were instigated by him. Further, it was held that the defendant could not be liable before a United States court even for those actions of his in Costa Rica which had no connection with the Costa Rican Government.

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12. 213 U.S. 347, 29 Sup. Ct. 511, 53 L. Ed. 826 (1909).

With regard to these acts the Court said:[13]

> It is obvious that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by the Act of Congress... But the general and almost universal rule is that whether the character of an act is lawful or unlawful must be determined wholly by the laws 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 the authority of another sovereign, contrary to the comity of nations, which the other state concerned might justly resent.

Thus Justice Holmes, in this famous case, concluded that acts abroad could not form the basis of an action under the antitrust laws of the United States. That part of the opinion is certainly not valid today and has been, for all practical purposes, over-ruled by later cases.[14]

After the Banana Case the Court gradually expanded

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13. Supra, fn. 12, at pp. 355-56, per Holmes J.

14. The part of the opinion which remains valid is the 'sovereign immunity doctrine' evinced by Holmes. Since the Court in American Banana found the injuries to the plaintiff's plantation had been the direct effect of the acts of the Costa Rican Government, later cases have distinguished American Banana on the ground that the acts involved were committed by a foreign sovereign who was immune from suit.

Another means of distinguishing this case has been

the jurisdiction it was willing to assume. The United States v. American Tobacco Company[15] was the first case to bring the American Banana case into argument before the Supreme Court. After a fierce competitive battle in the domestic market, the American Tobacco Company entered into an agreement with Imperial Tobacco Company, its British competitor, under which the two competitors would restrict their business to their respective home countries. The agreement was made in the United Kingdom, where it was allegedly legal. The Court, however, held that the substantial impact of that agreement on the United States tobacco market brought the conspiracy within the purview of the Sherman Act. Brewster has commented that 'by implication at least it (the Court) was unwilling

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to maintain that since the complaint did not allege activity or effects within the United States, the Sherman Act could not reach the alleged violations. The complaints in subsequent cases all include such allegations, American Banana has been held to be inapplicable, and the Courts have applied the Act extraterritorially on the basis of the objective territoriality principle -- infra, Chapter II,pp. 65-70.

A third distinguishing characteristic of the case, which does not perhaps carry the same weight, is that this was a private treble damage action for personal injury, and was thus essentially a tort action. Under general conflict of law rules, liability is determined by the law of the place of the tort. However, the Court in American Banana found the acts were lawful in Costa Rica, and this logic has enabled a distinction to be made between American Banana and later antitrust cases brought by the United States Government, since where the Government is the plaintiff, a tort conflict of laws rule is not applicable.

15. 221 U.S. 106, 31 Sup. Ct. 632, 55 L.Ed. 663 (1911).

to extend Banana's immunity to an arrangement which kept a foreigner out of the American market, at least when it served to buttress an unlawful domestic restraint and monopoly by the American party.'[16]

The dual concern emerging from these two cases, to respect the international principle of territoriality on the one hand and to comply with the statutory mandate to keep United States commerce free on the other, was clearly reflected in United States v. Pacific and Arctic Railway and Navigation Company.[17] Here the Supreme Court made a decree against a price combination of American and Canadian railway and steamer companies which allegedly monopolized both rail and water transportation between American and Alaskan ports and had been formed within the United States. It was contended by the defendants that the United States laws relating to interstate and foreign commerce 'were not intended to have any effect upon the carriage by foreign roads in foreign countries, and...it is equally clear that our laws cannot be extended to control or affect the foreign carriage.'[18] The Court, however, said:[19]

> This is but saying that laws have no extra-territorial operation; but to apply the

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16. Brewster, supra, fn. 11, at pp. 68-69.

17. 228 U.S. 87, 33 Sup. Ct. 443, 57 L.Ed. 742 (1913).

18. Ibid., at pp. 105-106.

19. Ibid., at p. 106.

> proposition as defendants apply it would put the transportation route described in the indictment out of the control of either Canada or the United States. These consequences we cannot accept... If we may not control foreign citizens or corporations operating in foreign territory, we certainly may control such citizens and corporations operating in our territory, as we undoubtedly may control our own citizens and our own corporations.

A similar case was that of Thomsen v. Cayser[20] in 1917, where the Court reviewed a conspiracy aimed at establishing a monopoly for the transportation of freight from the United States to certain South African ports. The defendant argued that this combination had been formed abroad. Finding a Sherman Act violation, the Court noted that 'the combination affected the foreign commerce of this country and was put into operation here.'[21] Further the managers of the defendants within this country 'were more than simple agents -- they were participants in the combination.'[22]

In United States v. Sisal Sales Corporation,[23] the Court was faced with a situation similar to that in the Banana Case. In this case the complaint alleged a conspiracy to restrain trade and to monopolize trade in sisal, a Mexican plant used for binder twine, most of which

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20. 243 U.S. 66, 37 Sup. Ct. 353, 61 L.Ed. 597 (1917).

21. Ibid., at p. 88.

22. Ibid.

23. 274 U.S. 268, 47 Sup. Ct. 592, 71 L.Ed. 1042 (1927).

was imported from Mexico and Yucatan. According to the complaint several United States commercial and banking companies and a Mexican corporation had conspired to obtain control of the foreign supply of sisal and to monopolize its import into the United States. These parties had influenced discriminatory legislation in Mexico and Yucatan; one of the companies had become the sole purchaser of sisal from producers and the Sisal Sales Corporation became the sole importer in the United States.

The Supreme Court found a conspiracy to restrain United States imports which was not exempt from the antitrust laws merely because part of the acts and agreements took place in foreign countries. The Court stated:[24]

> Here we have a contract, combination and conspiracy entered into by parties within the United States and made effective by acts done therein. The fundamental object was control of both importation and sale of sisal and complete monopoly of both internal and external trade and commerce therein...True, the conspirators were aided by discriminating legislation, but by their own deliberate acts here and elsewhere, they brought about forbidden results within the United States.

These modifications of American Banana, with the emphasis upon the effects on United States foreign commerce, gave the United States courts jurisdiction over the foreign acts of corporations if those acts were part of a conspiracy either formed or partly executed within the United States. But all activities carried on outside

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24. *Supra*, fn. 23, at p. 276.

the United States remained outside the jurisdiction of the United States courts, even if the activities in question resulted in effects detrimental to the United States.[24a]

The Alcoa Case and Later.

This rule remained the law until 1945 when it was further modified by Judge Learned Hand in United States v. Aluminum Company of America.[25] This is without doubt the most notable case in the United States on the jurisdictional aspect of the application of antitrust laws to foreign trade, and as such is worthy of detailed examination. The opinion written by Judge Hand concerned primarily the question of monopolization of the United States domestic market by the Aluminum Company of America (Alcoa)[26] but the case also had a very important foreign

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24a. See Kronstein, Enforcement of United States Antitrust Laws over Alien Corporations, 43 Georgetown L.J.661, at pp. 661-662 (1955). It should also be noted that it has been argued that these three cases decided after American Banana, supra, fn. 12, can be reconciled with concepts of strict territoriality because acts constituting these violations occurred within American territory -- but these cases did involve extra-national activities necessary to the success of the defendants' ventures -- see Extraterritorial Application of the Antitrust Laws, 69 H.L.R. 1452 at p. 1454 (1956).

25. 148 F. 2d 416 (2nd Cir. 1945). Decided by the Second Circuit Court of Appeals sitting in place of the Supreme Court by virtue of an Act of Congress, due to lack of a qualified quorum of the Supreme Court.

26. The principal issue in this case related to Alcoa's power and practices in the domestic aluminum ingot market. After finding Alcoa in violation of s. 2 of the Sherman Act, the Court turned to Alcoa's legal

trade aspect,and the law with respect to jurisdiction over acts abroad laid down therein has been adopted by the Supreme Court.

In this case the Aluminum Company of America, an American corporation, and Aluminum Limited, a Canadian corporation, were both defendants before the Court. One of the charges was that the latter company entered into a European cartel arrangement for control of production and allocation of markets for aluminum ingots.[27] A disputed issue in regard to this charge was as to the degree of control by the Aluminum Company of America over Aluminum Limited at the time the latter participated in the alleged cartels. The Second Circuit Court of Appeals, functioning in this case in lieu of the Supreme Court of the United States, chose to deal with the question on the assumption that Aluminum Limited was entirely separate from and not dominated by the Aluminum Company of America. On that basis, the court considered the issue of the Sherman Act.

First, the tribunal made an observation that can

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responsibility for the conduct of Aluminum Limited and to 'Limited's' own liability, under s. 1 of the Sherman Act, for participation in foreign cartel arrangements.

27. This was an international arrangement between French, British and Swiss aluminum producers, as well as Alcoa's Canadian affiliate 'Limited'. These firms had, in 1931, formed a Swiss company called 'Alliance' and subscribed to its stock in proportion to their ingot capacity. It was agreed to allocate the aluminum produced on a quota basis, and a price was fixed at which Alliance would purchase any of any particular shareholder's quota not sold.

only be taken as expressive of a viewpoint as to general international law:[28]

> ...It is settled law -- as Limited itself agrees -- that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize...

The Court then directed itself to the issue of the interpretation of the Sherman Act in this context. Two possibilities that the Sherman Act might extend further than the foregoing were seen; firstly, that external agreements might actually have affected imports or exports without having been intended to have this effect, and secondly, that such agreements might have been intended to affect imports without actually having had effect on them.[29]

As to the first point the Court foresaw such

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28. Supra, fn. 25, at p. 443. See in this connection Haight, Report of the Chairman of the Committee on the Extraterritorial Application of Restrictive Trade legislation, Report of the 52nd Conference of the I.L.A., Helsinki 1966, 125, at p. 128, who comments that perhaps if the Canadian company had not agreed with Judge Hand regarding the 'settled law', a different result may have been reached -- 'the point that international law imposes a limitation on the extraterritorial application of penal laws simply was not argued.' Ibid. Haight concedes, however, that Hand did recognize the relevance of international law as a guide to ascertaining Congressional intent, supra, fn. 25 at p. 443, and that on the facts Hand was satisfied that there was no impediment to giving effect to the will of Congress as expressed in the provision of the Sherman Act extending it to foreign commerce.

29. Supra, fn. 25, at p. 443.

international complications as to make it '...safe to assume that Congress certainly did not intend the Act to cover them.'[30] As to the second point the Court observed:[31]

> ...that situation might be thought to fall within the doctrine that intent may be a substitute for performance in the case of a contract made within the United States; or it might be thought to fall within the doctrine that a statute should not be interpreted to cover acts abroad which have no consequence here. We shall not choose between these alternatives; but for argument we shall assume that the act does not cover agreements, even though intended to affect imports or exports, unless its performance is shown actually to have had some effect upon them...

The Judge maintained that where both conditions were satisfied, the situation fell within the ambit of the decisions in <u>Pacific</u>,[32] <u>Thomsen</u>,[33] and <u>Sisal</u>.[34] Whilst he conceded that in these latter cases the defendants had sent agents into the United States to perform part of the agreement, nevertheless he maintained that an agent merely represented an animate means of executing his principal's

30. <u>Supra</u>, fn. 25, at p. 443. Judge Hand commented that almost any limitation of the supply of goods in Europe, for example, or South America, may have repercussions in the United States if there is trade between the two.

31. <u>Supra</u>, fn. 25, at pp. 443-444.

32. <u>Supra</u>, fn. 17.

33. <u>Supra</u>, fn. 20.

34. <u>Supra</u>, fn. 23.

purposes, and, for the purposes of the Alcoa Case at least, he did not differ from an inanimate means -- 'besides, only human agents can import and sell ingot.'[35]

Thus,with this equation of effects transmitted extraterritorially and the presence of agents actually within the country, Judge Hand removed the jurisdictional obstacle in the path of the United States Department of Justice in extending the application of United States anti-trust law beyond the shores of the United States,in those cases where foreign acts of foreign corporations caused harm within America.

After this rationalization of past cases, Judge Hand evinced what has come to be termed the 'Rule of Alcoa':[36]

> Both agreements would clearly have been unlawful, had they been made within the United States; and it follows from what we have just said that both were unlawful, though made abroad, if they were intended to affect imports and did affect them...

Although Hand applied his rule only to agreements which were both intended to and actually did affect American commerce (an important qualification which his critics do not always acknowledge) the Alcoa Case has also been said to support the proposition that intended impact alone may be sufficient to give jurisdiction, under the

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35. Supra, fn. 25, at p. 444.

36. Ibid. Emphasis added.

antitrust laws, over acts abroad by a foreigner.[36a] This proposition, to which little weight is attached by the writer, would appear to emanate from the fact that whilst Hand J., on the particular fact situation before him, had little difficulty in finding the necessary intent, he was forced to admit that the Government had failed to establish an actual restraint on imports.[37] Normally, therefore, this would have ended the case; however, 'after the intent to affect imports was proved, the burden of proof shifted

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36a. That is, whether or not a set of facts could be assumed where an agreement, without more, made outside the territorial limits of the United States by non-nationals but intended to affect the American market, would be subject to the American antitrust laws. There would appear to have been no case on this particular fact situation, but authority has been given to the proposition by a statement by Judge Hansen, onetime United States Assistant Attorney-General in charge of the Antitrust Division of the Department of Justice, who, in a speech before the American Management Association in 1957 stated that the Department considered that the Sherman Act extended to those factual situations which 'intend <u>or</u> have a substantial effect' upon the American market (emphasis added) -- cited by Graham, Antitrust Law: <u>Tweedledum</u> v. <u>Tweedledee</u>, 1 U.B.C.L.R. 354 at p. 357 (1959-63). Nevertheless, it is highly unlikely that Hansen's statement was intended to mark a determination by the Antitrust Division that its policy henceforth was not merely to reach activities abroad intended to affect United States commerce regardless of their effects. Indeed, it should be pointed out that Hansen also stated Department of Justice policy along somewhat more traditional lines -- see Hansen, The Enforcement of the United States Antitrust Laws by the Department of Justice to Protect Freedom of United States Foreign Trade, 11 A.B.A. Section of Antitrust Law 75 (1957).

37. <u>Supra</u>, fn. 25, at p. 444.

to "Limited".'[38] Since the evidence failed to show that the cartel's quota restrictions did not affect imports, the cartel, and Limited's participation in it, were found unlawful. Nevertheless, although decisive in this case, such a shift in the burden of proof would not appear to afford substantive grounds from which to infer the aforesaid proposition relating to the effect of intended impact alone.

Again, there is a certain amount of controversy as to whether Hand was confining his comments solely to the activities of non-nationals.[39] It is true that he indicated specifically that Alcoa could not be charged with the activities of Aluminum Limited, and accordingly this opinion prima facie represents the furthest point of any American decisions in that it relates solely to the actions of non-national corporations and is exclusively concerned with commercial dealings taking place outside the territorial boundaries of the United States.[40]

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38. Supra, fn. 25, at p. 444.

39. See, for example, the contrasting opinions of Dean, Extraterritorial Effects of the United States Antitrust Laws: Advising the Client, 11 A.B.A. Section of Antitrust Law 88, at p. 91 (1957) and Brewster, Extraterritorial Effects of the United States Antitrust Laws: An Appraisal, 11 A.B.A. Section of Antitrust Law 65, at p. 68 (1957).

40. Subsequent cases have not involved the actions of a foreign combination alone and thus Judge Hand's opinion is the furthest that United States Courts have gone in taking jurisdiction to prosecute aliens for violation of United States antitrust laws.

However, it is as well, in interpreting the case, to note the special circumstances, which to some extent colour the overtly clear-cut nature of Hand's judgment. Whilst Judge Hand chose to consider the Canadian and American corporations involved as separate entities, it must be recognized that the actions of Aluminum Limited outside the United States which affected the United States market were certainly not done without reference to the activities and position of Alcoa, its affiliated company and the largest aluminum company in America. This view is reinforced by the fact that in 1951, Judge Knox, in formulating the final relief in the Alcoa Case,[41] decreed that the common stockholders of Alcoa and Aluminum Limited would have to divest themselves of the stock of one company or the other.

Despite the varying interpretations of the breadth of Hand's judgment however, the fact remains that the Alcoa Case embodies the most extensive discussion hitherto of the extraterritorial reach of the Sherman Act, and indeed the formula of proved intent plus territorial effects is widely regarded as representing the high watermark of jurisdiction in these cases. An analysis of the case law subsequent to American Banana clearly indicates the manner in which the territorial principle of jurisdiction, originally so clearly expounded by Justice Holmes,

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41. 91 F. Supp. 333 (S.D.N.Y. 1950).

had become inadequate for the disposition of later cases involving facts so complex that an individual act had meaning only in relation to an entire international arrangement. Consequently, the Courts began to focus their attention on the extent to which restraints affected United States commerce, rather than upon fortuitous 'acts' or 'events' which happened to take place within American territorial limits; it was in this manner that the territorial principle of jurisdiction was replaced by that which Jennings has termed 'a startling projection of the objective test of territoriality',[42] a concept which will be discussed in detail in the Chapter following.

The Alcoa Case gave new impetus as well as new direction to the antitrust prosecutions. In United States v. National Lead Company,[43] for example, American and foreign companies were found to have restrained world commerce in titanium pigments through participation in a so-called international cartel. In answer to the defendant's argument that the Court was without jurisdiction to consider conduct abroad on the part of foreign corporations, the majority declared that 'the object of the government's attack is a conspiracy in the United States affecting American commerce, by acts done in the United States as

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42. Jennings, Extraterritorial Jurisdiction and the United States Antitrust Laws, 33 B.Y.B.I.L. 146, at p. 165 (1957).

43. 332 U.S. 319, 67 Sup. Ct. 1634, 91 L.Ed. 2077 (1947).

well as abroad',[44] and, therefore, the Sherman Act could reach the activity in question. Brewster has stated that as a result of this case 'it became clear that cartel participation which explicitly governed United States imports or exports was thereafter vulnerable even if imports or domestic production were not proved to be seriously curbed or extortionately priced.'[45]

Moreover, in United States v. Timken Roller Bearing Company,[46] where the government attacked agreements between Timken, a domestic corporation, and its two foreign subsidiaries, guaranteeing to each exclusive territories for the manufacture and sale of tapered roller bearings, the Court found that 'the fact that the cartel arrangements were made on foreign soil did not relieve defendant from responsibility',[47] for these arrangements 'had a direct and influencing affect on trade in tapered bearings between the United States and foreign countries.'[48]

The restraint of United States imports or exports and the exclusion of competitors in support of a domestic monopoly is illustrated by the case of United States v.

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44. Supra, fn. 43, at p. 525.

45. Brewster, supra, fn. 11, at p. 28.

46. 83 F. Supp. 284 (N.D. Ohio 1949), modified on appeal, 341 U.S. 593, 71 Sup. Ct. 971, 95 L.Ed. 1199 (1951).

47. 83 F. Supp. 284, at p. 309.

48. Ibid.

General Electric Company,[49] sometimes referred to as the 'Incandescent Lamp' Case. Here, a District Court found that an arrangement made abroad between foreign nationals, in which arrangement American companies participated but in which also the United States market was expressly excluded from the operative provisions, 'deleteriously affected' and 'aborted'[50] competition in the American domestic market, and was therefore subject to their jurisdiction. They impliedly rejected a plea by one of the foreign defendants, the Dutch company of Philips, that 'the Court should seize this opportunity to announce the rule that foreign corporations like Philips engaged in business abroad may enter into agreements among themselves or with American corporations or individuals freely and without fear of antitrust suits here, so long as what they do is not done wilfully to restrain United States trade and does not have a direct and substantial restraining effect upon it.'[51] It was unsuccessfully claimed by Philips that 'a different test must be applied when considering the legality of acts of foreign corporations whose activities are wholly abroad, and a fortiori if such acts are done abroad and if Americans are involved.'[52] The Court answered this plea by saying that Philips knew

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49. 82 F. Supp. 753 (D.N.J. 1949); final decree, 115 F. Supp. 835 (D.N.J. 1953).

50. 82 F. Supp. 753, at p. 891.

51. Ibid., at p. 890. 52. Ibid.

or should have known[52a] these activities were 'a substantial contribution to the scheme whereby the domination of General Electric over the United States market of incandescent lamps would be perpetuated and competition thwarted.'[53]

Following on this case, Judge Ryan in United States v. Imperial Chemical Industries (I.C.I.),[54] a case which will be closely examined in a subsequent chapter,[55] deemed the law to be 'crystal clear: a conspiracy to divide territories, which affects American commerce, violates the Sherman Act.'[56]

Momentarily, in 1956, it appeared that the American Courts were turning away from the more extreme claims to extraterritorial jurisdiction. In refusing a remedy against a Canadian company for alleged infringement of the

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52a. Thus, it appears that 'intent' as used in Hand's formula was not interpreted to mean the specific intent to accomplish the result of monopoly or restraint of trade. From the use of this phrase it would seem that the element of intent is established if the actor should have known that its conduct would have the forbidden effects and the conduct itself was deliberate. This objective test of intent is in accordance with the principle laid down in S.18(b)(iii) of the Restatement, Second, Foreign Relations Law of the United States (1965), infra, Chapter II, p. 76, and consequently perhaps the exclusions and reservation by Judge Hand in Alcoa which were cast in terms of 'intent' possess only limited significance.

53. Supra, fn. 50, at p. 891.

54. 100 F. Supp. 504 (S.D.N.Y. 1951); final decree, 105 F. Supp. 215 (S.D.N.Y. 1952).

55. See Chapter III, infra, pp. 131-38.

56. 100 F. Supp. 504, at p. 592.

American plaintiffs' Canadian trademark, even though the offence might be said to have affected American commerce, the District Court of the Southern District of New York stated in Vanity Fair Mills v. T. Eaton Company Ltd.:[57] 'We in this country undoubtedly would be outraged if American companies having branches in foreign lands were faced with the possibility that the Courts of all these lands would assume jurisdiction to determine the rights of the American company in its homeland to trademarks, copy-rights, or patents granted or registered under the laws of the United States.'[58] However, such a relatively restricted view *vis-à-vis* extraterritorial jurisdiction was not followed in the case of United States v. Holophane Co. Inc.,[59] an

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57. 133 F. Supp. 522 (S.D.N.Y. 1955); affirmed, 234 F. 2d 633 (2nd Cir. 1956). Certiorari denied, 352 U.S. 871 (1956). The issue in this case was whether a Federal Court should entertain an action brought by an American corporation against a Canadian corporation holding Canadian trademarks when the plaintiff had not appealed from an administrative denial, based on defendant's pre-existing rights, of its application for a Canadian trademark. The District Court entered judgment dismissing the complaint for lack of federal jurisdiction. The Court of Appeals held that the complaint did not state a cause of action arising under the laws of the United States, since the relevant provision of the Lanham Trademark Act (s. 32(1)) did not grant jurisdiction to review the acts of Canadian authorities. Accordingly, the Court held that claims arising in Canada were properly dismissed, but jurisdiction should have been retained over claims based on sales made to the United States. Affirmed as modified.

58. 133 F. Supp. 522, at p. 528.

59. 119 F. Supp. 114 (S.D. Ohio 1954) as supplemented by 1954 Trade Cas. par. 67,679 (S.D. Ohio 1954); affirmed *per curiam*, in part by an equally divided Court, 352 U.S. 903, 77 Sup. Ct. 144, 1 L.Ed. 2d 114 (1956).

action brought to prevent and restrain the defendant company from engaging in an allegedly unlawful combination and conspiracy and from being a party to contracts allegedly in restraint of interstate and foreign trade and commerce in violation of Section 1 of the Sherman Act. The District Court had ordered Holophane to terminate its exclusive licensing and marketing agreements with British and French corporations and moreover to use reasonable efforts to promote the sale and distribution of its products in foreign markets.[60] In this case the international law concerning the limits of extraterritorial jurisdiction was strenuously argued for the appellants; these arguments found no favour, however, before the Supreme Court, which affirmed the District Court's orders in a 'memorandum of affirmation.'

It is significant that the specific recommendations of the Attorney-General's National Committee to Study the Antitrust Laws[61] in connection with extraterritorial

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60. The Supreme Court upheld this contested provision by virtue of a four to four decision. As a result, Holophane was required to adopt new foreign trademarks, carry adequate stock bearing these trademarks to compete in foreign territories with its co-conspirators, offer these products at prices comparable with its domestic prices, fill orders from these areas, and publicize that it was competing with its co-conspirators, all in violation of the unlawful cartel agreement. Drafted in the light of I.C.I., the decree did not require Holophane to infringe the valid foreign patent and trademark rights of its co-conspirators.

61. Supra, fn. 2.

jurisdiction, closely follow the judicial guidelines as evinced in Alcoa and subsequent cases:[62]

> The cases suggest guides this Committee deems important to assure that the Sherman Act remains within its congressionally intended application to persons and activities abroad. We feel that the Sherman Act applies only to those arrangements between Americans alone, or in concert with foreign firms, which have such substantial anti-competitive effects on this country's 'trade or commerce... with foreign nations' as to constitute unreasonable restraints. Where a United States Court holds a contract between an American and a foreign company illegal under our antitrust laws, and the foreign party attempts to enforce that contract under foreign law, United States agencies, including the State Department, should endeavour to protect the United States party.
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> 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 anti-competitive effects on our foreign commerce. The 'international complications likely to arise' from any contrary view convince us, as they did the Court in Alcoa 'that Congress certainly did not intend the Act to cover such arrangements when they have no restrictive purpose and effect on our commerce.'

Thus, the guidelines proposed in the 1955 Report emphasized effects on American trade and gave no importance to the location of the conduct producing the forbidden effect. This principle continued to be applied in the post-1955 cases. In a recent Supreme Court case,

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62. Supra, fn. 2, at pp. 76-77.

Continental Ore Company v. Union Carbide and Carbon Corporation,[63] the Court held that the Sherman Act could be applied to an alleged conspiracy to monopolize trade in vanadium that involved an exclusion of plaintiff from the Canadian market by a Canadian subsidiary of an American concern acting under Canadian wartime regulations. The Court, rejecting defendant's reliance upon American Banana, stated that 'a conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries.'[64]

The amended final judgment in United States v. The Watchmakers of Switzerland Information Centre Incorporated,[65] in its substantive provisions, once more represents an assertion of jurisdiction to control the activities of foreign enterprises, and their arrangements with foreign third parties, even if occurring outside the United States, if they affect the domestic or foreign commerce of the United States. Here it was held that four United States manufacturers and five Swiss concerns, including two Swiss trade associations, violated Section 1 of the Sherman Act and the Wilson Tariff Act. The Court found defendants had conspired to restrain the

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63. 370 U.S. 690, 82 Sup. Ct. 1404, 8 L.Ed. 2d. 777 (1962).

64. Ibid., at p. 704.

65. 1963 Trade Cas. par. 70,600 (S.D.N.Y. 1962); order modified, 1965 Trade Cas. par. 71,352 (S.D.N.Y. 1965).

manufacture, sale, importation, exportation and distribution of watches and watch parts in the United States. The Court found that 'Collective Conventions' or industry-wide agreements were entered into for the purpose of preventing the development of competitive watch industries in the United States and countries other than Switzerland. These included agreements not to export watch parts from Switzerland except under restrictions, and not to furnish watch-making machinery or technical assistance outside Switzerland. The United States Court would, therefore, exercise jurisdiction over these acts, because of their 'substantial and material effect upon our foreign and domestic commerce'[66] and because 'the restrictions of the Convention have obviously had a crippling effect in this country, and was so intended.'[67]

Lastly, in this connection, the very recent case of Zenith Radio Company v. Hazeltine Research Incorporated,[68] should be noted. Here the Supreme Court affirmed the lower court's holding of illegality[69] in the participation by a United States company (Hazeltine) in a foreign patent pool which was designed for, and had the effect of,

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66. 1963 Trade Cas. par. 70,600, at 77,457, citing Continental Ore, supra, fn. 63.

67. Ibid.

68. 395 U.S. 100, 89 Sup. Ct. 1562, 23 L.Ed. 2d 129 (1969).

69. 239 F. Supp. 51 (N.D. Ill. 1965).

preventing United States exports of radio and T.V. sets to Canada.[70] While pools in the United Kingdom and Australia were also involved, it was held that factors other than the pools prevented export to these countries. The argument was again rejected that agreements made in other countries between American concerns and foreign concerns were governed solely by foreign law and not the Sherman Act. In the lower Court it was stated emphatically that:[71]

> It is well established that a conspiracy to restrain the domestic or foreign commerce of the United States to which any American company is a party violates the Sherman Act irrespective of the fact that the conduct complained of occurs in whole or in part in foreign countries.

The Effect of Foreign Law.

However, whilst the basic jurisdictional rule in this sphere is that the United States courts have jurisdiction over acts and agreements, even though made abroad, which directly and substantially affect the foreign commerce of the United States,[71a] this does not mean that

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70. Supra, fn. 68, at p. 118. The Supreme Court stated that the Court of Appeals, 388 F. 2d 25 (7th Cir. 1967), had erred in setting aside the District Court's decision with respect to the fact of damage in Canada.

71. Supra, fn. 69, at p. 78.

71a. An additional consideration vis-à-vis the applicability of the antitrust laws to foreign activities is the possibility that even where there are no effects, however slight, on United States foreign commerce, the foreign activity may be deemed to violate the Sherman Act because of effect on interstate commerce within the United States -- see dictum in United States v. Minnesota Mining

the Department of Justice will always push this rule to its outermost limits. In testimony before a Senate Sub-Committee on Antitrust and Monopoly, in 1967, Assistant Attorney-General Turner admitted that too broad an application of the rule might raise a serious risk of creating conflicts with foreign laws and foreign economic interests;[72] in other words, the courts have been concerned with carrying out the oft-stated intent of Congress to protect United States foreign commerce from international cartels and monopolies, and at the same time with not infringing the sovereignty of other nations whose trade may be affected.

It would seem appropriate at this stage, therefore, briefly to define the limits of the immunity accorded by the United States courts to foreign acts which have been performed under the aegis of foreign law.

Such immunity is more generally referred to as the 'foreign sovereignty' exception to the antitrust laws, and, as Fugate comments,[73] this phrase may be more

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and Manufacturing Company, 92 F. Supp. 947 (D.Mass. 1950), at p. 963. For comment thereon, see Dean, supra, fn. 39, at pp. 92-93 and Graham, supra, fn. 36a, at p. 356.

72. Cited in The Report of the Committee on the Extra-territorial Application of Restrictive Trade Legislation of the International Law Association, Buenos Aires Conference, 1968, at p. 16.

73. Fugate, Antitrust Jurisdiction and Foreign Sovereignty, 49 Va. L.R. 925, at p. 932 (1963).

appropriate than that of 'foreign law', since one principle which may be clearly discerned from the cases is that acts and agreements abroad may be part of an illegal conspiracy under the antitrust laws even though they are lawful[73a] -- that is, permissible -- in a foreign country. He notes that perhaps the most apposite question in this context is whose acts are the subject of inquiry.[74] If the acts are those of a foreign government within its own jurisdiction, then the exception is applicable. Again, if, through its laws, regulations or orders, the foreign government requires private parties to perform the anticompetitive acts, the situation is the same. On the other hand, if the acts which are subject to the scrutiny of the court are _de facto_ those of private parties hiding behind the cloak of foreign law, the courts will seek to attach liability.

Reference to the aforementioned case law clearly illustrates the application of these basic principles. It was held, for example, in _American Banana_,[75] that the Sherman Act does not apply to acts in a foreign country

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73a. In other words, mere authorization standing alone is no defence to a charge of violation of the Sherman Act -- see, for example, _United States v. American Tobacco Company_, _supra_, fn. 15 and the comments following re _Continental Ore_ and _Swiss Watchmakers_, _infra_, pp. 39-41.

74. Fugate, _supra_, fn. 73, at p. 932. See also in this connection Fugate, Antitrust Law and International Trade, 1959 U. of Illinois L.F. 387.

75. _Supra_, fn. 12.

directed by the foreign sovereign.[75a] The Court in American Banana described the situation in the following terms:[76]

> The substance of the complaint is that, the plantation being within the de facto jurisdiction of Costa Rica, that state took and keeps possession of it by virtue of its sovereign power.

It was clear, therefore, that the court construed the acts to be, not those of the defendant, but those of the Costa Rican Government.[76a]

Some modification of this doctrine was made in the Sisal Case,[77] where the court upheld a complaint alleging that as part of a conspiracy affecting United States foreign trade, the parties had obtained discriminatory legislation in a foreign country. Thus, if private parties use laws or regulations of a foreign government

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75a. This case is today cited solely as authority for this proposition -- infra, fn. 14 -- much to the anguish of the territorialist school of thought, who maintain that that part of the decision merely restating a well-established principle has been given great lustre, whilst the 'water's edge' comments of Holmes, J., which originally made American Banana a ruling case have faded from view: 'If it is ever proper to say that a decision has been glossed, the American Banana case is a shining example' -- see Baggett, The Gloss on American Banana, 5 A.B.A. Section of International and Comparative Law Bulletin 14 (1960). See also, Chapter II, infra, pp. 81-87, for an exposition of the territorialists' theories.

76. Supra, fn. 12, at p. 357.

76a. Whilst it was alleged that the defendant influenced the action, this alone was not deemed by the Court to be sufficient for antitrust liability. For further information on this point, see infra, fn. 87.

77. Supra, fn. 23.

to implement or perpetuate a conspiracy to restrain or monopolize United States trade, such laws and regulations will not constitute a good defence to prosecution. The Court stated:[78]

> 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.

Two further cases -- Continental Ore and Swiss Watchmakers -- provide classic examples of situations where a court has found a substantial effect upon United States commerce, although the parties have acted, to some extent, within the framework of the laws and policies of foreign nations. Yet neither of these cases may be deemed contrary to the 'foreign sovereignty' exception, for in neither of those cases did the foreign government command what was done.

In Continental Ore,[79] the point at issue was the wartime emergency delegation by the Canadian Government to a large Canadian corporation of the discretionary agency power to purchase and allocate to Canadian industries all vanadium products which they required. However, in condemning the monopolistic plan, the court said that the Canadian company's discriminatory purchases, while 'permitted' by Canadian law, were not in any way

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78. Supra, fn. 23, at p. 276. 79. Supra, fn. 63.

'compelled' by it. Justice White, in speaking for a unanimous court, found Sisal[80] to be a strong analogy. He concluded that:[81]

> ...As in Sisal, the conspiracy was laid in the United States, was effectuated both here and abroad, and respondents are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government.

Accordingly, there was no impediment in the enforcement of the antitrust laws. However, the court was careful to say that the plaintiff did not question the validity of any action taken by the Canadian Government or of its Metals Controller, finding no indication that the Controller or any other government official 'approved or would have approved of joint efforts to monopolize the production and sale of vanadium or directed that purchases from Continental be stopped.'[82] And the Court noted in passing that mandatory foreign regulations would have furnished a defence to acts in Canada.[83]

This latter principle was re-affirmed in Swiss Watchmakers.[84] The defendants in this case took the position that the agreements in question were entered into and took effect in Switzerland, were in accordance with Swiss law, and therefore lay beyond the reach of United States law. They further contended that the actions were those of the Swiss Government.

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80. Supra, fn. 23. 81. Supra, fn. 63, at p. 706.

82. Ibid. 83. Ibid., at p. 707. 84. Supra, fn. 65.

The Court rejected both arguments, saying that foreign law, in order to constitute a justification, must be mandatory and not merely authorized -- the Court stated:[85]

> If, of course, the defendant's activities had been _required_ by Swiss law, this court could indeed do nothing. An American court would have under such circumstances no right to condemn the governmental activity of another sovereign nation.

The Court found that whilst certain parts of the arrangements in _Swiss Watchmakers_ were known to be permitted, or even indeed encouraged by, the Swiss Government, 'the defendants in the case had built an elaborate scheme using the Swiss Government's permission as a foundation.'[85a] Accordingly, therefore, in the absence of specific foreign legal requirements, the United States court felt able to exercise extraterritorial jurisdiction over the foreign acts and contracts in question.[86]

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85. _Supra_, fn. 65, at par. 77,456-57. Emphasis added.

85a. Fugate, _supra_, fn. 73, at p. 933.

86. The Court stated: 'It is clear that these private agreements were then recognized as facts of economic and industrial life by that nation's government. Neverthe-less, the fact that the Swiss Government may, as a procedural matter, approve of the effects of this private activity cannot convert what is essentially a vulnerable private conspiracy into an unassailable system resulting from foreign governmental mandate. _In the absence of direct foreign governmental action compelling the defendants' activities_, a United States Court may exercise its jurisdiction as to acts and contracts abroad, if, as in the case at bar, such acts and contracts have

Thus, it is clear from dicta in the cases that the 'foreign sovereignty' exception to the application of the antitrust laws enunciated in American Banana is strictly limited to activities in another country actually required by the laws of that country. Thus, if a foreign government does not regard free competition as a desired objective, it can issue orders requiring the commission of non-competitive acts within its jurisdiction, and those acting in conformity will not be held answerable in the United States courts. But the foreign government must command -- there must be direct participation by the government in the non-competitive conduct.[87]

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a substantial and material effect upon our foreign and domestic commerce.' (emphasis added). Ibid.

87. An ancillary question is whether a defendant violates the antitrust laws if engaging in activities designed to persuade a foreign government to adopt a policy or take action conflicting with the American antitrust laws or the decree of an American Court. The Supreme Court in Sisal held that the mere fact that defendants obtained discriminatory legislation in a foreign country and were aided by it would not justify their private acts to restrain foreign commerce -- supra, fn. 23, at p. 276. Sisal was specifically approved in Continental Ore, in which it was emphasised that the defendants were engaged in private commercial activity, no element of which was seeking to procure the passage or enforcement of laws -- supra, fn. 63, at p. 707. Note on the other hand that dicta of the Supreme Court in the Noerr Case -- Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, at p. 138 (1961) -- suggests that it would be perfectly proper for a would-be conspirator or monopolist to petition the foreign state for legislative action; i.e., as long as it is the foreign state which commands the acts outside the United States, the exemption attaches. No cases have been decided on this specific point, although a provision in the decree in Swiss Watchmakers, which was

United States commentators are always quick to point out that where the laws of a foreign country do have positive requirements, the United States courts have been very sensitive to the effect of these laws, and that the courts have repeatedly emphasized that they will take due account of foreign sovereignty. And even in those cases where the United States has asserted authority to deal with foreign business conduct under the law, the courts have exercised the traditional concept of comity and have considered claims of infringement of foreign sovereignty as a basis for refraining from exercising power under the law or for modifying the exercise of that power to reduce conflicts.[88] Paradoxically, in view of the basic aims of the American antitrust legislation, it would seem that the greater the extent that a foreign restrictive practice arises from state ownership or control, there is little or no liability under the anti-trust laws, while the greater the private initiative involved the greater the danger.[89]

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contained in the final amended decree, stated that nothing in the aforesaid decree would prohibit any defendant from 'advocating the enactment of laws, decrees or regulations or urging upon any Swiss Government body, department, or agency or official the taking of any official action' -- 1965 Trade Cas. par. 80,491-92.

88. For example, the judicious use of 'saving clauses', Chapter III, infra, pp. 143-46.

89. Oliver, The Range of Effect of the Antitrust Laws of the United States, Report of the 51st Conference of the I.L.A., Tokyo 1964, 511, at p. 525. With regard to

On the basis of the foregoing discussion therefore, it may safely be stated that sovereign acts and requirements of foreign law within a foreign country will usually constitute an exception to the application of American antitrust laws to acts abroad. At the same time, it is worth noting that no case in this area has held that the United States courts are deprived of jurisdiction merely because a defendant may be required by a foreign court to perform an agreement alleged to have violated the antitrust laws. The Court will generally assume jurisdiction in such a case, and any inconsistent demands imposed upon a defendant will be considered in determining what relief, if any, should be ordered. In Swiss Watchmakers,[90] for example, the court rejected the defendant's argument that it was without jurisdiction because a judgment would impinge on the sovereignty of the Swiss Confederation:[91]

> All these claims are entirely premature, and presuppose that this court intends to permit the issuance of a decree of wide scope which would have such a drastic effect. Such a presupposition is erroneous.

The precise nature of the requirement in question which would cause the American courts to refuse jurisdiction

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sovereign immunity for state trading in this context, see also Barnard, Extraterritoriality and Antitrust Law in the United States, I.C.L.Q. Supplementary Publication No. 6., 95, at p. 105 (1963).

90. Supra, fn. 65. 91. Supra, fn. 65, at par. 77,457.

instead of hearing the cases and perhaps giving effect to the foreign law by finding no violation of American law or by moderating the relief granted, has not been clearly evinced in the case law. A clue, however, to the specific meaning of the word may be found in the Swiss Watchmakers opinion where the test is said to be 'direct foreign governmental action compelling the defendants activities.'[92]

It has been urged by Brewster,[93] among others, that subject-matter jurisdiction should be refused at the outset because the mere examination of the laws or acts of a foreign state, with a view to holding acts required thereby illegal under United States law, indicates disrespect for the legal system of the foreign state with a consequent worsening of relations between itself and the United States. On the other hand, the Restatement takes the position that a state is never deprived of jurisdiction with respect to particular conduct or persons solely because the law of another state would subject such person to inconsistent demands.[94] Thus, as embodied in the Restatement,

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92. Supra, fn. 65, at par. 77,457.

93. Brewster, supra, fn. 3, at pp. 298, 303, 306.

94. Restatement, Second, Foreign Relations Law of the United States (1965), s. 39(1): 'A State having jurisdiction to prescribe or 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.'

International Law is seen as not including a general rule that a state having a base of legislative jurisdiction that international law recognizes is required to abstain from its exercise because another state also has a legal competence to legislate.[95]

The Chapter following will accordingly survey the existing international law jurisdictional concepts and illustrate the manner in which such a recognized jurisdictional basis has been utilized by the United States courts in a volume of case law which, in Nebolsine's words, 'has been in a state of jungle growth'[96] since the case of American Banana.

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95. This statement follows from the fact that international law, in the eyes of the Restatement, does not provide for choosing among competing bases of jurisdiction to prescribe rules of conduct; thus, where conflicts of jurisdiction exist, they should be resolved by judicial restraint in formulating the terms of any order -- see Chapter III, *infra*, pp. 146-50.

96. Nebolsine, Trade or Commerce...with Foreign Nations, 7 A.B.A. Section of Antitrust Law 64 (1955).

CHAPTER II

INTERNATIONAL JURISDICTIONAL BASES IN THE ANTITRUST SPHERE -- OLD CONCEPTS FOR NEW PROBLEMS ?

There exists a substantial body of opinion amongst international lawyers that in some of the antitrust cases in the past three decades the United States courts have pushed their claims to jurisdiction to extreme limits. Indeed, the barometer of judicial attitude indicates such an extreme swing -- what was 'surprising'[1] to Holmes appeared 'settled law'[2] to Hand. Accordingly, this Chapter will attempt to consider the decisions in the light of established public international law principles,[3] to make some assessment of the suitability or otherwise of the application of existing law to international antitrust

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1. Dictum of Holmes J. in American Banana Company v. United Fruit Company, 213 U.S. 347, at p. 355 (1909).

2. Dictum of Hand J. in United States v. Aluminum Co. of America, 148 F. 2d 416, at p. 443 (2nd Cir. 1945).

3. Whilst one or more aspects of every antitrust case involves a number of foreign elements, thus *prima facie* bringing it within the aegis of certain private international law concepts, it is worth noting that, in practice, the American Courts have never considered antitrust enforcement as a matter to be governed by the rules of conflicts. Moreover, it is submitted that this factor is legally distinct from the public international law problems of jurisdiction which have been simultaneously raised in the case law, and which comprise the sole subject-matter for discussion in the context of this paper.

problems, and to indicate the two main bodies of opinion *vis-à-vis* the international legal validity of the findings of the American courts.

I CLASSICAL INTERNATIONAL PRINCIPLES OF JURISDICTION.

Jurisdiction under international law connotes the right of a state to take specified action -- that is, the right of a state to exert its authority through the medium of its legislative, administrative or judicial branches.[4] As such, jurisdiction flows from the sovereignty of states, the principal subjects of international law, and, as long as the resources and peoples of the world are organized in the form of independent sovereign nations, certain overriding considerations apply.[5] It would be difficult to find these better put than in the following extracts from Story:[6]

> The first and most general maxim or proposition is that...every nation possesses an exclusive sovereignty and jurisdiction within its own territories. A direct consequence of this rule is, that the laws of every state affect and bind directly all property, whether real or personal, within its territory, and

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4. See Oppenheim, International Law, Vol. 1, p. 19 (8th ed. 1955, Lauterpacht).

5. See Haight, Antitrust Laws and the Territorial Principle, 11 Vanderbilt L.R. 27 (1957).

6. Story, Commentaries on the Conflict of Laws (8th ed. 1883) quoted in Cook, The Application of the Criminal Law of a Country to Acts Committed by Foreigners Outside the Jurisdiction, 40 W. Va. L.Q. 303, at p. 304 (1934).

> all persons who are resident within it...and also all contracts made and acts done within it. A state may therefore regulate the manner and circumstances under which property ...within it, shall be held, transmitted, bequeathed, transferred, or enforced;...the validity of contracts and other acts done within it; the resulting rights and duties growing out of these contracts and acts; and the remedies and modes of administering justice...
>
> Another maxim or proposition is, that no state or nation can by its laws directly affect or bind property out of its own territory, or bind persons not resident therein, whether they are natural born subjects or others... for it would be wholly incompatible with the equality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate either persons or things not within its own territory. It would be equivalent to a declaration that the sovereignty over a territory was never exclusive in any nation, but only concurrent with that of all nations; that each could legislate for all, and none for itself; and that all might establish rules which none were bound to obey. The absurd results of such a state of things need not be dwelt upon.

This basic principle of territorial sovereignty was re-affirmed by the Permanent Court of International Justice in The Case of the S.S. Lotus:[7]

> The first and foremost restriction imposed by international law upon a state is that -- failing the existence of a permissive rule to the contrary -- it may not exercise its power in any form in the territory of another state.

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7. P.C.I.J., Ser. A, No. 9 (1927).

> In this sense jurisdiction is certainly territorial; it cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or from a convention.[8]

In the same case, views were expressed regarding the freedom of a state to apply its laws and to extend the jurisdiction of its courts to persons, property, and acts outside its territories. It was said that international laws do not contain any general prohibitions against a state exercising jurisdiction in its own territory over acts which have taken place abroad. On the contrary, international law leaves a state 'a wide measure of discretion which is only limited in certain cases by prohibitive rules'[9]; otherwise 'every state remains free to adopt the principles which it regards as best and most suitable'.[10]

This wide measure of discretion attributed to states by international law to determine the reach of their own laws is a discretion which is made workable by those principles of restraint and comity which are essential to

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8. *Supra*, fn. 7, at p. 18. 9. *Ibid.*, at p. 19.

10. *Ibid*. It would appear from the majority opinion in this case that there is an outer limit to any assertion by a State of the right to prosecute foreigners for their acts abroad, and that this is set by the *over-riding prohibition* of international law against the application by a State of its power *in any form* within the territory of another State.-- see the comments of Haight, *supra*, fn. 5, at p. 30.

every system of international law.[11] Nevertheless, international law does set limits on the reach of that part of a state's public law that embodies its peculiar notions by public order or policy;[12] that is, in general that part of its law that is attended by penal sanctions, for, unless international law imposes some limits to the extraterritorial application of penal legislation, states could devise their own list of crimes and then punish foreigners as they saw fit without regard to the places where the acts were performed.[13]

Whilst other opinions have been expressed,[14] it has

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11. See Jennings, The International Law Governing Anti-trust Jurisdiction, Report of the Committee on the Extra-territorial Application of Restrictive Trade Legislation, Report of the 51st Conference of the I.L.A., Tokyo 1964, at p. 354.

12. Ibid. It is interesting to note that in attempting to define the ultimate limit to which extraterritorial jurisdiction may be exercised, Jennings has formulated the following 'countervailing principle': 'That extra-territorial jurisdiction may not be exercised in such a way as to contradict the local law at the place where the alleged offence was committed'. -- Jennings, Extra-territorial Jurisdiction and the United States Antitrust Laws, 33 B.Y.B.I.L. 146, at p. 151 (1957).

13. See Haight, supra, fn. 5, at p. 31. Note also Lauterpacht, Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens, 9 Camb. L.J. 330 (1947), who, in commenting on Joyce v. D.P.P., [1946] A.C. 347, stressed that the latter case could not be adduced in support of the proposition that a State has unlimited jurisdiction over an alien for acts which have been committed abroad and which it considers to be prejudicial to its safety...'There is no warrant in international law for a rule of such alarming comprehensiveness'. -- Ibid., Lauterpacht, at p. 347.

14. See for example, McDougal: 'To describe the anti-trust laws as penal or even quasi-penal only is to employ

been convincingly argued -- and this viewpoint is adopted in this paper -- that the jurisdiction of the Federal Courts under the antitrust laws is a penal jurisdiction, no matter whether it is exercised in criminal or equitable proceedings. As Haight has stated,[15] the distinctions which prevail in the United States between criminal and civil proceedings under the Sherman Act -- between indictment and subsequent fine or imprisonment on the one hand, and a bill in equity and subsequent injunction or order compelling the disposition of property or perhaps reconstruction of an industry on the other -- are not relevant in determining whether the proceedings are penal in the international law sense. Basically, therefore, whether a matter is penal for the purposes of international law is a question not merely of procedure but of substance. He maintains that those proceedings which are labelled 'civil' under municipal law may be, and usually are, highly penal. While criminal proceedings carry the overt stigmas

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one type of possible sanction as a descriptive categorization for a major substantive policy, for the implementation of which many different sanctions might be invoked' -- Plenary Session regarding the Extraterritorial Application of Restrictive Trade Legislation, Report of the 51st Conference of the I.L.A., Tokyo 1964, at p. 330. For a similar viewpoint, see: Extraterritorial Application of the Antitrust Laws, Notes and Comments, 70 Y.L.J. 259, at p. 267. (1960).

15. Haight, International Law and Extraterritorial Application of the Antitrust Laws, 63 Y.L.J. 639, at p. 640 (1954).

of indictment, finger-printing and conviction, civil proceedings may result in shackling a company in perpetuity with the fetters of a decree forbidding it to do a great many things. Since a decree may be difficult to interpret, a wide range of company behaviour will be subject to the constant peril of a prosecution for contempt. In addition, orders may be issued requiring the company to divest itself of valuable property which it holds abroad, to alter contracts, license patents and grant patent immunities -- 'Orders such as these and injunctions which forbid the performance of contracts made abroad and valid by the laws of the states where they are made clearly constitute an interference with the internal trade and commerce of foreign states, which it is the purpose of international law -- and more specifically the territorial principle -- to avoid.'[16]

As has been observed from the case law however, American antitrust jurisdiction does not adhere to the strict territoriality rule which _prima facie_ is applicable to proceedings which may be said to be penal in an international law sense. Since this jurisdiction does not stop at the 'water's edge', under what recognized international law basis -- if any -- is such extraterritorial jurisdiction exercised ?

In addition to the universally accepted territorial

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16. _Supra_, fn. 15, at p. 641.

principle of jurisdiction, which is 'everywhere regarded as of primary importance and of fundamental character',[17] there would appear to exist in public international law five distinct principles which, in certain circumstances, may be held to found extraterritorial jurisdiction -- those of nationality, security, (also known as the protective principle), universality, passive personality and objective territoriality -- and it is these principles which represent what has been termed the 'primary jurisdiction'[18] of a state. This classification may be seen from an analysis of customary and conventional international law, particular characterizations of these exceptions having been postulated by the Harvard Draft Convention on Jurisdiction With Respect to Crime, 1935, and more recently by the Restatement, Second, Foreign Relations Law of the United States, 1965.

The debate over the relevant rules of international

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17. Research in International Law under the auspices of the Faculty of the Harvard Law School, Jurisdiction With Respect to Crime, 29 A.J.I.L. Supp. 443, at p. 445 (1935). [Hereinafter cited as Harvard Research].

18. See McDougal, *supra*, fn. 14, at p. 329, who maintains that there is an indispensable distinction between what a state may do for itself when it has effective control, and what it may request others to do when it does not have such control. The former is termed 'primary jurisdiction' and is justified in terms of the recognized international law principles of jurisdiction, whilst the latter he describes as 'secondary jurisdiction' and is justified in terms of principles requiring the honouring of 'acts of State' (judicial, legislative and executive), and the granting of governmental immunities.

law in antitrust cases involving a foreign element has tended to concentrate on the objective territoriality test, since this criterion features so prominently in the case law. Nevertheless, it may perhaps be appropriate to consider also the other aforementioned exceptions in the context of the antitrust prosecutions, in an attempt to evaluate the relative justification of the American Courts in placing such considerable emphasis on this test.[18a]

The Nationality Principle.

In the world community of nation-states, it has seldom been questioned that such states have general jurisdiction over their own nationals.[19] Professor Hyde states:[20]

> It is generally agreed that a state may punish its own nationals for disobeying its commands while in a foreign country, notwithstanding the legal quality which a territorial sovereign may have annexed to the acts of disobedience...

This principle is generally recognized on the theory of a continuing allegiance of the national to his state

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18a. I am greatly indebted to an article by Professor Jennings for the following lucid categorization -- see Jennings, Extraterritorial Jurisdiction and the United States Antitrust Laws, 33 B.Y.B.I.L. 146, at p. 153.

19. See Fukuda, Jurisdiction in International Application of United States Antitrust Laws, 12 Cleveland-Marshall L.R. 125, at p. 127 (1963).

20. Hyde, International Law Chiefly as Interpreted and Applied by the United States, Vol. 1, 802 at p. 803 (2nd Rev. ed. 1945).

regardless of his travel across national boundaries. The common-law countries have been sparing in their use of this liberty, preferring in the main to rely on the territorial claim. Nevertheless, United States Courts have claimed extraterritorial jurisdiction over nationals in some important respects. For instance, they have decided that a United States citizen abroad can be required to return home to give testimony before a United States Government tribunal.[21] Again, in Steele v. Bulova Watch Company,[22] this jurisdiction was utilized to prevent a United States citizen, doing business in Mexico, from there using a Mexican trademark which infringed a similar United States trademark. The Court in this case stated that 'Congress...in prescribing standards of conduct for American citizens may project the impact of its laws beyond the territorial boundaries of the United States.'[23]

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21. In Blackmer v. United States., 284 U.S. 421 (1932), the Supreme Court declared that an American residing abroad could be subpoenaed for testimony in the United States, and due to his failure to appear the United States could fine him and execute judgment on his property in that country.

22. 344 U.S. 280, 73 Sup. Ct. 252, 97 L.Ed. 319 (1952).

23. Ibid., at p. 282. It may be noted that both this case and Vanity Fair Mills v. T. Eaton Company Ltd., supra, Chapter I, fn. 57, involved the construction of the Lanham Trademark Act. The former may, however, be distinguished from the latter on the facts. In Steele, the appellant was enjoined, as an American citizen, from affixing the 'Bulova' trademark to watches in Mexico, whereas in Vanity Fair, United States trademark law was held not applicable to the alleged infringement in Canada by a Canadian concern of a trademark claimed by an

This jurisdiction is thus relevant to antitrust activities of United States nationals, including United States corporations. Moreover, this jurisdiction will not be weakened even if an American corporation has an agreement with a foreign corporation, a factor which was made clear in the National Lead Case.[24] Judge Rifkind in the District Court stated:[25]

> The argument has been advanced that this Court cannot invalidate contracts with parties who are not within the Court's jurisdiction and amenable to its orders. The absence of National Lead's foreign associates will, of course, place a practical limitation upon the scope of the Court's decree; it does not prevent the Court from finding a violation as the facts warrant and from restraining those within the reach of its mandate from continuing a conspiracy in defiance of the Sherman Act.

American citizen but registered in Canada by a Canadian concern; i.e. it was a case concerned solely with the protection of an American property right which the Court considered unenforceable against a foreigner abroad. A further case of interest in another area of trade regulation which stressed jurisdiction over conduct abroad by United States citizens is that of Branch v. F.T.C., 141 F. 2d 31 (7th Cir. 1944), in which s. 5 of the Federal Trade Commission Act, supra, Chapter I, fn. 3, was held to have been violated by a United States correspondence school sending course material to Latin-American countries and deceptively advertising its courses there.

24. United States v. National Lead Company, 63 F. Supp. 513 (S.D.N.Y. 1945), affirmed 332 U.S. 319, 67 Sup. Ct. 1634, 91 L. Ed. 2077 (1947).

25. 63 F. Supp. 513, at p. 525.

Similarly, in Timken Roller Bearing Company v. United States,[26] where American Timken owned thirty per cent of British Timken and fifty per cent of French Timken, and, with the interest held by a third party, controlled both, the Supreme Court held that '...the fact that there is common ownership or control of the contracting corporation does not liberate them from the impact of the antitrust laws.'[27]

Thus, it seems clear by now that all American corporations will fall under the jurisdiction of American courts for violations of the antitrust laws even though the acts are done in a foreign country. In the case of juristic persons, however, it is a question of some moment how nationality is to be established, and it is clear that the nationality principle is inadequate to cover the whole area of restrictive business practice. A company may easily incorporate itself in a foreign country, and have a home office there, and yet effectively restrain American trade through various activities. The American Courts have on occasions elected to pierce the corporate veil and to make intimate inquiries into the control and activities of foreign as well as of American corporations in antitrust

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26. 341 U.S. 593, 71 Sup. Ct. 971, 95 L. Ed. 1199 (1950).

27. *Ibid.*, at p. 598.

cases.[28] The purpose here, however, was generally not to establish jurisdiction on a nationality basis, but either to establish 'presence' within the jurisdiction, for procedural purposes, of a foreign corporation, or to establish a chain of cause and effect to bring the activities of a foreign corporation within one of the interpretations of the territorial principle of jurisdiction.[29]

The Security Principle.

The security principle embodies the claim that a state may exercise extraterritorial jurisdiction over crimes of aliens directed against its security, credit, political independence or territorial integrity. Although it has a firm place in the practice of a number of states, it has been traditionally suspect in Anglo-American jurisprudence. The need for it is said to arise because states do not always have laws of their own to restrain the preparation on their territories of subversive activities against their neighbours, so that in many cases

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28. On this aspect, see particularly: Note on Jurisdiction in Personam over Foreign Corporations Doing Business Abroad, Oppenheim, Weston, Federal Antitrust Laws, c. 14, p. 794 (3rd ed. 1968). See also Fukuda, supra, fn. 19, at p. 142; Timberg, Extraterritorial Jurisdiction under the Sherman Act, 11 Record of the Association of the Bar of the City of New York 101, at p. 114 (1956).

29. Infra, pp. 65-70.

where this principle is employed, an alien defendant may be prosecuted for an offence which was lawful in the jurisdiction where he was at the material time.[30]

It has been convincingly argued that extra-territorial application of antitrust legislation may be justified on a careful extension of this so-called 'protective' principle. States would thus be allowed to rely on this principle not only if the security of the state was involved but also if the main elements of its economic order were affected in a substantially adverse manner.[31]

According to the American Restatement, however, the kind of act of which a state may take jurisdiction by virtue of the protective principle is one which 'threatens its security as a state or the operation of its governmental functions', such as 'counterfeiting of the states'

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30. The effective exercise of such jurisdiction presupposes that the State offended against is able to secure custody of the person of the offender or of his property.

31. See, for example, Jaenicke, Plenary Session concerning the Extraterritorial Application of Restrictive Trade Legislation, Report of the 51st Conference of the I.L.A., Tokyo 1964, at p. 319; Martin, ibid., at p. 333: 'any State should be permitted to invoke the protective principle in defence, not only of the economic order in the structural sense of that phrase, but also in defence of the safety and smooth running of its economy...' See also, Timberg, Remarks on the Extraterritorial Effects of the United States Antitrust Laws, 11 A.B.A. Section of Antitrust Law 105 (1957).

seals and currency, and the falsification of its official documents.'[32] Moreover, as far back as 1926, a sub-committee of the League of Nations stated that this principle 'relates to a very special class of crimes', and should be limited to an 'agreed and uniform list' of acts which endanger a state's security.[33] In addition, the only American case which would have appeared to have relied solely and squarely on this principle clearly regarded it as applying to acts abroad which produced a detrimental effect on the sovereignty of the United States.[34]

Jennings has commented that the security principle has in any event not appeared eo nomine in American anti-trust cases, and although theoretically it is a matter for consideration whether the principle might not in some respects be apposite, the ground has in fact been once

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32. Restatement, Second, Foreign Relations Law of the United States (1965), s. 33. Note also comments on this subject in the Harvard Research, supra, fn. 17, at pp. 543-63, and the following quotation from Hyde, supra, fn. 20, at pp. 805-806: 'Such legislation may be regarded as exceptional in character. Occasions for its application were formerly infrequent and attributable to circumstances of great public need.'

33. Brierly, Criminal Competence of States in Respect of Offences Committed outside their Territory, Report of Committee of Experts for the Progressive Codification of International Law, Publications of the League of Nations (1926) -- cited in Haight, supra, fn. 15, at p. 651.

34. See United States v. Bowman, 260 U.S. 94, 43 Sup. Ct. 39, 67 L. Ed. 149 (1922).

again more than covered in the American courts by their extremely flexible notions of territorial jurisdiction.[35]

<u>The Universality Principle</u>.

The assertion of the right to punish foreigners for their acts abroad has not, however, been limited to the security principle. The universality principle asserts a far wider competence; it claims jurisdiction to punish aliens as well as nationals for any crime, committed outside as well as within the territorial limits of the prosecuting state. It is based on the concept that the suppression of crime is an interest common to all states and to all mankind. In Brierly's words, it is justified on the grounds that 'crime is an attack on a law of justice common to all states, and consequently it concerns the public order of each of them; the state which has the delinquent in its power may therefore judge him; it is even its duty to do so, in virtue of international solidarity in the struggle against crime.'[36] Thus, an offence subject to universal jurisdiction is one which comes under the jurisdiction of all states, wherever it be committed. At the present time, the only clear-cut cases of universal jurisdiction are those of piracy

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35. Jennings, <u>supra</u>, fn. 12, at p. 155.

36. Brierly, The Lotus Case, 44 L.Q.R. 154, at p. 161 (1928).

jure gentium[37] and war crimes,[38] although the concept of general jurisdiction is also met with in relation to other international crimes, such as trafficking in women, children, and drugs.[39]

The Harvard Draft limited 'universality' to certain crimes committed in places not subject to the authority of any state, and to crimes which were also offences by the law of the place where they were committed, if the offender had been offered to the state of such place, and the offer was unaccepted.[40] Thus restricted, it appears inconceivable that the United States would invoke the universality principle as justification for the application of the antitrust laws to acts committed by foreign nationals in a foreign country -- such laws are peculiarly

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37. On piracy, see generally, Harvard Research in International Law, Piracy, 26 A.J.I.L. Supp. 739 (1932); Moore, Digest of International Law, Vol. 2, pp. 951-79 (1906); In re Piracy Jure Gentium, [1934] A.C. 586.

38. The principle of universality of punishment of war crimes was affirmed by the Geneva Conventions of 1949 relative to prisoners of war, protection of civilians, and sick and wounded personnel. -- Common Article 49/50/129/146, 75 U.N.T.S. 62, 116, 236, 386.

39. Note however that 'it would appear that universal interest in the suppression of slavery and these other crimes has not as yet been carried to the point of recognizing, either in customary law, or in international agreements, the principle of universal jurisdiction that obtains in the instance of piracy' -- Restatement, supra, fn. 32, s. 34, Reporter's Note 2. These offences have been brought within the scope of international Conventions, but have been dealt with on the basis of aut punire, aut dedere, which does not specifically embody the principle of universal jurisdiction.

40. Harvard Research, supra, fn. 17, at pp. 573-92.

American both in concept and enforcement.

The Passive Personality Principle.

The passive personality principle -- the notion according to which a state claims a right to punish aliens for offences committed abroad to the injury of its own nationals -- met with trenchant criticism in the Lotus Case[41] from Judge Moore, the American Judge:[42]

> What, we may ask, is this system ? In substance, it means that the citizen of one country, when he visits another country, takes with him for his 'protection' the law of his own country and subjects those with whom he comes in contact to the operation of that law. In this way an inhabitant of a great commercial city, in which foreigners congregate, may in the course of an hour unconsciously fall under the operation of a number of foreign criminal codes. This is by no means a fanciful supposition; it is merely an illustration of what is daily occurring, if this principle is admissible. It is evident that this claim is at variance not only with the principle of exclusive jurisdiction of a state over its own territory, but also with the equally well-settled principle that a person visiting a foreign country, far from radiating for his protection the jurisdiction of his own country, falls under the dominion of the local law and, except so far as his government may diplomatically intervene in case of a denial of justice, must look to that law for his protection.

Once again, this principle has found no place in Anglo-American jurisprudence, and certainly need not be further considered in the context of this paper.

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41. Supra, fn. 7, at p. 92. 42. Ibid.

The Objective Territoriality Principle.

It seems clear, therefore, that these exceptions to the territorial principle have little relevance in the antitrust context, and consequently have not found favour in the decisions of the American Courts. The contrary, however, is the case as far as the 'objective territoriality' or, as it is alternatively known, the 'impact territoriality' principle is concerned.

A leading American authority has described this principle in the following manner:[43]

> The principle that a man who outside of a country wilfully puts in motion a force to take effect in it is answerable at the place where the evil is done, is recognized in the criminal jurisprudence of all countries.

Thus, under the proper delineation of this doctrine, a criminal offence is deemed to have been partly committed at the place where one of the elements of the offence was committed, and specifically at the place of the constituent effect. The classical example is that of the man who fires a shot on one side of a frontier and thereby commits a murder, the victim being on the other side of the frontier. The act and effect, intended and achieved, form an indivisible whole; only together do they constitute the crime of murder, and the elements 'act' and 'effect' are so closely bound up with each other that the

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43. John Bassett Moore, A Digest of International Law, Vol. 2, p. 244 (1906).

one element cannot constitute the crime without the other. In such a case it has long been accepted in international penal law that the crime was committed on both sides of the frontier, so that both states have jurisdiction with regard to that crime.[44]

The objective territorial doctrine was confirmed as to penal law by the Permanent Court of International Justice in The Lotus Case:[45]

> ...it is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another state, are nevertheless to be regarded as having been committed in the national territory if one of the constituent elements of the offence, and more especially its effects have taken place there.[46]

Again, the Harvard Draft provides that under this principle a state has criminal jurisdiction:[47]

> ...with respect to any crime committed in whole or in part within the territory. A crime is committed 'in whole' within the territory, when every essential constituent element is

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44. Whilst the objective elaboration of the basic territorial principle is the point at issue, reference may conveniently be made to the correlative aspect, the subjective territorial principle, 'which establishes the jurisdiction of the State to prosecute and punish for crime commenced within the State but completed or consummated abroad.' -- Harvard Research, supra, fn. 17, at p. 484.

45. Supra, fn. 7.

46. Ibid., at p. 23.

47. Supra, fn. 17, at p. 495.

> consummated within the territory; it is committed 'in part' within the territory when any essential element is consummated there.

It may readily be understood that the objective application of the territorial principle is a most flexible and far-reaching technique of jurisdiction. 'It has enabled the common-law countries, while insisting that all crime is local, and that jurisdiction over crime is strictly territorial, in fact to acquire jurisdiction in many ways as extensive as that of countries which frankly claim extraterritorial rights under one of the other principles.'[48] Bearing this factor in mind, the question arises as to the established international law limits within which the objective territoriality principle may be employed; for if it were permissible to found objective territorial jurisdiction upon the territoriality of more or less remote repercussions of an act performed wholly within another territory, then there would be virtually no limit to a state's territorial jurisdiction.[49]

It is clear from the authorities, however, that so radical an extension of the doctrine is not warranted and that the 'effects' element of the test must be strictly qualified.[50] It is clear that the objective application

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48. Jennings, <u>supra</u>, fn. 12, at p. 157.

49. See Jennings, <u>ibid</u>., at p. 159.

50. The Harvard Research, after an exhaustive investigation of State practice, concluded that 'a crime

of the territorial principle is limited to those 'effects' which are direct, if not immediate, and which form part of the actus reus -- in other words, where the crime was completed in the territory claiming jurisdiction.

In addition, the opinion has been expressed that the test ought only to be applied to offences where the results were intended to be produced in the state claiming jurisdiction.[51] This argument was rejected by the majority decision in The Lotus Case,[52] and indeed the Harvard Research concluded that such a limitation of the test to cases of intention cannot be supported as a proposition of international law except by sparse and inconclusive authorities.[53]

In the literature and in the case law of municipal courts the acceptance and application of the objective

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is committed wherever an essential element of the crime is accomplished' (emphasis added), supra, fn. 17, at p. 494.

51. This limitation was strongly pressed by the French argument in The Lotus Case, supra, fn. 7, at p. 7 -- and this view was vigorously defended by the dissenting Judges. See, for example, the opinion of Judge Loder, at p. 37.

52. Supra, fn. 7.

53. 'The decision in S.S. Lotus clearly supports the conclusion that no principle of international law forbids the localization of an offence, consisting of unintended injury caused through negligence, at the place where the negligence takes effect. This conclusion is in harmony with tendencies clearly manifested in modern legislation. It is approved in modern draft codes, projects and resolutions. The present article accepts this conclusion and makes no distinction between an act and an omission to act or between an intended or an unintended result.' -- Harvard Research, supra, fn. 17, at p. 501.

territoriality principle are very often encountered. In the judicial decisions -- including the older United States decisions[54] -- the cases concerned have always been ones in which two elements were present: Firstly, the decisions have always related to a sharply defined act of a concrete nature (homicides, libel, fraud, smuggling), and secondly, the decisions have always related to offences regarded in all civilized countries as criminal.

The decision in the Alcoa Case,[55] interpreted at its face value, exploded this unanimity of opinion. The American Court, the opinion being that of Judge Learned Hand, extended the objective territoriality doctrine and held that an intent to limit United States imports having been shown, an effect on imports must be presumed; the burden was on the defendants to establish an absence of effects. Thus, intended and presumed effects on United States commerce were held to be sufficient for assuming jurisdiction over the participation by the Canadian enterprise in the Swiss cartel organization.[56]

On all essential points, this judgment deviated from the generally accepted objective territoriality doctrine:[57]

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54. See, for example, Lamar v. United States, 240 U.S. 60 (1916); Ford v. United States, 273 U.S. 593 (1927); Hammond v. Sittel, ex parte Hammond, 59 F. 2d 683 (9th Cir. 1932); United States v. Steinberg et al., 62 F. 2d 77 (2nd Cir. 1932).

55. Supra, fn. 2. 56. Supra, Chapter I, pp. 18-25.

57. See Riedweg, Jurisdiction under International Law to apply Restrictive Trade Legislation to Conduct of Aliens

Firstly, there was no question of the effect being indissolubly bound up with the conduct abroad ('constituent element') but the effect was not so indissolubly bound, being remote and indirect;[58]

Secondly, the effect was not sharply defined and concrete;[59]

Thirdly, the conduct at issue is not regarded in all countries as criminal; on the contrary, the contract in question was entirely lawful at the place where it was concluded.[60]

This dictum has been widely criticized as contrary to the accepted international law application of the objective territoriality principle, it being clear from the opinion in <u>The Lotus Case</u>[61] that this principle was applicable only to crimes which all civilized nations condemned. This is far from being true of 'economic crimes' created by the Sherman Act, for there are several features which distinguish such offences from those so regarded by the community of civilized nations.

II ECONOMIC CONTRA UNIVERSAL CRIMES -- DISTINGUISHING FEATURES

Various characterizations have been made of these distinguishing features, which may be summarized as

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Abroad, Part III of Report to the Committee on the Extra-territorial Application of Restrictive Trade Legislation, Report of the 51st Conference of the I.L.A., Tokyo 1964, at p. 371.

58. <u>Ibid</u>. 59. <u>Ibid</u>. 60. <u>Ibid</u>. 61. <u>Supra</u>, fn. 7.

follows:[62]

In the first place, violation of United States antitrust laws (and especially of sections 1 and 2 of the Sherman Act) do not fall within any category of crimes which are common to such community -- they are offences created by Congress for the purpose of better regulating commerce between the states and with foreign nations, and they express the particularly parochial public policy of the United States on American trade and the American economy.[63] Indeed it is evident from the many and unsuccessful attempts to obtain international agreement in this field[64] that neither the principles nor the methods of laws directed against trusts, cartels and

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62. The outline of the relevant distinguishing features is based on a much-quoted article by Haight, International Law and Extraterritorial Application of the Antitrust Laws, 63 Y.L.J. 639, at pp. 644-650 (1954). See also in this connection, Neale, The Antitrust Laws of the U.S.A., c. 10, at p. 324 (1960); Haight, Antitrust Laws and the Territorial Principle, 11 Vand. L.R. 27, at p. 58 (1957); Schwartz, Plenary Session of the Committee on the Extra-territorial Application of Restrictive Trade Legislation, Report of the 51st Conference of the I.L.A., Tokyo 1964, at pp. 326-28; Friedmann, The Changing Structure of International Law, c. 11, at p. 169 (1964).

63. No mention of this type of economic crime has been made in comprehensive academic comment on the objective application of the territorial principle. See, for example, Hyde, International Law Chiefly as Interpreted and Applied By the United States, Vol. 1, at pp. 804-13, (2nd ed. 1945); Cook, The Application of the Criminal Law of a Country to Acts Committed by Foreigners Outside the Jurisdiction, 40 W.Va.L.Q. 303 (1934); Harvard Research, <u>supra</u>, fn. 17, at pp. 487-506.

64. For further information, see Chapter V, <u>infra</u>, pp. 216-18.

other restrictive practices have been accorded universal recognition under international law.

Secondly, whilst in the usual type of crimes to which this principle is applied with the sanction of the international community -- for example, homicide across a border, arrangements in one country to obtain money by false pretences in another -- the proximity of cause and effect is direct and readily ascertainable, the Sherman Act offence is complex, and it is usually difficult to establish a definitive cause and effect relationship. The connection for example, between a commercial agreement made in Europe and an undue restraint of trade in the United States is less direct and obvious by any calculation than between pressing the trigger in Mexico and the victim's dropping dead in California. Similarly, when foreigners agree abroad to fix prices, to limit production, to allocate territories or otherwise 'restrain trade' (in the United States sense), they may have no intention or expectation that their arrangements will operate in the United States; as in the case of the Swiss Aluminum Cartel, they may even exclude the United States from the operative provisions. Nevertheless, foreigners may find themselves charged in the United States with a criminal offence which they could hardly have been expected to foresee or understand.

Thus, in view of the various factors at work in the market-place, it is an act of some temerity -- even

after the fact -- to connect economic cause and effect. In a normal antitrust case, it is necessary to trace the economic consequences which radiate from an act or a complex of acts abroad into and through many different markets and territories. The more extensive these consequences are, the more difficult it becomes to identify them as they combine with, and are submerged by, consequences radiating from other acts, conditions of supply and demand, tariff barriers, currency controls, government quotas and subsidies, and the perils of war or economic strife. Indeed, often the best that can be done may be a finding that foreign conduct was a 'contributing cause' of domestic effect, and to pronounce jurisdiction on this basis is, as Professor Jennings points out, 'to enter upon a very slippery slope.'[65]

Thirdly, the prohibitions of the antitrust statutes are vague and uncertain in nature. Not even American lawyers can always forecast its application. In the words of an eminent member of the New York Antitrust Bar:[66]

> ...the lawyer called upon to counsel a client with a problem concerning the possible applicability of United States antitrust laws to overseas or other non-domestic transactions, must contend with a great many imponderables...for he

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65. Jennings, supra, fn. 12, at p. 159.

66. Dean, Extraterritorial Effects of the United States Antitrust Laws: Advising the Client, 11 A.B.A. Section of Antitrust Law 88 (1957).

> is not only heir to the uncertainty of ordinary antitrust authority, but he must also cope with the additional complications engendered by the extra-territorial application of these laws during a period when time, space and economic frontiers are being annihilated...

Lastly, if international law were to permit an objective application in the case of antitrust laws such as the Sherman Act, it would open the door to interference with freedoms and liberties guaranteed by other nations. Concern for such interference was expressed as far back as 1887 in the Cutting Case,[67] a famous incident in which Mexico undertook the criminal prosecution of an American national for an alleged libel of a Mexican citizen, apparently published in a Texas newspaper. In instructing the United States Chargé d'Affaires in Mexico, the United States Secretary of State declared:[68]

> ...To say, however, that the penal laws of a country can bind foreigners and regulate their conduct...either in their own or in any foreign country, is to assert a jurisdiction over such countries and to impair their independence...

There the liberty in question was freedom of speech; in the case of the extraterritorial application of laws regulating trade it is freedom of trade and

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67. 1887 U.S. Foreign Rel. 757. Cited also by Moore, Report on Extraterritorial Crime and the Cutting Case, 1887, p. 23.

68. 1882 U.S. Foreign Rel. 751.

freedom of contract. Moreover, it may usefully be observed that restrictive trade legislation in other common law countries has followed quite a different course. Building upon the common law experience in the field of restraints of trade, the United Kingdom law, for example, saw no comparable development to the Sherman Act. No restrictive trade legislation was enacted until after the Second World War, and when such legislation, providing for the establishment of a Monopolies Commission and a Restrictive Practices Court,[69] was passed, the Sherman Act approach was expressly rejected.[70] In addition, even in the few instances where foreign legislation has been patterned after the Sherman Act, there is little similarity in fact between the law as it has developed in the United States and the law in countries which have such legislation.[71]

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69. See the Monopolies and Restrictive Practices (Inquiries and Control) Act, 11 and 12 Geo. 6, c. 66 (1948); Monopolies and Restrictive Practices Commission Act, 1 and 2 Eliz. 2, c. 51 (1953); Restrictive Trade Practices Act, 4 and 5 Eliz. 2, c. 68 (1956).

70. Just prior to the passage of the Restrictive Trade Practices Act, ibid., Harold Wilson, spokesman for the Labour Party, said in the House of Commons: 'The approach of the Labour Government is well-known to the House. We rejected the American approach and the Conservative Party joined with us.' -- Hansard, H.C., February 24, 1955, col. 1472.

71. The laws of other countries are collected and discussed in Restrictive Business Practices, (Economic and Social Council, United Nations) E/2379, published March 13, 1953. See also: Report of the Department of State, Foreign Legislation Concerning Monopoly and Cartel

III THE OBJECTIVE TERRITORIALITY PRINCIPLE -- OUTMODED OR APPOSITE ?

It may be observed from these distinguishing features that the American antitrust laws disclose aspects which can hardly be considered to be covered by the objective territoriality principle, at least as it is understood in classical international law. To add the whole complex realm of Sherman Act case law with its subtle theology of 'conspiracy' and 'intent' to the rare contexts in which extraterritorial jurisdiction may be properly claimed would inevitably be unjust to foreign businessmen, to whom this type of regulation is strange, and would set almost no limit in principle to jurisdictional claims. It has sometimes been contended that the 'classical' interpretation of the rule in the Lotus Case has been superseded by the teachings of modern writers, and that case itself outdated. For example, Section 18 of the Restatement, Second, Foreign Relations Law of the United States, 1965, is headed 'Jurisdiction to Prescribe with Respect to Effect within Territory' -

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Practices, submitted to the Senate Sub-Committee on Monopoly, July 9, 1952. For academic comment on those laws, see Haight, Antitrust Laws and the Territorial Principle, 11 Vand. L.R. 27, at p. 35 et seq. (1957); International Law and the Extraterritorial Application of the Antitrust Laws, 63 Y.L.J. 639, at p. 644 et seq. (1954); Extraterritorial Application of Restrictive Trade Legislation, Annex A: Summary of Restrictive Trade Legislation, Report of 51st Conference of the I.L.A., Tokyo 1964, at p. 417 et seq.

and contains the following statements:

> A state has jurisdiction to prescribe a rule of law attaching legal consequence to conduct that occurs outside its territory and causes an effect within its territory, if either
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> (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
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> (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; (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

Although it is not apparent from a reading of Section 18, the Reporters' notes to the rule indicate that it was thus intended to restate Alcoa as a definitive rule of international law.[72] Riedweg however, comments that this is a somewhat dubious argument,[73] when one considers that Judge Hand had expressly disclaimed any pretensions

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72. The proceedings of the Institute indicate that, in the debate on the adoption of s. 18, the Chief Reporter stated that:...'the exclusion of 18(b) will be a decision by this body that the decision of the court in that case was in violation of international law; and I think that this decision should be viewed with that in mind.' -- 1962 A.L.I. Proceedings, at p. 334. The inference is clear.

73. Riedweg, *supra*, fn. 57, at p. 372.

to deciding the Alcoa Case according to principles of international law and that the defendants did not take issue with his view of the law but only with its conclusions from the facts:[74]

> ...we are concerned only with whether Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it. That being so, the only question open is whether Congress intended to impose the liability and whether our Constitution permitted it to do so; as a Court of the United States, we cannot look beyond our law...

Moreover, he points out that the Reporters' notes to Section 18 of the Restatement refer to several decisions of European tribunals, and that such decisions appear not to have involved assertions of jurisdiction based solely on 'effects' where the offence was not a common crime. Many of the decisions involved actual conduct within the prosecuting state or were civil actions between private parties; others fall under the aegis of either the nationality or protective principle.[75]

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74. Supra, fn. 2, at p. 443.

75. Supra, fn. 73, at pp. 373-74. Whilst several American writers agree with the Institute -- see infra, p.87 et seq. -- it is worth noting that nearly all European commentators have been critical of the Restatement's notion of the extraterritorial application of a State's laws to aliens. The European Advisory Committee on the Restatement stated: 'In our view, the exercise of jurisdiction based on territory is not justified in cases where all that has occurred within the territory is the effects of certain conduct and not at least part of the conduct itself' -- Final Report of European Advisory Committee on Tentative Draft No. 2, Restatement of the

Jennings has reinforced the argument against such an extension of the objective territorial doctrine by propounding the following hypotheses.[76] If, for example, 'effect' were not to be used in the strict international law sense, but occurs, to use the language of the Restatement, 'as a direct and foreseeable result of the conduct outside the territory', what criteria may be employed, in a complex antitrust situation, to determine which 'effects' are too remote from the originating act to cause a matter to become objectively territorial ? Again, turning to the concept of 'intention', as expressed in Judge Hand's test of 'intended effects' on United States imports and exports, how practical would it be for a Court to inquire into whether the effects were in fact intended ? Are businessmen to be presumed to intend the reasonably probable consequences of their arrangements, especially when it may well be the situation that the acts of the same businessmen may not only have been permitted by the law of the territory where the contractual arrangement was performed, but may even have been enjoined by that law ?[77]

Foreign Relations Law of the United States (Jurisdiction), March 3, 1961, at p. 35.

76. Jennings, The International Law Governing Antitrust Jurisdiction, Memorandum to the Committee on the Extra-territorial Application of Restrictive Trade Legislation, Report of the 51st Conference of the I.L.A., Tokyo, 1964, at p. 355.

77. Ibid., at p. 356.

It thus seems extremely doubtful whether, within the specific sphere of restrictive trade practices, it is feasible to allow a state to exercise jurisdiction by reason of certain intentions on the part of an alien and to require it to refrain from exercising it where the intention is lacking. If the object of rules about jurisdiction is to avoid tension between states, then it would seem axiomatic to reduce the area of inquiry into subjective attitudes. Unless, indeed, the objective territoriality test is thus stringently limited, it is destructive of the territoriality principle on which it purports to be based, and what purports to be a mere extension or interpretation of the territoriality principle is found to have become a 'ubiquity'[78] principle of jurisdiction.

IV THE VALIDITY OF UNITED STATES EXTRATERRITORIAL JURISDICTION.

It may be observed, from the foregoing discussion, that the classical international law concept of objective territoriality is in many ways inappropriate in the area of international restrictive trade legislation, and, in the writer's opinion, is an wholly unsuitable basis of jurisdiction in the antitrust context. Nevertheless, outmoded as it may be, it is extremely difficult, in the face of two widely divergent viewpoints, to state

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78. Supra, fn. 76, at p. 355.

definitively that extraterritorial trade regulation on the part of the United States is as a consequence invalid in the international legal sense.

The 'Limited Territorial Sovereignty' School.

The members of what may conveniently be termed the 'limited territorial sovereignty' school maintain that the one essential rule of international law is that each country applies its own law in its own territory, and that the laws of other nations have no place there.[79] In other words, in applying its antitrust laws to activities within the territory of another, a state is exercising a power of regulation over such activities and by the use of subpoenas, orders and decrees is compelling the observance of such exercise in such territory. Consequently, this amounts to an intrusion into the affairs of another state which requires the consent of that state in order to avoid an abusive exercise of sovereign power. Thus, the territorialists submit that the governing principle is, and must be, that each state is free to regulate the

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79. For an extensive discussion of this viewpoint, reference may be made to the following articles: Whitney, Antitrust Law and Foreign Commerce, 11 Record of the New York Bar Association 134 (1956); Antitrust Symposium, 11 A.B.A. Section of Antitrust Law 103 (1957); Haight, Antitrust Laws and the Territorial Principle, supra, fn. 71; International Law and Extraterritorial Application of the Antitrust Laws, supra, fn. 71; Riedweg, The Extraterritorial Application of Restrictive Trade Legislation -- Jurisdiction and International Law, Rapporteur to the Committee on the Extraterritorial Application of Restrictive Trade Legislation, Report of the 51st Conference of the I.L.A., Tokyo 1964, at p. 357.

conduct of trade and commerce within its own borders as it sees fit and without interference by other states except to the extent that it has given its consent thereto. Consequently, United States extraterritorial antitrust enforcement 'violates international law, increases American unpopularity abroad, and is hamstringing American business.'[80]

This body of opinion maintains that it is a perversion of the territorial principle to stretch objectivity to the point of permitting regulation abroad in cases in which consent has not been obtained, for if any nation were free to deal with acts performed in another state on the ground of 'effects', there would hardly be any business activity in the modern world of inter-dependence and rapid communication that would not thereby be encompassed. In the words of a leading member of this school of thought, G. W. Haight, 'to found jurisdiction on "effects" is to open flood gates and multiply conflicts.'[81] In addition, the extension of the objective territorial doctrine, from its normal application to criminal behaviour recognized by the community of civilized nations as such, to the economic crime, poses a difficult problem, for to what limits may such extension be permitted ? For

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80. Whitney, Record, <u>supra</u>, fn. 79, at p. 134.

81. Comment made during Plenary Session re the Extra-territorial Application of Restrictive Trade Legislation, Report of 51st Conference of I.L.A., Tokyo 1964, at p. 342.

example, in the Communist bloc many things are criminal which in the Western world would be regarded as an assertion of a fundamental freedom. Should therefore, on the application of the objective principle, the United States acquiesce in the exercise of a criminal jurisdiction over a United States citizen by a Soviet court on the ground that that citizen had said or done something lawful in the United States which was considered to have had some effect in Russia, and which was unlawful there ?[82]

Again, the fear has often been expressed by the territorialists that if the rule is allowed to stand that America has jurisdiction over every nation in the world that affects her, should not logically every other nation have jurisdiction over United States actions which affect them ? Since America is the largest trading area in the world she has, generally speaking, a far greater effect upon the trade of foreign nations than vice versa. If, as Judge Hand stated, it is 'settled law' that wherever a jurisdiction recognizes 'consequences' flowing from actions in another jurisdiction, it may institute criminal or civil proceedings in regard to those actions, then an extensive panorama of potential litigation may be revealed

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82. See Shawcross, English Restrictive Practice Legislation: Extraterritorial Effect of United States Antitrust Laws, 11 A.B.A. Section of Antitrust Law 111, at p. 114 (1957).

to foreign nations.[82a] W. D. Whitney, in a striking analogy perhaps stimulated by the Swiss Watchmakers Case, has posited the following example:[83]

> A Grand Jury empanelled in Switzerland should take this position -- that the Swiss purchased aircraft from manufacturing corporations in California, such as Boeing, Douglas or Lockheed; that the terms of sale have effects and consequences on Swiss buyers; indeed that these are vitally important to Swiss defense and to Swiss commercial aviation; that these corporations send representatives into Switzerland to solicit orders and that therefore these representatives at least have a close connection with Switzerland; and accordingly if the Grand Jury in Switzerland issues a subpoena ordering the American corporations to send over all their books and papers relevant or material to their prices and terms of sale in America and elsewhere -- how would that differ from what we are doing in reverse ?

In answer to the commentators who assert that each state does have jurisdiction to apply its restrictive trade legislation extraterritorially and that the only useful exercise in this area is the evolution of means of resolving the conflicts resulting from the exercise of such

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82a. Precisely this sentiment was expressed by the Committee on Foreign Commerce of the New York State Bar Association, who, in discussing the Oil Cartel case -- infra, Chapter III, p.104 -- stated: 'It is a stimulating question for us American lawyers to ponder whether if the rule be that we have jurisdiction over every action in the world that affects us, every other nation may not have jurisdiction over our actions which affect them.' -- Antitrust Law Symposium 1953, Commerce Clearing House Inc., Chicago, p. 125 (1953).

83. Whitney, Symposium, supra, fn. 79, at p. 104.

concurrent jurisdiction, Riedweg has pointed out that one need not explore means of resolving conflicts of jurisdiction unless two states do in fact have concurrent jurisdiction, and that to by-pass principles of jurisdiction in search of means of resolving conflicts of jurisdiction is to put the 'cart before the horse'.[84] The question of resolution of conflicts of jurisdiction is admittedly a proper subject for study -- once the existence of concurrent jurisdiction has been proved with respect to existing international law principles.[85]

Whitney is at pains to emphasize that the position of the territorialists is, in their opinion, consistent with the language of the Sherman Act.[86] He states that the United States Bench and Bar have omitted to distinguish between the alternative meanings of the words 'foreign commerce'; export and import trade are one entity, and acts and events inside foreign countries are another. He maintains that the Sherman Act, dealing with 'trade and commerce with foreign nations' deals only with the first. This argument is well supported by Haight,[87] who states that there would be less confusion in this area of the law

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84. Riedweg, <u>supra</u>, fn. 79, at p. 360. 85. <u>Ibid</u>.

86. Whitney, Record, <u>supra</u>, fn. 79, at p. 139.

87. Haight, International Law and the Extraterritorial Application of the Antitrust Laws, <u>supra</u>, fn. 71, at pp. 653-54.

if the rule stated by Judge Caffey at the end of the trial in the Alcoa Case were recognized:[88]

> 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...

In all the cases cited by Caffey to support the statement of the issue, the agreement made abroad actually did operate in the United States in the sense that it was performed there, the performance in every case being substantial. On appeal however,[89] Judge Hand substituted the far vaguer test of whether the act abroad 'has consequences within' the territory. While admitting that in the earlier cases the foreign conspirators 'had sent agents into the United States to form part of the agreement' he dismissed that which Haight considers to be an essential distinction on the grounds that 'an agent is merely an animate means of executing his principal's purposes', and the real test was whether the foreign conspiracy was 'intended to affect imports and did affect them.'[90]

A concise summary of the territorialists' position

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88. United States v. Aluminum Company of America, 44 F. Supp. 97, at p. 283 (S.D.N.Y. 1941) (emphasis added). For the view that 'effect on American commerce' is enough, see Note: Application of the Antitrust Laws to Extraterritorial Conspiracies, 49 Y.L.J. 1312, at pp. 1316-17 (1940).

89. United States v. Aluminum Company of America, 148 F. 2d 416, at p. 443 (2nd Cir. 1945).

90. Ibid., at p. 444.

is afforded by a quotation from a distinguished Dutch authority, Professor Verzijl, in whose opinion the judicial order to Aluminum Limited in Alcoa was 'simply an international nullity'.[91] Verzijl states:[92]

> The conclusion, therefore, must be that there is no recognized form of public international law which entitles the United States to institute criminal proceedings against aliens who, in other countries, enter into cartel and similar agreements which may or will produce their effects on American soil...
>
> Attempts by a state to enforce, by means of criminal proceedings, certain principles of its own legal order within that of a foreign country which upholds different principles and has, moreover, exclusive jurisdiction to establish those principles, are in fact, by their very nature, nothing but an abuse in international law of criminal jurisdiction.

The Other Side of the Coin -- The American Viewpoint.

The American attitude on this subject is, understandably, diametrically opposed to that of the territorialists. The Federal Judiciary and a considerable body of academic opinion[93] maintain that United States

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91. Verzijl, The Controversy regarding the so-called Extraterritorial Effect of the American Antitrust Laws, Netherlands Tijdschrift Voor International Recht, 1961, p. 3 et seq. -- cited by Riedweg, supra, fn. 79, at p. 380.

92. Ibid.

93. See, for example, Kronstein, Miller, Dommer, Major American Antitrust Laws (1965); Fugate, Foreign Commerce and the Antitrust Laws (1958); Enforcement of the United States Antitrust Laws in Foreign Trade, 5 A.B.A. Section of International and Comparative Law

antitrust prosecutions are firmly rooted in principles of jurisdiction generally accepted by all nations, and constitute therefore no encroachment of the sovereignty of any nation. Judge Hand's opinion in Alcoa is accepted as exemplifying a well-known principle of law, and this argument is consolidated by reference to the work of the American Law Institute, and especially in this connection the recent Restatement of the Foreign Relations Law of the United States.[94]

Little weight, moreover, is attached to the much publicized contrary view of Holmes J. in American Banana.[95] It is pointed out that Holmes, who is termed by Timberg 'a legal schizophrenic'[96] on the subject of the Sherman Act, was never an enthusiast for the philosophy underlying the Act, which he himself described as 'a humbug

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Bulletin 20 (1960); Damper or Bellows ? Antitrust Laws and Foreign Trade, 45 A.B.A. Journal 947 (1959); Antitrust Aspect of Foreign Investment, 49 Law and Contemporary Problems 142 (1969); Young, Extraterritorial Power of the Courts Under the Antitrust Laws, 39 U. of Detroit L.J. 240 (1961-62); Timberg, Extraterritorial Jurisdiction Under the Sherman Act, 11 Record of the Association of Bar of City of New York 101 (1956); Celler, A Congressman's View of Foreign Commerce Aspects of the Sherman Act, 27 A.B.A. Section of Antitrust Law 3 (1965).

94. Restatement, Second, Foreign Relations Law of the United States (1965). See particularly, s. 18, supra. p. 76.

95. American Banana Co. v. United Fruit Co., 213 U.S. 347, at pp. 355-56 (1909).

96. Timberg, Record, supra, fn. 93, at p. 103.

based on economic ignorance and incompetence.'[97] In addition, whilst it is considered by many people that Holmes was a strict adherent of the territorialist view-point vis-à-vis United States legislation, an analysis of certain of his statements in American Banana and other cases, indicate that this is not an accurate assumption, at least in instances when he considered that American 'national interests' were at stake. In American Banana, for example, Holmes commented:[98]

> In cases immediately affecting national interests, they [countries] may go further still and may make, and, if they get the chance, execute, similar threats [of suit] against acts done within another recognized jurisdiction.

Again, in Strassheim v. Daily,[99] he held that a conspiracy to defraud had a similar immediate effect and, in a statement which closely anticipated Judge Hand's rule, he stated that:[100]

> Acts done outside a jurisdiction, but

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97. Holmes-Pollock Letters (1941 ed.), Vol. 1, p. 163 -- cited by Timberg, supra, fn. 96, at p. 104.

98. Supra, fn. 95, at p. 356.

99. 221 U.S. 280, 31 Sup. Ct. 558, 55 L. Ed. 735 (1911). This case involved an extraditee who had been convicted of procuring a Michigan public official to pay bills presented to the State known to be fraudulent. Stated Holmes: '...the usage of the civilized world would warrant Michigan in punishing him, although he had never set foot in the State until after the fraud was complete' -- Ibid., at p. 356.

100. Ibid., at pp. 284-85.

> intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power.

In addition, in Ford v. United States,[101] he apparently agreed with Taft C.J., that a conspiracy to violate the National Prohibition Act had a comparable impact on national interests. Thus, had he in 1909 thought the violation of the Sherman Act a sufficiently grave impairment of United States 'national interests' -- which he did not, and this fact is perhaps due to certain *a priori* prejudices -- it would appear from his other pronouncements that he would have had no qualms about enforcing the Act with respect to acts committed outside the jurisdiction, against persons who happened to be caught within the United States jurisdiction. Moreover, it is a viable inference, from the Justice's failure to dissent in Thomsen v. Cayser[102] and Sisal Sales,[103] that he was subsequently persuaded that Congress at least felt that the public interests sought to be protected by the Sherman Act were important enough to preserve from harm, even if that harm be projected from abroad.[104]

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101. 273 U.S. 593, 47 Sup. Ct. 531, 71 L.Ed. 793 (1927).

102. 243 U.S. 66, 37 Sup. Ct. 353, 61 L.Ed. 597 (1917).

103. 274 U.S. 268, 47 Sup. Ct. 592, 71 L.Ed. 1042 (1927).

104. Timberg, Record, *supra*, fn. 93, at pp. 104-105.

In connection with this concept of the protection of American national interests, those who would support the international legal validity of American antitrust decisions have, on occasion, maintained that the decisions of the United States Courts in this view are in accord with the recognized territorial principle of international law; for it is argued that this principle embraces the right of a sovereign country to exercise a 'protective' jurisdiction against acts which, though taking place outside the territorial boundaries of that country, have effects within those boundaries which are forbidden by the laws of that country.[105] Indeed, Timberg[106] has said that the classic statement of the protective jurisdiction rule in antitrust cases was made by Judge Learned Hand in Alcoa when he supported the right of the state to 'impose liabilities even upon persons not within its allegiance, for conduct outside of its borders which the state reprehends.'[107]

As a corollary of this protective jurisdiction concept, it is argued that if such jurisdiction of the United States Courts were not exercised to prohibit some

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105. See Timberg, Remarks Concerning the Extraterritorial Effects of the United States Antitrust Laws, 11 A.B.A. Section of Antitrust Law 105 (1957); Timberg, Record, supra, fn. 93, at pp. 108-109.

106. Remarks, ibid., at p. 108.

107. United States v. Aluminum Co. of America, 148 F. 2d 416, at p. 443.

of the practices involved in international cartel agreements, the factual consequence would be to permit private parties located outside the United States to exercise an extraterritorial jurisdiction over citizens and residents of the United States, in contravention of the laws of the United States. The jurisdiction exercised by United States Courts in Sherman Act cases relating to foreign trade has therefore been a defensive and protective, not an agressive, one. Timberg maintains[108] that an exemplification of this thesis -- that the Sherman Act may serve to protect the United States from the exercise of extraterritorial jurisdiction by a private cartel -- is to be found in the allegations of the Swiss Watchmakers[109] complaint. He questions Switzerland's justification under international law for attempting to control a trade which was entirely alien, and indeed challenges the territorialists to comment about such a sweeping assumption of extraterritorial jurisdiction by private parties, whether or not acting under the guise of implementing their own national public policy.[110] Again, in this instance, he asks whether it would have been possible for the United States to have protected itself

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108. Timberg, Remarks, supra, fn. 105, at p. 109.

109. 1963 Trade Cas. par. 70,600 (S.D.N.Y. 1962); order modified, 1965 Trade Cas. par. 71,352. For further information on this case, see supra, Chapter I, at p. 33, infra, Chapter III, at pp. 138-43.

110. Timberg, Record, supra, fn. 105.

from this sweeping exercise of extraterritorial jurisdiction by the Swiss Watchmakers cartel, aided as they were by Swiss legislation and by the private sanctions of boycott, fine and blacklisting, 'if it is assumed, as it is by the limited territorial sovereignty school, that the powers of a United States court extend only to the water's edge ? I think not.'[111] This essentially pragmatic outlook clearly illustrates the manner in which this school of thought considers that classical international law -- while still basically adhered to -- is able to be modified to meet the needs of the times.[112]

Such an opinion is reflected in the writings of other academics. One treatise on the American antitrust

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111. Supra, fn. 110. Timberg states further: 'To forego antitrust action against such interferences with United States commerce because the legal arsenal which makes interference possible is prepared and located in a foreign land is to give extraterritorial effect, within the United States, to restrictive activities taking place in other countries.' -- Ibid.

112. In support of his hypothesis, Timberg cites Lauterpacht's views that '...territoriality of jurisdiction is a rule of convenience in the sphere of evidence. It is not a requirement of justice or even a necessary postulate of the sovereignty of the State...', and that with technical developments in the communications field the importance of mere physical distance, and thus of the territorial principle, is correspondingly diminished -- Lauterpacht, Allegiance, Diplomatic Protection and Criminal Jurisdiction Over Aliens, 9 Camb. L.J. 330 (1945-47). It is interesting also to compare Timberg's views, which conceive international law as already so modified, with the arguments of Martin and Jaenicke, supra, fn. 31, who advocate the defence of a State's economic order under a careful extension of the territorial principle.

laws[113] states categorically that the United States courts do not offend principles of international law in exercising extraterritorial jurisdiction, for they simply repel the effect of foreign actions which have a substantial effect on the American economy. 'Perhaps the shock of repulsion passes back along the laws of commerce to be heard in foreign countries, but the effect is ancillary and reasonable.'[114] Put another way, a nation, through its legislature and courts, has jurisdiction over its own imports and exports as well as over its internal commerce. Young submits that a nation has the right to establish rules under which those seeking to benefit from its system of commerce must act, and to exclude those who refuse to abide by the rules. Thus, if the United States has jurisdiction over the content of its foreign commerce -- for example contraband -- should it not also have jurisdiction over the methods employed in this commerce ?[115] Indeed, 'the United States may establish and maintain its own system of commerce, may legitimately assert jurisdiction over acts which intentionally and substantially affect the system, and may levy penalties... against those who freely choose to engage in the system

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113. Kronstein, Miller, Dommer, Major American Antitrust Laws 396 (1965).

114. Ibid.

115. Young, Extraterritorial Power of the Courts Under the Antitrust Laws, 39 U. of Detroit L.J. 240, at p. 243.

and who freely choose to ignore its rules.'[116]

One of the foremost American authorities on this subject, W. F. Fugate, former Chief of the Foreign Commerce Section of the Antitrust Division of the United States Department of Justice, has consistently supported the decisions and reasoning of the United States judiciary. While stating that the United States courts have always accepted the territorial theory, but in its broader sense to include acts directly affecting United States trade, he argues that this is the only practical rule in an era of rapid communication and transportation.[117] Moreover, Fugate replies to the territorialist contention that United States extraterritorial antitrust enforcement adversely affects American business.[118] He cites the hearings on the 'International Aspects of Antitrust' before the Senate Antitrust and Monopoly Sub-Committee, in 1964, in which, after considering some twenty alleged examples of such detriment, Senator Hart stated:[119]

> One would have to get the full story before resolving the doubt, if it could be resolved, and somewhere it would appear that the argument could

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116. Supra, fn. 115, at pp. 243-44.

117. For an elaboration of his basic argument, see references cited, supra, fn. 93.

118. See Fugate, Damper or Bellows ? Antitrust Laws and Foreign Trade, supra, fn. 93; also, Antitrust Aspects of Transatlantic Investment, supra, fn. 93.

119. Antitrust Aspects of Transatlantic Investment, supra, fn. 93, at p. 142.

> have been made only on the theory that competition ought to be restricted.

Moreover, Fugate quotes Professor James Rahl,[120] in a recent American Bar Association panel on antitrust and foreign trade, who stated that the concept of the United States antitrust laws as a detriment to United States foreign trade was greeted with some amusement in Europe in the light of American companies' huge investment there. In addition, Rahl was unable to find a single American businessman in Europe who thought that this was true.

Lastly perhaps, the most cogent jurisprudential justification of the United States' right to extend the reach of its antitrust jurisdiction is to be found in the words of Professor M. S. McDougal:[121]

> The most fundamental policy underlying all the principles for allocation of competence among states is, that each state is authorized to make -- and, where it has effective control, to apply -- law for events, even when occurring beyond its territorial boundaries, which substantially affect its own community processes. This policy is not uniquely derivable from any single jurisdictional principle, such as that labeled 'territoriality', but is rather the fundamental thrust of all relevant principles...

It is evident, from the very existence of such

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120. Supra, fn. 119.

121. McDougal, Plenary Session of the Committee on the Extraterritorial Application of Restrictive Trade Legislation, Report of the 51st Conference of the I.L.A., Tokyo 1964, at p. 330.

diametrically opposed views *vis-à-vis* the justification at international law for the American extraterritorial application of antitrust legislation, that there exist no guidelines in classical international law on this particular subject[122] -- as Brewster has pointedly remarked:[123]

> Given the substantive contrast between antitrust and common crimes, and given the widespread disagreement amongst nations about the merits of the competitive policy, it is not surprising that the right of the Turkish Government to prosecute a French Officer of the Watch on a French vessel for the death of Turks suffered in a collision on the high seas should not be exactly dispositive of the jurisdictional propriety of the extraterritorial reach of American antitrust law.

Clearly, there is a pressing need for a redefinition of the different categories of crime from the standpoint of the universal acceptance of their criminality. This redefinition is, as Friedmann has commented, 'an indispensable prerequisite of any attempt to extend the internationalization of offences in a more closely integrated international community,[124] and as

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122. See Miller, Extraterritorial Effects of Trade Regulation, 111 U. Pa. L.R. 1092 (1963).

123. Brewster, Extraterritorial Effects of the United States Antitrust Laws: An Appraisal, 11 A.B.A. Section of Antitrust Law 65, at p. 70. (1957).

124. Friedmann, The Changing Structure of International Law, c. 11, p. 169 (1964).

such would do much to mitigate the conflicts and complications precipitated by the United States courts in this sphere.

CHAPTER III

INTERNATIONAL COMPLICATIONS ENGENDERED BY EXTRATERRITORIAL ANTITRUST JURISDICTION.

In view of the foregoing discussion, it is clearly apparent that antitrust law, be it American or otherwise, cannot be applied in foreign dealings, or to foreigners, without impact on business elsewhere. The conduct in issue in any antitrust proceeding concerns more than one country, and touches on the sensitive area of sovereignty both in the country which seeks to correct what it views as a 'public injury' and in the country of the foreign actor which regards the charge and, above all, the order punishing or prohibiting the 'injury', as infringing its sovereignty. As the Legal Advisor to the State Department pointed out in 1959 in commenting on protests against the extraterritorial reach of American antitrust laws:[1]

> What Congress in the Sherman Act referred to as 'trade or commerce... with foreign nations' very often appears to the particular foreign nation concerned to be the trade or commerce of England, or the Netherlands, or Switzerland with the United States, over which that nation, too, has a co-equal right to control.

This observation is relevant to the controversies

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1. Cited by Haight, Chairman, Report of Committee on the Extraterritorial Application of Restrictive Trade Regulation, Report of the 52nd Conference of the I.L.A., Helsinki 1966, at p. 136.

arising in two main areas in which the United States courts have asserted jurisdiction to deal with foreign business conduct under the antitrust laws -- in the investigation process before trial in which subpoenas are issued in the courts for the production of documents located abroad, and in the framing of relief after a finding of a violation, in which orders issued by the judiciary in antitrust proceedings enjoin or direct acts in a foreign jurisdiction.

I GRAND JURY SUBPOENAS FOR THE PRODUCTION OF DOCUMENTS.

The preparation of major antitrust cases involves the assembling and examination of a mass of evidence. American Courts have from time to time resorted to the practice of ordering enterprises before the Court to produce documentary evidence in connection with antitrust proceedings. The typical situation is a Grand Jury investigation of suspected crime, in the course of which the potential defendants are ordered by a United States Court to produce their private books and records -- wherever located -- for examination by the Government and the Grand Jury. Failure to comply is punishable in the same manner as any other contempt of Court, by fines or imprisonment.

In this connection, the United States Courts have not hesitated to address orders for discovery to foreign firms through their American branches, requiring them to produce to the United States Court documents situated in

foreign territories.[2] There is, of course, no reason in general principle why a Court should not order an alien subjected to its jurisdiction in personam to produce documents relevant to a case in which he is a party, no matter where he may choose to keep those documents -- control is decisive, not location.[3] The objection in the antitrust cases is that the documents are required for a preliminary investigation which ranges outside the permissible limits of extraterritorial jurisdiction, and attempts to subject aliens in respect of their doings, even in their own countries, to a kind and scale of investigation which is quite unknown in any jurisdiction

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2. For general information on this aspect, see particularly Brewster, Antitrust and American Business Abroad (1958); Neale, The Antitrust Laws of the U.S.A. (1960); Kronstein, Miller, Dommer, Major American Antitrust Laws (1965).

3. With respect to procedural matters, such as the production of documents located in foreign countries by a party before a United States Court, there is no question that the law of the former applies -- this is a fundamental conflict of laws rule. As the Court stated in the 1952 Oil Cartel Grand Jury Investigation: 'Calling for the disclosure of documents is a procedural matter and it has long been the rule that the lex fori governs the law of procedure.' -- In re Investigation of World Arrangements with Relation to the Production, Transportation, Refining and Distribution of Petroleum, 13 F.R.D. 280, at p. 286 (D.D.C. 1952). It is also clear, as stated by the Court in the International Paper Grand Jury investigation, that 'The fact that a corporation's records and documents are physically located beyond the confines of the United States does not excuse it from producing them if they are in its possession and the Court has jurisdiction of the corporation. The test is control -- not location of the records.' -- In re Grand Jury Subpoena Duces Tecum Addressed to Canadian International Paper Company, 72 F. Supp. 1013, at p. 1020 (S.D.N.Y. 1947).

outside the United States.[4]

Such extension of American legal processes beyond her borders has more than once led to a sharp reaction on the part of foreign governments, and an examination of some of the most significant instances will, it is submitted, clearly illustrate that such orders have been considered in conflict with international law by the majority of civilized countries.

In the Canadian International Paper Company Case,[5] for example, which arose in response to American investigations into certain aspects of the pulp and paper industry, one of the Canadian defendants sought to excuse the production of corporate records by offering proof of a corporate resolution enacted at the corporation's headquarters in Canada which directed that production should be refused. However, the United States District Court refused to honour that action of the Canadian Board

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4. Jennings, Extraterritorial Jurisdiction and the Anti-trust Laws, 33 B.Y.B.I.L. 146, at p. 171 (1957). See also Radio Corporation of America v. Rauland, [1956] 1 Q.B. 618, a case involving a claim relating to the production of documents which were in the possession of English corporations and which were needed to assist in the preparation of an American case involving, *inter alia*, patent infringement and violation of the American anti-trust laws. Lord Goddard stated, at p. 649, that the instant application for interlocutory materials by the American corporations before the Court was in the nature of 'a fishing procedure which is never allowed in the English courts...'

5. In re Grand Jury Subpoena Duces Tecum Addressed to Canadian International Paper Company, 72 F. Supp. 1013 (S.D.N.Y. 1947).

of Directors, stating that the corporation was in personam before the Court and that the subpoena must be adhered to -- 'the corporation may not evade complying with the subpoena by a resolution of this character.'[6]

A direct result of this ruling was the passage three years later, in the Province of Ontario, of the Business Records Protection Act,[7] which prohibits the removal from Ontario of business records 'pursuant to or under or in a manner that would be consistent with compliance with any requirement, order, direction or subpoena of any legislative, administrative or judicial authority in any jurisdiction outside Ontario.'[8] The Honourable George A. Drew, then Prime Minister of Ontario, in introducing the Bill before the Ontario Legislature, summed up the prevailing mood when he said:[9]

> I question if there has ever been such an assertion of extraterritorial authority as this demand upon Canadian companies, and Canadian officials of these companies, for all details of what they propose

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6. Supra, fn. 5, at p. 1020.

7. The Business Records Protection Act, R.S.O. 1960, c. 44.

8. Ibid., s. 1. This Section makes exception for the normal flow of records between parts of a corporate structure, provision of information in connection with public offerings of shares with the consent of the persons involved, and for cases specifically provided for by any law of Ontario or of the Parliament of Canada.

9. Debate, House of Commons, Province of Ontario, Canada, October 27, 1947.

> to do or may be considering in regard to the production of new types of papers and of the changes in the machinery and other details of production. This government objects very strongly to fishing expeditions through our own Courts, and it is certainly not prepared to approve of fishing expeditions of this nature into the affairs of our companies through the Courts of the United States in regard to something which is not properly before these Courts.

Again, the Oil Cartel Investigation -- In re Investigation of World Arrangements[10] -- vividly illustrated the international complications arising with respect to the issuance of Grand Jury subpoenas. In this instance, the Department of Justice set on foot a Grand Jury Investigation into restrictive agreements affecting international trade in oil, and subpoenas were served on the Anglo-Iranian Oil Company and other foreign companies, requiring the production of many hundreds of documents. The investigation was directed specifically and exclusively to operations outside the United States on the part of certain American and foreign oil companies. In this instance the British Government and the Governments of the Netherlands, France, Belgium, India, and Pakistan all issued directives to companies under their jurisdiction

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10. In re Investigation of World Arrangements with Relation to the Production, Transportation, Refining and Distribution of Petroleum, 13 F.R.D. 280 (D.D.C. 1952).

that the subpoenas should not be obeyed.[11] The letter from the British Government to the Anglo-Iranian Oil Company said in part:[12]

> Her Majesty's Government consider it contrary to international comity that you or your officers should be required in answer to a subpoena couched in the widest terms to produce documents which are not only not in the United States of America but which do not even relate to business in that country.

Subsequently, President Truman asked the Attorney-General to bring to an end the criminal process against the companies and institute instead a civil suit. After the change of administration in January, 1953, civil litigation was commenced, but only against the five American oil companies named in the original suit; the

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11. See Haight, Extracts from some Published Material on Official Protests, Directives, Prohibitions, Comments, etc., Report of the 51st Conference of the I.L.A., Tokyo 1964, at p. 569.

12. Extract from letter dated October 2, 1952, to the Anglo-Iranian Oil Company, and set out in the transcript of the United States District Court proceedings of November 7, 1952 -- quoted in Haight, supra, fn. 11. In addition to this protest by the British Government, there was a certain amount of informed criticism in the British Press -- See, for example, Fletcher-Cooke, Risk of Applying American Antitrust Law to Middle East Oil, The Daily Telegraph, London, November 20, 1952, p. 6, in which article he stated that: 'However backward and benighted the United States may think the rest of the world is over the matter of monopolies and restraints of trade, the truth is that she cannot, even if she wants to, enforce her sincere and deep convictions upon countries whose outlook is entirely different.' See also in this connection, Comity and the Oil Companies, 165 The Economist 556 (1952).

foreign companies were no longer joined in the case.[13]

The Effect of Governmental Protests.

It may be noted that the government protests in these cases were undoubtedly not without effect. In the Canadian International Paper Company Case,[14] the subpoenas were subsequently withdrawn on the authority of the United States Attorney-General (although such withdrawal was not overtly the result of the Canadian protests.)[15] A

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13. United States v. Standard Oil Co. (N.J.), 23 F.R.D. 1 (S.D.N.Y. 1958). Despite the words of District Judge Cashin that 'possibly because of national security considerations, the Grand Jury investigation was terminated and the instant action was instituted' -- Ibid., at p. 2 -- it would seem likely that this was an attempt by the Department of Justice to eliminate the oft-voiced criticism of the promiscuous prosecution of non-nationals in the American Courts. See Graham, Antitrust Law, 1 U.B.C.L.R. 354, at p. 359, who states that in the vast majority of cases filed in the period 1957-1960 by the Department of Justice, which involved foreign commerce, a clearly-discernible trend was visible in that the Department named only United States nationals as defendants (seeking thereby to impose liability upon the basis of activity abroad, through affiliates or subsidiaries), and named foreign nationals as co-conspirators only, despite the fact that conceptually the co-conspirators were equally responsible for the actions of the American defendants -- 'the Department of Justice has seemingly been somewhat sensitive to this type of criticism'.-- Ibid.

14. Supra, fn. 5.

15. The United States Attorney-General maintained that the subpoenas had been withdrawn because, at meetings held between Department of Justice representatives and envoys from the Canadian newsprint industry, relevant information was supplied to the American representatives which rendered redundant the necessity for compliance with the subpoenas -- see Extract from a letter of November 20, 1947, from the United States Attorney-General to the American Secretary of State, cited by

similar situation prevailed in the Oil Case;[16] when the action of the British Government came to the notice of the Court, Judge Kirkland, being satisfied that 'there is a true objection by the foreign sovereign and not a premature expectation by the movant party',[17] excused the Anglo-Iranian Oil Company, and granted the notices to quash the subpoenas.[18]

Haight, supra, fn. 1, at pp. 568-69.

It is worth noting that, at the time of writing, the United States Department of Justice has launched another Grand Jury investigation of the paper industry. This time they have issued a subpoena against the records of a number of United States paper manufacturers and also against the American sales subsidiaries of Canadian paper companies. These call for some documents that are physically present in Canada, once more occasioning widespread protest. Moreover, in the opinion of a senior Canadian executive in the industry, there has not only been a general initial refusal to produce any Canadian-based documents but it is also unlikely that such documents will ever be divulged. It remains to be seen whether this probe will end as abruptly as that of 1947. For press comment on this recent antitrust investigation, see, for example, The Globe and Mail, July 8, 1969; E. and P, July 5, 1969; The Gazette, July 8, 1969; Wall Street Journal, July 9, 1969.

16. Supra, fn. 10.

17. Ibid., at p. 286.

18. It is interesting to note that Judge Kirkland's decision was made on the ground that the British Government's substantial financial interest in the company made it in effect an arm of the Government, and thus entitled to the immunity extended to a foreign sovereign. Whilst this was no doubt a good ground for action, it ignored the more important point at issue, namely that the jurisdiction of the Court had been wrongly asserted and that the subpoena was unacceptable even in the absence of any financial relation between the company and the foreign sovereign.

Again, in In re Grand Jury Investigation of the Shipping Industry,[19] an investigation into the shipping industry of the United States, the widespread protests from foreign countries vis-à-vis subpoenas for the production of documents produced a tangible effect in the hearing of the investigation.[20] In this case, heard in the United States District Court for the District of Columbia, Judge Walsh made specific reference to 'the timely objections made by the British, Canadian, Danish, French, German, Italian, Japanese, Netherlands, Norwegian and Swedish embassies, with respect to the subpoenas 'and said that the Court must 'insure' that these 'be given

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19. 186 F. Supp. 298 (D.D.C. 1960).

20. The following extract from the note from the Ambassador of Denmark, dated February 26, 1960, symbolises the general tenor of the protests:

'...In the opinion of the Danish government the investigation instituted goes beyond the limits of United States jurisdiction under the general principles of international law...these subpoenas require the production not only of documents in the possession of the American representative of the Danish companies, but also of documents outside the United States. Under international law no State is entitled to extend its judicial or executive authority into the territory of another State. With respect to documents in the lawful possession of Denmark, it is incompatible with the fundamental sovereign rights of Denmark that a foreign tribunal, under the threat of penal sanctions, require the production thereof.' -- Cited, in addition to other instant protests, by Riedweg, The Extraterritorial Application of Restrictive Trade Legislation -- Jurisdiction and International Law, Report of the 51st Conference of the I.L.A., Tokyo 1964, at p. 403.

the greatest consideration.'[21] He continued:[22]

> ...with respect to the documents of foreign corporations physically located in foreign countries, it would seem that this investigation would not be impeded if the Court reserved its opinion on the production of those documents, at this time. Meanwhile, the government will be better informed and so may better inform the Court, of the need for those documents, should such need still exist, after the inquiry has progressed to some extent.

However, such governmental protests have not always found favour in the Courts of the United States. Immediately following this investigation of the shipping industry, the United States Federal Maritime Board requested some one hundred and ninety foreign shipping companies to produce documents relating to liner conferences. In Montship Lines Limited et al v. Federal Maritime Board,[23] the aforementioned carriers petitioned for review of Federal Maritime Board orders requiring the filing inter alia, of every contract agreement or understanding 'involving the water-borne commerce of the United States'[24] which were in effect as of January 1st, 1960.

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21. Supra, fn. 19, at p. 318.

22. Ibid.

23. 295 F. 2d. 147 (D.C. Cir. 1961).

24. Order of the Federal Maritime Board, entered April 11, 1960, under s. 21 of the Shipping Act 1916, cited ibid., at p. 150.

The petitioners asked in particular that they be exempted from filing documents located outside the United States.

Between May and November, 1960, the governments of Denmark, Finland, Germany, Great Britain, India, Italy, Japan, Yugoslavia, Netherlands, Norway and Sweden, filed diplomatic protests with the Secretary of State,[25] which were transmitted to the Board and all of which were filed with the Court, protesting the attempted exercise of jurisdiction over shipping of vital importance to other nations and wholly outside the territorial limits and jurisdiction of the United States, the infringement of the sovereignty of such nations, the excessive and unreasonable burden of compliance, and interference with trade.

Nevertheless, these objections did not prevail in the United States Courts, as an extract from the decision of the Circuit Court of Appeals of the District of Columbia indicates:[26]

> We must reject petitioners' contentions regarding protests of foreign governments and extraterritorial enforcement of the Board's order...The protests of foreign governments are matters for consideration by the Executive and not the Courts. And the question as to whether the order can be enforced by extraterritorial means is not presently before us. All that is here involved is whether the order was properly and validly issued.

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25. For selected extracts from these protests, see Haight, <u>supra</u>, fn. 11, at p. 579.

26. <u>Supra</u>, fn. 23, at p. 154.

In these circumstances, ten European nations, subsequently joined by Japan, held a conference in London in December, 1963. At its conclusion they declared that the American demands were 'an infringement of their countries' jurisdiction'[27] and they urged their shipowners not to comply with them.

Foreign Legislative Reaction.

The hostility felt by foreign nations who found themselves on the 'receiving end' of United States anti-trust subpoenas is evident. It is not surprising therefore, that a certain amount of reactive legislation has been enacted by foreign governments in order to deal with this problem. Mention has already been made of the efforts of the Ontario Provincial Legislature.[28] Perhaps a more striking example of such legislation on a national level is to be found in the Shipping Contracts and Commercial Documents Act,[29] enacted by the United Kingdom Parliament in 1964.

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27. The Times, December 14, 1963, p. 5.

28. Supra, fn. 7.

29. Shipping Contracts and Commercial Documents Act 1964, c. 87 (U.K.). For extensive comment on the background and passage of this Act, see Osborough, The Extra-territorial Impact of Antitrust Enforcement, 16 N. Ireland L.Q. 239 (1965); Mann, Anglo-American Conflict of International Jurisdiction, 13 I.C.L.Q. 1460 (1964); Feltham, Extraterritorial Application of Antitrust Legislation, Conference on International and Comparative Law of the Commonwealth, at p. 150 (1968).

In 1961, Congress gave effect to the Bonner Amendment of the 1916 Shipping Act.[30] This amendment, generally referred to as the Bonner Act, changed the name of the Federal Maritime Board to that of the Federal Maritime Commission; and provided for unilateral intervention by the Commission in regard to shipping conference regulations, and particularly the use of 'dual-rate' freight contracts.[31]

A series of Congressional revelations relating to disparities in shipping freights, which ostensibly favoured America's European and Japanese competitors, resulted in the Federal Maritime Commission demanding to see documents of non-American shipowners, which would enable them to discover how freight rates were fixed and whether United States exporters were being placed at a disadvantage. The resistance and protests of various European governments to accord with the Commission's demands, which were to no avail in the Montship Lines case, have already been noted;[32] however, the matter came to a head in Britain in April 1964, in circumstances involving the Federal Maritime Commission's attack on the

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30. 46 U.S.C.A. ss. 801-42 (1958), as amended (1966 Supp.).

31. 46 U.S.C.A. s. 813 (1966 Supp.).

32. Supra, pp. 110-11.

aforementioned 'dual-rate' contracts.[33]

Negotiations with the Commission were initiated, but remained unsuccessful. The British Government was of the opinion that compliance with the demands of the Commission, like the demands themselves, could not be tolerated, and accordingly on July 31, 1964, the aforementioned Shipping Contracts and Commercial Documents Act[34] became law in the United Kingdom. In introducing the second reading of the Bill Mr. Ernest Marples, then Minister of Transport, had made it clear that it was the actions of the American Government that had obliged the British Government to introduce the Bill, although it dealt with encroachment by any foreign government.[35] This

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33. These contracts when made, for example, by a British shipowner with a British shipper, provide for a reduction of freight if the shipper undertakes to ship his goods on the shipowner's vessels both to and from the foreign port of destination. The Federal Maritime Commission demanded the elimination of such clauses and threatened a penalty of $1,000 in respect of each day of default. Thus, the Commission claimed the right to dictate to traders and shipowners in Britain the form of contracts between them, regardless of who owned the goods being shipped, who owned the ships, and where the contract was negotiated.

34. Supra, fn. 29.

35. Parliamentary Debates, Hansard, House of Commons, Vol. 698, Col. 1215. Another member, Sir Leonard Ropner, during the same debate, remarked that '...No nation has done more to upset the traditional freedom of trade among the shipowners and shippers of the world than has America herself, by subsidies, by flag discrimination, by trade reservation and by the use of flags of convenience...If the Federal Maritime Commission were allowed to be allowed to get away with it, how many other countries might be

policy is indicated by the long title of the Act in which it is stated that it is indended 'to secure Her Majesty's jurisdiction against encroachment by certain foreign requirements...'. Under Section 1 of the Act, dealing with foreign measures affecting United Kingdom shipping, the Minister of Transport is authorized to determine what acts of foreign countries 'regulating or controlling the terms or conditions upon which goods or passengers may be carried by sea, or the terms or conditions of contracts or arrangements relating to such carriage...constitute an infringement of the jurisdiction which, under international law, belongs to the United Kingdom,' and to make an order that this section shall apply to these measures.[36] When such an order has been made, every person in the United Kingdom carrying on a business of the carriage of goods by sea has a duty to give the Minister

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tempted to follow its lead ?' -- Hansard, Vol. 698, Col. 1227. The wide divergence between the European and American outlook on this subject, and the correlative adverse American reaction to the European resistance, is exemplified by a statement attributed to Senator Douglas, clearly a strong supporter of punitive Federal Maritime Commission action, who said:

'I don't want to compare the European nations to a child or to juvenile delinquents, because I don't wish to insult our honourable friends. I simply say that so far as child psychology is concerned, sometimes behaviour is improved by the knowledge that there is a woodshed and a switch therein.' Quoted in the speech of Mr. Paul Williams, M.P., during the Second Reading of the Act. Hansard, Vol. 698, Col. 1217.

36. S. 1 (1), (a), (b).

notice of any requirement imposed on him by the courts or authorities of the foreign country, and the Minister may give to such a person in the United Kingdom directions for prohibiting compliance with any such requirement as he considers apposite for maintaining the jurisdiction of the United Kingdom.[37]

On a more general plane, Section 2 gives to any Minister of the Crown authorized so to act[38] the power to determine whether certain requests of foreign courts, tribunals or administrative authorities addressed to persons in the United Kingdom to produce or furnish any commercial document not within the territorial jurisdiction of the foreign country constitute an infringement of the sovereign jurisdiction of the United Kingdom, and authorizes the Minister involved to give directions to the addressee to prohibit him from complying with the requirement in question, except as may be specified in the directions.[39]

Finally, Section 3 provides for the imposition of a fine not exceeding £1,000 to any person who wilfully fails to comply with the requirement of notice under

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37. S. 1 (2), (a), (b).

38. S. 2 (2) authorizes the Secretary of State, the President of the Board of Trade, the Minister of Aviation, the Minister of Power, and the Minister of Transport to act under the Section.

39. S. 2 (1), (a), (b).

S. 1 (2), (a) of the Act, or alternatively contravenes any directions issued under the authority of the Act.[39a]

Other instances of legislative reaction on the part of foreign governments may be briefly mentioned. The Netherlands Economic Competition Law 1956, Section 39, for example, which prevents Dutch companies from complying with the orders of a foreign court with respect to Netherlands records or operations, was in direct response to the Dutch outrage over the successful effort of the Department of Justice to prosecute Philips in the General Electric Case,[40] and the attempt to investigate the activities of oil companies incorporated in the Netherlands. Legislation prohibiting the production of documents pursuant to foreign orders has also been enacted by Quebec[41] and

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39a. From the comments made in a personal letter to the writer by a Junior Minister of the Conservative Government of the time, who was intimately connected with the passage of the Act, it would appear that the Act has been highly successful in its operation, as long as the British commercial interests involved have indicated to the Government that they required assistance under it. Nevertheless, it was indicated in the same letter that the British Act represented no more than an isolated attempt to mitigate the awesome power of the American shipping industry and the Federal Maritime Commission in particular, and that some type of concerted action among the other maritime nations of the world is required adequately to deal with the whole problem of the American 'regulation' of shipping conferences.

40. United States v. General Electric Company, 82 F. Supp. 753 (D.N.J. 1949); final decree, 115 F. Supp. 835 (D.N.J. 1953).

41. Business Concerns Records Act, R.S.Q. 1964, c. 278.

Panama.[42]

In a discussion of the origin of such retaliatory statutes, the question arises vis-à-vis the attitude of the United States judiciary when the issuance of a subpoena for documents abroad is clearly in conflict with existing foreign law. What, for example, would have been the attitude of the American Courts in the Canadian International Paper Company Case[43] if the Ontario Business Records Protection Act[44] had already been in existence at the time of the issue of the relevant subpoena ?

The Effect of Foreign Law.[45]

Whether foreign law in fact prohibits the discovery sought is not treated as a preliminary question in anti-trust proceedings. The Courts first find an obligation to make discovery, using the standards of relevancy and good cause only. After the appropriate obligation is determined and settled by an order, a specific procedure exists for dealing with foreign prohibitions. This

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42. Republic of Panana Law No. 17, January 30, 1961, Articles 89, 93.

43. Supra, fn. 5. 44. Supra, fn. 7.

45. See, in this connection, Fugate, Antitrust Law and International Trade, 1959 U. of Ill. L.F. 387, at p. 395; Emmerglich, Antitrust Jurisdiction and the Production of Documents Abroad, 11 Record of the Association of the Bar of the City of New York 122 (1956); Roth, Subpoena of Documents Located in Foreign Jurisdiction Where Law of Situs Prohibits Removal, 37 N.Y.U. L.R. 295 (1962); Note: Limitations on the Federal Judicial Power to Compel Acts Violating Foreign Law, 63 Col. L.R. 1441, at p. 1453 (1963).

procedure can best be stated by quoting from the opinion of Judge Kirkland in the Oil Cartel Case,[46] where conflict with foreign law was asserted by several defendants. He said:[46a]

> In its decision, this Court also reserved its views as to the production or inspection of papers located in foreign jurisdictions and/or subject to foreign laws, pending the movants showing:
>
> (a) a good faith endeavour to gain consent from the foreign sovereign to remove the required documents;
>
> (b) what, if any, interest the foreign sovereign has in the movant corporation, or in the investigation; and
>
> (c) proof of the foreign law.

This method for dealing with claims of conflict was followed in the Shipping Case - Montship Lines Ltd. v. Federal Maritime Board[47] -- in which petitioners comprising foreign steamship lines of Yugoslavia and the Netherlands asserted that the production by them of documents acquired by the Board's order would be violative of their local national laws, respectively provisions of

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46. In re Investigation of World Arrangements with Relation to the Production, Transportation, Refining and Distribution of Petroleum, 13 F.R.D. 280 (D.D.C. 1952).

46a. Ibid., at p. 288.

47. 295 F. 2d 147 (D.C. Cir. 1961).

the Yugoslav Criminal Code and the Netherlands Economic Competition Law.

Prior to determining whether these foreign laws did in fact forbid the production of documents such as those required by the Board's order and, if so what effect this would have upon compliance, the Court held that the appropriate procedure was to require these petitioners to make a good faith attempt to obtain a waiver of such restrictions from their respective governments. Consequently, these petitioners should, upon the demand, bring any arguments that their local law prohibits compliance before the Board so that it could then be initially determined whether the petitioners had made a good faith effort to secure waivers and, if so, whether compliance was to be required.[48]

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48. Supra, fn. 47, at p. 156. Note that Judge Cashin in United States v. Standard Oil Co. (N.J.), 23 F.R.D. 1 (S.D.N.Y. 1958), the civil antitrust case instituted after dismissal of the Oil Cartel Grand Jury, handled the problem of possible prohibitions of foreign law along much the same lines. It would appear also that a certain amount of discretion is vested in the Courts in these cases. In Société Internationale v. Rogers, 357 U.S. 197 (1958), the Supreme Court held that it had been an abuse of discretion on the part of the District Court in that case to dismiss a complaint because the plaintiff had failed to produce documents because of prohibitions of Swiss law. The case involved a failure to produce by a plaintiff, not a defendant, but the Court likened the claim to that of a defendant, and held that since good faith efforts were frustrated by foreign law, the plaintiff was not in default. However, the Court indicated that even though the plaintiff was unable to produce after such a good faith attempt, the District Court nevertheless had wide discretion in dealing with the

Thus, the procedure which prefaced a consideration of the effect of foreign law upon the compliance with their subpoena appears to be clearly recognized and established. Moreover, when the requirements as evinced by Judge Kirkland have been satisfied, the cases, at least until relatively recently, seem to indicate definitively that it is improper for a United States Court to order disclosure that would violate the mandatory provisions of foreign law. This fact is evident in a number of banking cases; in Re Application of Chase Manhattan Bank,[49] for example, the United States Second Circuit Court of Appeals upheld a claim by an American corporation that the law of Panama prohibited the production of documents in the possession of a branch in Panama. Here, a Grand Jury subpoena had directed the Bank to produce, inter alia, records relating to the accounts of four individuals and one corporation in the possession of its branch in Panama. Production was to be made on January 27th, 1961. The subpoena was subsequently adjourned at the request of the Bank until January 30th, 1961. On the latter date the

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situation, in that, for example, it could draw inferences unfavourable to the non-complying party as to particular events. -- Ibid., at p. 213.

49. 297 F. 2d 611 (2nd Cir. 1962). For a similar approach in areas other than antitrust, see First National City Bank v. Internal Revenue Service, 271 F. 2d 616 (2nd Cir. 1959); In re Matter of Equitable Plan Co. 185 F. Supp. 57 (S.D.N.Y. 1960), modified on other grounds sub nom. Ings v. Ferguson, 282 F. 2d 149 (2nd Cir. 1960).

Republic of Panama enacted two statutes which clearly forbade the production of either the original documents called for or copies of them. Furnishing such records was made subject to a maximum fine of approximately $100. On the Bank's motion to modify the subpoena, the District Court found that the production of the records would violate Panamanian law, and held that this shifted to the Government the duty of asking the Panamanian authorities to allow the Panama branch to produce, in effect modifying the subpoena. However, in recognition of the strong public interest in the production of these records, the subpoena was left outstanding, and a duty of 'actively co-operating with the government' was imposed upon the Banks.[50]

The Court of Appeals affirmed, and stated as a 'principle' that 'a subpoena _duces tecum_ should be modified if compliance would necessitate a violation of foreign law.'[51] The United States Government argued, _inter alia_, that the foreign law prohibiting production must provide criminal sanctions to justify the Court in

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50. _Application of Chase Manhattan Bank_, 192 F. Supp. 817, at p. 819 (S.D.N.Y. 1961).

51. _Supra_, fn. 49, at p. 612. The Court was here quoting its own dictum in _First National City Bank v. Internal Revenue Service_, 271 F. 2d 616 (2nd Cir. 1959), a case involving a summons issued by the I.R.S. calling for production before the Service in New York of certain bank records of a corporation whose tax liability was under investigation. For further information, see Roth's article, _supra_, fn. 45.

modifying the subpoena. The Court held that it was not necessary to decide this question since 'the testimony before the District Court was to the effect that violation of the Panama statute would be "equivalent to a misdemeanour" under our criminal law.'[52]

This problem of a conflicting foreign law was most recently before the United States Courts in <u>United States</u> v. <u>First National City Bank</u>.[53] This case, which in the words of the presiding Appeal Court Judge, Kaufman C.J., was 'of considerable importance to American Banks with branches or offices in foreign jurisdictions',[54] contains an extremely cogent review of the law in this area, and as such is worthy of detailed examination.

On March 7th, 1968, the First National City Bank of New York [Citibank] was served with a subpoena <u>duces tecum</u> in connection with a Federal Grand Jury investigation of certain alleged violations of the antitrust laws by several of its customers. A subpoena required the production of documents located both in the Bank's offices in New York City and Frankfurt, Germany, relating to any transaction in the name of or for the benefit of its customers, a German corporation and a New York corporation. Citibank complied with the subpoena insofar as it called

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52. <u>Supra</u>, fn. 49, at p. 613.

53. 396 F. 2d 897 (2nd Cir. 1968).

54. <u>Ibid</u>., at p. 898.

for the production of material located in New York but failed to produce or divulge any documents reposited in Frankfurt. Indeed, the Bank even refused to inquire or determine whether any relevant papers were overseas. Instead, Citibank's Vice President responsible for the decision to defy the subpoena, appeared before the Grand Jury and asserted that the Bank's action was justified because compliance would subject Citibank to civil liability and economic loss in Germany.

After two hearings, in which conflicting testimony was given vis-à-vis the provisions of German law in connection with Bank secrecy, Judge Pollack concluded that Citibank had failed to present a legally sufficient reason for its failure to comply with the subpoena. He determined that it was manifest that Citibank would not be subject to criminal sanctions or their equivalent under German law, that it had not acted in good faith, and that there was only a 'remote and speculative'[55] possibility that it would not have a valid defence if it were sued for civil damages. Accordingly, he adjudged the Bank and the Vice President in question to be in civil contempt and fined the Bank $2,000 per day for its failure to act; in addition he sentenced the Vice President to sixty days imprisonment.

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55. Supra, fn. 53, at p. 900, Kaufman C.J. quoting from Pollock's opinion.

The Bank accordingly appealed the case, remaining adamant in its refusal to produce the documents. Indeed, Citibank had received some support for its arguments from some large American banks, who, as _amici curiae_, on the side of Citibank, had filed briefs urging Kaufman C.J., presiding in the Second Circuit Court of Appeals, to reverse Judge Pollack.[56] In his judgment, Kaufman expressed his understanding of the international complications of the issue, and expressed his sympathy with those who were 'subject to the jurisdiction of two sovereigns and confronted with conflicting demands.'[57] He stated that in cases such as these, the difficulties facing the Courts were manifold, because the latter must take care not to impinge upon the prerogatives and responsibilities of the political branches of the government in an extremely sensitive and delicate area of foreign affairs. He continued that mechanical rules of thumb were of little value. What was required was a careful balancing of the interests involved and a precise understanding of the facts and circumstances of the particular case.[58]

Turning to the particular fact situation, he noted that compliance with the subpoena did not require the

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56. For journalistic comment on this case, see Guzzardi, Business Around the Globe -- Report from Bonn, Fortune Magazine, August 1968, pp. 47-48.

57. _Supra_, fn. 53, at p. 901.

58. _Ibid_.

violation of the criminal law of a foreign power, or indeed risk the imposition of sanctions that were the substantial equivalent of criminal penalties as in Application of Chase Manhattan Bank. All that remained was a possible prospective civil liability flowing from an implied contractual obligation between Citibank and its German customers.[59] Nevertheless, Kaufman took the opportunity to criticize vigorously the United States Government's argument that to be excused from compliance with an order of a Federal Court, a witness, such as Citibank, must show that following compliance it would suffer criminal liability in the foreign country. He continued that to hold that the mere absence of criminal sanctions abroad necessarily mandated obedience to a subpoena would show scant respect for international comity. Moreover, the vital national interests of a foreign nation, especially in matters relating to economic affairs, could be expressed in ways other than through the criminal law; equally important was the fact that a sharp dichotomy between criminal and civil penalties provided an imprecise means of measuring the hardship for requiring compliance with a subpoena. Admittedly, the Court was not required to decide whether penalties must be under the 'criminal law' to provide a legally sufficient reason for non-

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59. Supra, fn. 53, at p. 901.

compliance with a subpoena; but it would seem unreal to let all hang on whether the label 'criminal' were attached to the sanction and to disregard all other factors.[60] In any event, assuming that in appropriate circumstances civil penalties or liabilities would suffice to provide adequate reason for non-compliance with a subpoena, Kaufman, on the facts, held that Citibank had failed to provide an adequate justification for its disobedience of the subpoena.[61]

This opinion, with its emphasis on civil as well as criminal liability, differs somewhat from the formula evinced in the previous Second Circuit cases, in which the criterion for judgment appeared to rest solely on the danger of potential criminal liability on the part of the addressee if he complied with the subpoena. Perhaps more important however, is the relative sophistication of Kaufman's judgment, as exemplified by his recognition that the task of the court in this sensitive area was 'not one of defining power but of developing rules governing the proper exercise of power,'[62] and in the evaluation of Citibank's contention the utilization of Section 39 (1)[63]

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60. Supra, fn. 53, at p. 902. 61. Ibid, at p. 905.

62. Ibid., at p. 901.

63. Ibid. S. 39(1) states: 'A state having jurisdiction to prescribe or 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.'

and Section 40[64] of the Restatement, Second, Foreign Relations Law of the United States. As Roth has commented,[65] the essence of the Restatement approach lies in its emphasis on the facts of each case, in direct contrast with the approach taken, for example, in Chase Manhattan, which seems to terminate the inquiry upon the finding that conduct has been ordered which will violate the criminal laws of a foreign State. This however, is precisely the point from which the judicial inquiry into the facts begins under Section 40. Moreover, as Kaufman J. pointed out, it would be a considerable distortion to allow all to hang on a 'criminality' label

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64. Supra, fn. 53, at p. 902. S. 40 states: 'Where two States have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each State is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as

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

65. Supra, fn. 45, at p. 301.

and to disregard other factors; by far the most important task facing the Court was to 'balance the national interests of the United States and Germany and to give appropriate weight to the hardship, if any, Citibank will suffer.'[66]

The subpoena of documents located abroad illustrates clearly the sensitive issues of infringement of foreign sovereignty and correlative detrimental effect upon international harmony which are inherent in the extraterritorial application of restrictive trade legislation. If the Citibank judgment is indicative of the latest judicial attitude -- and it is submitted that it is -- it would seem that the United States has recognized this factor, and that henceforth the determination of any particular case in this sphere will not depend on strictly mechanical guidelines, but will embody an essentially relatavistic approach to the problem of deviant foreign law and consequent enforcement jurisdiction.

II COURT ORDERS ENJOINING OR DIRECTING ACTS IN A FOREIGN JURISDICTION.

The second aspect under discussion in this Chapter -- orders issued by the United States Courts in antitrust proceedings enjoining or directing acts in a foreign jurisdiction -- has provoked, if anything, more international disharmony than the problems engendered by

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66. Supra, fn. 53, at p. 902.

United States Grand Jury subpoenas, and has put the whole question of power to act extraterritorially up for scrutiny in the most direct manner possible.[67]

Throughout the presentation of the substantive law in antitrust proceedings, the emphasis is placed on the jurisdiction of antitrust laws over the subject-matter of the action. The question of jurisdiction in connection with decrees for the first time involves the issue of what effects may be produced in a foreign country as a result of a declaration by the Court that an unlawful restraint on the domestic or foreign commerce of the United States has been perpetrated. Equity, acting *in personam*, may order the persons under its jurisdiction to do any act.[68] This rule is limited by the practical consideration of enforceability and certain excuses of impossibility which are recognized as available to the defendant.

The terms of a final decree in an antitrust case -- including those settled by consent -- typically contain prohibitions against repetition of the illegal conduct, together with certain positive orders designed to prevent future violations and to discover such violations if they

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67. On this aspect, see Young, Extraterritorial Power of the Courts Under the Antitrust Laws, 39 U. of Detroit L.J. 240, at p. 246 (1961); Rosen, Antitrust Laws: Extraterritorial Enforcement, 42 Cornell L.Q. 390, at p. 395 (1957); Kronstein, Miller, Dommer, Major American Antitrust Laws, c. 12, p. 389 (1965).

68. *Penn* v. *Lord Baltimore*, (1750) 1 Ves. 444.

occur. For example, if two defendants have been found guilty of dividing up markets through the use of a joint company, the Court's decree may (a) prohibit the defendants from agreeing not to compete; (b) order the defendants to dissolve or sell the joint company or order one party to sell its interests to the other; and (c) require the defendants to make their books and records available for inspection by representatives of the United States Government. The decree usually further recites that the Court retains jurisdiction over the case for a specified number of years, thus subjecting the defendants to the potent weapon of contempt of Court if any of the provisions of the decree are violated during that time interval.

The United States Courts have not hesitated to issue such decrees against foreign defendants -- indeed, the most serious jurisdictional issues have arisen over the decrees directed by the Courts against foreign companies which have been found in civil cases to have violated the Sherman Act -- and in some important cases within the last two decades the injunctions and prohibitions which the Courts have laid on foreign companies have at times involved far-reaching effects on the activities of those companies outside the United States and even on their obligations to third parties abroad.

For the purposes of illustration, two such major cases will be examined in detail. Both cases have

engendered much criticism due to the extraterritorial elements present in the United States decree, and epitomise the international complications arising as a result of the actions of the United States judiciary in enjoining or directing acts in a foreign jurisdiction.

The I.C.I. Case.

The decision in United States v. Imperial Chemical Industries Ltd.[69] received considerable attention both in Britain and America. The background to this case began in 1944 when the United States Department of Justice began to take proceedings under the Sherman Act against a number of corporations engaged in the production of chemicals, including Imperial Chemical Industries Ltd. (I.C.I.), an English company and E. I. du Pont de Nemours Inc. (du Pont), an American corporation. They were alleged to have entered into contracts and engaged in combinations and conspiracies 'in restraint of trade or commerce among the several states or with foreign nations', and also to have monopolized or attempted to monopolize or combined or

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69. 100 F. Supp. 504 (S.D.N.Y. 1952); opinion on remedies, 105 F. Supp. 215 (S.D.N.Y. 1952); final judgment, Civil No. 24-13, S.D.N.Y. July 30, 1952. I am considerably indebted to an article by Professor Kahn-Freund for the following lucid summation of this most complex American litigation -- see Kahn-Freund, English Contracts and the American Antitrust Law, The Nylon Patent Case, 18 M.L.R. 65 (1955). For other academic comment on this case, see Timberg, Antitrust and Foreign Trade, 48 N.W.U.L.R. 411 (1953); Note: Limitations on the Federal Judicial Power to Compel Acts Violating Foreign Law, 63 Col. L.R. 1441, at p. 1443 (1963); Neale, The Antitrust Laws of the U.S.A., c. 10, p. 327 (1960).

conspired with others to monopolize part of such trade, that is, to have committed criminal offences under Sections 1 and 2 of the Sherman Act. The United States Government did not, however, prosecute these corporations but started 'proceedings in equity' under Section 4 of the Sherman Act. It sought to obtain restrictive and mandatory injunctions to 'prevent and restrain' violations of the Act.

I.C.I. and du Pont had for years been parties to far-reaching agreements for the allocation of markets, some of which (including the United States) were reserved to du Pont, while others (including the British Commonwealth outside North America) were reserved to I.C.I. and still others (including Canada) shared by both, partly through jointly owned subsidiaries.

In 1951 and 1952 Judge Sylvester Ryan in the Federal District Court for the Southern District of New York, made a number of orders designed to terminate these agreements and the allocation of markets between the two corporations, and to compel them to 'divest' themselves of their joint interests. In 1939 I.C.I. had obtained from du Pont exclusive licences to exercise and practise in the United Kingdom and certain other parts of the Commonwealth all inventions concerning the manufacture of nylon for which du Pont had taken out United Kingdom and other Commonwealth patents, and by a further agreement of 1946 (by which the earlier one of 1939 was cancelled) I.C.I. acquired these

patents from du Pont. It was one of the terms of Judge Ryan's decrees that the 1946 agreement should be cancelled within ninety days and the patents be reassigned to du Pont. Moreover, both corporations were ordered not to make any disposition of non-American patents without granting, until 1977, non-exclusive immunities 'to import into any foreign country any common chemical product which had been lawfully manufactured in the United States'.[70]

In 1940, I.C.I., acting in virtue of the patent licences obtained from du Pont in 1939, had granted exclusive sub-licences (for the United Kingdom and other parts of the Commonwealth) to British Nylon Spinners Ltd. ('Nylon'), a subsidiary company of I.C.I. itself and of Courtaulds Ltd., each of these two parent companies having half the share capital and an equal share with the other in control of the subsidiary. In 1947, after it had acquired the patents, I.C.I. made an informal agreement with Nylon by which the latter were given the right to be granted licences instead of sub-licences, although the licences were never formally executed. Nylon continued to manufacture the patent products with the consent of I.C.I.

I.C.I. was now confronted with the following situation: If the company complied with the decrees made by Judge Ryan, they rendered impossible the performance of

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70. Kahn-Freund, _supra_, fn. 69, at p. 66.

their licence agreement with Nylon, that is, they broke their contract. If, on the other hand, they continued to adhere to the agreement, they violated the decrees and possibly laid themselves open to contempt proceedings in the Federal Courts. By re-assigning the patents to du Pont, I.C.I. would put it out of their power to grant the licences to Nylon. On the other hand the grant of these exclusive licences for manufacture of nylon in the United Kingdom was prohibited by Judge Ryan's decree, unless the licencee agreed to hold the licence subject to the rights of American manufacturers of these nylon products freely to import and vend in the United Kingdom articles manufactured in accordance with patents or with comparable patents.[71]

Accordingly, prior to completion of the final decree in the United States court, Nylon brought suit against I.C.I. in an English court, seeking specific performance of its exclusive patent licence and an injunction against compliance with the United States District Court's order. On August 13, 1952, Mr. Justice Upjohn, sitting in Chancery, granted an interlocutory injunction to restrain the defendants from assigning the patents until judgment or further order.

Subsequently, in British Nylon Spinners Ltd. v. Imperial Chemical Industries Ltd.,[72] the Court of Appeal

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71. *Supra*, fn. 70. 72. [1953] 1 Ch. 19 (C.A.).

in sustaining Upjohn J., revealed that it disagreed markedly with the American court on the jurisdictional issue. Whereas Judge Ryan, after addressing his directions to I.C.I. <u>in personam</u> respecting its foreign patents, had then appealed to comity between nations as a factor which might lead foreign courts to recognize his decree,[73] the English Judges took the position that considerations of comity should have restrained the American court from asserting extraterritorial jurisdiction in the first place.[74] Moreover, Judge Ryan's statement that '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,'[75] was referred to specifically by the Master of the Rolls as one which he could not accept. Lord Evershed

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73. He stated: 'We recognize that substantial legal questions may be raised with respect to our power to decree as to du Pont's foreign patents as well as those issued to I.C.I. Here, we deal with the regulation of the exercise of rights granted by a foreign sovereign to a domestic corporate defendant and to a foreign corporate defendant. Our power so to regulate is limited and depends on jurisdiction <u>in personam</u>; <u>the effectiveness of the exercise of that power depends upon the recognition which will be given to our judgment as a matter of comity by the court of the foreign sovereign which has granted the patents in question.</u>' -- 105 F. Supp. 215, at p. 229 (emphasis added).

74. See, for example Lord Evershed, <u>supra</u>, fn. 72, at p. 24.

75. 105 F. Supp. 215, at p. 229.

stated:[76]

> If by that passage the Judge intended to say (as it seems to me that he did) that it was not an intrusion on the authority of a foreign sovereign to make directions addressed to that foreign sovereign or to its courts or to nationals of that foreign Power effective to remove (as he said) 'harmful effects on the trade of the United States,' I am bound to say that, as at present advised, I find myself unable to agree with it.

This passage from Lord Evershed's judgment graphically illustrates the dim view taken by the British judiciary of the action of the United States courts -- the British court in effect told its American counterpart to mind its own business.

Indeed, this represented the tenor of the approach in subsequent proceedings in the instant case,[77] when Nylon obtained from Dankwerts J. a declaration that they were entitled to be granted exclusive licences, an order for the specific performance of the 1947 agreement, a permanent injunction restraining I.C.I. from parting with the patents, and the rectification of the register of patents.[78] Although Dankwerts J. went out of his way to

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76. <u>Supra</u>, fn. 72, at p. 25. 77. [1955] 1 Ch. 37.

78. Counsel for the defendant, I.C.I., was in the somewhat anomalous position of having to argue to the British court the appropriateness of the American court's claim to extraterritorial jurisdiction -- '...They (I.C.I.) have been put in an even more embarrassing position by the

recognize the difficulties which had faced Judge Ryan in the formulation of his judgment,[79] nevertheless he firmly agreed with Lord Evershed that:[80]

> ...so far as the English patents are concerned, it seems to me, with all deference to his Honour's judgment, to be an assertion of an extra-territorial jurisdiction which we do not recognize for the American courts to make orders which would destroy or qualify those statutory rights belonging to an English national who is not subject to the jurisdiction of the American courts...

The presence of a 'saving clause'[81] in Judge Ryan's judgment however, enabled Dankwerts J., in making the declaration sought by Nylon, to emphasise that no difficulties thereby arose with respect to the principle of comity, 'which the courts of the United States and the courts of England are so anxious and careful to observe.'[82]

Nevertheless, whilst international judicial face was thus maintained, the controversy epitomises the tendency of municipal courts to apply their own law rather than that of a foreign state to govern international

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desire of the United States court that they should fully and fairly present in this action all the facts on which the judgment of the United States court was founded...' -- per Dankwerts J., <u>supra</u>, fn. 77, at p. 41.

79. <u>Supra</u>, fn. 77, at p. 45.

80. Quotation from Lord Evershed's judgment in the Court of Appeal, [1953] 1 Ch. 19, at p. 26 -- <u>supra</u>, fn. 77, at pp. 51-52.

81. <u>Infra</u>, p. 143. 82. <u>Supra</u>, fn. 77, at p. 54.

transactions: 'an American court broadly applied its antitrust law to a large corporate complex affecting the commerce of the United States, while an English court asserted its strong policy in favour of the enforcement of contracts made in England between English nationals.'[83]

The Swiss Watchmakers Case.

A more modern but equally important case, which exemplifies the manner in which issues of national sovereignty and international comity are provoked by United States antitrust decrees, is that of United States v. Watchmakers of Switzerland Information Centre Inc.[84] This case, in which it was held that agreements among Swiss watch trade associations, manufacturers, and distributors of watches, watch parts and watchmaking machinery, and American watch manufacturers and importers, were held to violate Section 1 of the Sherman Act and Section 73 of the Wilson Tariff Act, has rapidly become somewhat of a cause célèbre in antitrust circles, creating a considerable amount of judicial and political furore.

The Final Judgment of the United States District

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83. Note: Limitations on the Federal Judicial Power to Compel Acts Violating Foreign Law, 63 Col. L.R. 1441, at p. 1445.

84. 1963 Trade Cas. par. 70,600 (S.D.N.Y. 1962); Final Judgment dated January 22, 1964 (S.D.N.Y. Civil Action No. 96-170); modified January 7, 1965, 1965 Trade Cas. 71,352 (S.D.N.Y.). For a brief summation of the facts, see supra, Chapter I, at pp. 33-34.

Court for the Southern District of New York,[85] in Swiss Watchmakers is indicative of the breadth of orders still being sought by the United States Department of Justice. Despite the forceful statements of international law made by the Swiss Confederation in its amicus curiae brief,[86] and despite the evidence given to the Court by Swiss governmental and legal experts regarding the conformity of the Swiss watchmaking industry's regulations with Swiss law, Swiss public order and the expressed policies of the Swiss Government, the Final Judgment ordered the defendants, (the Swiss Federation of Watchmakers and Ebauches, the Swiss company most intimately concerned):[87]

Firstly, to cancel, terminate, withdraw from or otherwise render inapplicable to United States commerce certain contracts made in Switzerland, governed by Swiss law, and relating to the manufacture and sale of watches and watch parts in Switzerland (and not directed specifically at the

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85. Supra, fn. 84.

86. 'Nothing in the language of the antitrust laws requires that these laws should be applied to this action and to these contracts of the Swiss watch industry, and the antitrust laws should not be so applied. Such application, among other things, would infringe Swiss sovereignty, would violate international law, and would be harmful to the international relations of the United States...People will not be safe in their own backyards if international law does not prohibit a State from giving its criminal law extraterritorial application in a case such as this...' -- U.S. Dist. Ct., Civil Action No. 96-170, M. Reese, atty. for Swiss Confederation.

87. Supra, fn. 84. For a comprehensive account of this judgment, see Riedweg, Jurisdiction Under International Law to Compel Conduct Abroad, Report of 51st Conference of the

United States), to the extent that such contracts restrict production anywhere in the world outside Switzerland; secondly, to stop restraining exports to the United States, despite the fact that all such exports were regulated in conformity with the policies of, and induced by, the Swiss government; thirdly, to stop refusing to deal with persons engaged in United States imports or exports, or in the sale or production within the United States of watches, movements, parts of machinery; fourthly, to cancel, terminate, withdraw from or otherwise render inapplicable to United States commerce provisions in contracts with British, German and French manufacturers, that limited or restricted exports or imports into the United States.

Although exemption was provided for acts in Switzerland required under the law of that country and no defendant was required to do any act in Switzerland which was illegal under the law of Switzerland, there was no exemption in the decree for acts outside Switzerland that were required by any law and no recognition was given to the validity of acts in Switzerland that were valid under Swiss law or to acts performed there or elsewhere in conformity with Swiss governmental policy, although not actually required by any law.

Due to its far-reaching extraterritorial elements however, the 1964 Final Judgment was severely criticized

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I.L.A., Tokyo 1964, at p. 410.

in many quarters, and the Department of Justice, at the instance of the Department of State, met with representatives of the Swiss Government for a period of several months and worked out a satisfactory modification of the Final Judgment which took into consideration the views of the Swiss Government concerning recognition of Swiss sovereignty and jurisdiction over its own trade.

Accordingly, an Amended Final Judgment was delivered by Federal District Judge Cashin in February, 1965, on the motion of the United States and with the consent of the defendants.[88] The latter also agreed not to appeal the modified Final Judgment. The modifications were proposed on the grounds, firstly, that the Swiss Confederation had issued new regulations with respect to export permits for watch parts from Switzerland; secondly, the Department of State had indicated to the Department of Justice that a resolution of the instant litigation on a basis consistent with United States antitrust laws and the basic objectives of the Judgment would be advantageous from the standpoint of American foreign policy; and, thirdly, that the termination of the litigation without any appeal would give immediate relief in restoring competition in the United States watch trade and industry.

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88. Supra, fn. 84. See Haight, Recent Antitrust Developments in the United States -- The Swiss Watchmakers Case, Report of the 52nd Conference of the I.L.A., Helsinki 1966, at p. 67.

The modifications in the Amended Final Judgment, both in spirit and letter, somewhat reduced the control claimed by the Court; for example, provisions attempting to reach persons who were not defendants before the Court were deleted, and in addition detailed directions to the Swiss defendants affecting their contractual or organizational relations with non-American parties were in large part eliminated, and such directions couched in more general terms. Moreover, certain exculpatory provisions were amended and in some cases inserted, and certain procedural requirements for securing compliance with the decree were qualified and deleted.

Nevertheless, Judge Cashin stressed in his brief opinion that the modifications did not affect the crucial objectives which were sought to be achieved in the Final Judgment and that in the main the modifications related to peripheral areas of the Judgment which might have been construed to have had some bearing upon the sovereignty of the Swiss Confederation. Furthermore he stated that the modifications would prevent any situation from arising such as had occurred in other litigation when there was believed to be a possible conflict between a decree of a United States court and the sovereignty of a foreign nation, such as was inherent in both the American and British aspects of the I.C.I. litigation.

Thus, the Amended Final Judgment, despite its modifications, still represented, 'both in its substantive

and in its compliance provisions, an assertion of jurisdiction to control the activities of foreign enterprises, and their arrangements with foreign third parties, even if occurring outside the United States, if they affect the domestic or foreign commerce of the United States.'[89]

Particularly significant in Swiss Watchmakers were the provisions recognizing Swiss sovereignty and the exclusion of matters to which such sovereignty is exercised. For example, in addition to retaining in Section 11 the original exculpatory provisions of the Final Judgment, a further paragraph was added to that section in the Amended Final Judgment, which evidenced a clear recognition and acceptance of a generally overriding Swiss sovereignty vis-à-vis matters within Swiss jurisdiction. It stated that nothing contained in the Final Judgment should be deemed to:[90]

> Limit or circumscribe the sovereign right and power of the government of the Swiss Confederation or any agency thereof, or specifically the sovereign right and power of the government of the Swiss Confederation or any agency thereof to control or regulate its domestic or foreign commerce or to make and apply regulations with respect to the watch making industry or any part thereof.

Saving Clauses.

The use of such 'saving clauses', as they are

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89. Haight, supra, fn. 88, at pp. 73-74.

90. Haight, ibid., at p. 72.

commonly known, is indicative of the recognition by the United States Courts of their inability to extend the antitrust laws so as to regulate the conduct of foreign nationals who are subject to a conflicting foreign law. Such clauses in fact are a device for saving face for the American courts, or at least for reserving the area of conflict. Thus, Judge Ryan in the I.C.I. Case[91] included in the Court's decrees a saving clause which was seized upon with relief by Denning L.J., in the correlative Nylon Case;[92] in the course of his judgment Denning stated:[93]

> It would be a serious matter if there were a conflict between the orders of the Courts of the United States and the orders of these Courts. The writ of the United States does not run in this country, and, if due regard is to be had to the comity of actions, it will not seek to run here. But, as I read the judgment of this United States Court, there is a saving clause which prevents any conflict, because although Imperial Chemical Industries have been ordered to do certain acts by the

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91. See British Nylon Spinners v. Imperial Chemical Industries Ltd., [1955] Ch. 37, at p. 49, quoting United States v. Imperial Chemical Industries Ltd., Civil No. 24-13, S.D.N.Y., July 30, 1952 [final judgment], par. 3, in which Ryan J. stated: 'No provision of this judgment shall operate against I.C.I. for action taken in compliance with any law of the United States Government or of any foreign government or instrumentality thereof, to which I.C.I. is at the time being subject and concerning matters over which, under the law of the United States, such foreign government or instrumentality thereof has jurisdiction.'

92. [1953] 1 Ch. 19 (C.A.).

93. Ibid., at p. 28.

> United States court, nevertheless there is a provision which says that nothing in the Judgment shall operate against the Company for action taken in complying with the law of any foreign government or instrumentality thereof to which the Company is for the time being subject. With that saving clause, I hope there is no conflict between the orders.

The use of such a clause in I.C.I. followed a precedent set in the decree addressed to the Dutch company of Philips in the Incandescent Lamp Case.[94] Upon the Dutch company being enjoined from further violation of the United States antitrust laws in the remedial portion of the decree, the Netherlands Government protested against this decree, particularly the visitorial powers of the United States Government officers, and accordingly the Court inserted a saving clause,[95] the avowed intention of which was said by the Court to be 'a safeguard to its (Philips) protection from being caught between the jaws of this judgment and the operation of laws in foreign countries where it does its business.'[96]

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94. United States v. General Electric Co., 115 F. Supp. 835 (D.N.J. 1953).

95. The Court stated: 'Philips shall not be in contempt of this judgment for doing anything outside of the United States which is required or for not doing anything outside of the United States which is unlawful under the laws of the government...in which Philips or any other subsidiaries may be incorporated...or... may be doing business.' -- Ibid., at p. 878.

96. Ibid.

Whilst saving clauses perform an essentially amelioratory function in preventing the embarrassment of an actual collision with conflicting sovereignties, they would appear to express clear acceptance by the United States courts that an antitrust decree cannot validly prevent a defendant from complying with foreign law, nor can it compel him to violate it. Indeed, except in the area of interlocutory procedural orders, the problem of a decree which absolutely commands disregard of foreign law, as opposed to foreign obligations, has not arisen, due to the effect of the saving clauses. Moreover, it is equally apparent from the I.C.I. Case and the resultant attitude of the British Court of Appeal in Nylon Spinners that the American Courts cannot issue a decree which will affect the rights of third parties not subject to its jurisdiction if those rights will be upheld by a foreign court; such a decree is unenforceable and therefore void, since one of the basic tenets in the formulation of a decree is that a court of equity cannot order what it cannot enforce.[97]

Comity and Judicial Restraint.

It is clear that in the whole field of the extra territorial application of the antitrust laws the United States Courts have been very aware of the difficult problem

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97. See Young, Extraterritorial Power of the Courts Under the Antitrust Laws, 39 U. of Detroit L.J. 240, at p. 246 et seq. (1961).

of comity with foreign countries and the maintenance of good international relations. The 1955 Attorney-General's Report stressed that on the assumption of jurisdiction over extraterritorial activities, the Courts should utilize restraint in exercising that jurisdiction; the Report cited with approval the language of the General Electric Case re the use of 'safeguards' in this connection.[98] The post-1955 cases demonstrate the exercise of such restraint because of the laws, orders or representations of foreign governments -- the Swiss Watchmakers Case[99] provides a classic example in this instance.

Moreover, the American enforcement authorities have also been willing to recognize the charge of intrusion upon foreign sovereigns and foreign laws, and the international complications thus arising. As a practical matter, the Department of Justice, the main enforcement agency of the antitrust laws, is sensitive to the issue of foreign commerce and foreign relations, and works closely with the Department of State and other government departments to develop solutions in antitrust cases possessing foreign policy implications.[100] An interesting example

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98. 1955 Att.-Gen.'s Report, at p. 76.

99. Supra, p. 138.

100. As, for example, in the Swiss Watchmakers Case, ibid. See also comments of Hansen, The Enforcement of the United States Antitrust Laws by the Department of Justice to Protect Freedom of United States Foreign Trade, 11 A.B.A. Section of Antitrust Law 75, at p. 76 (1957).

of this type of administrative restraint is that of the Holophane Case.[101] In that case agreements were entered into between an American company and foreign companies over which the court had no personal jurisdiction. Finding the agreements constituted an illegal division of world territories, the Court enjoined their enforcement and directed the American defendant company to take steps to develop and promote exports; in other words, the decree entered by the Court affirmatively required the defendants to engage in competitive activity abroad.[102]

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101. United States v. Holophane, Inc., 119 F. Supp. 114 (S.D. Ohio 1954), as supplemented by 1954 Trade Cas. par. 67,679 (S.D. Ohio 1954); affirmed per curiam, 352 U.S. 903 (1956).

102. Note that when issuing injunctions relating to activities abroad, American courts had in the past confined their decrees merely to the restraining of activity and had tended to avoid the ordering of positive acts. See, for example, United States v. Timken Roller Bearing Co., 83 F. Supp. 284 (N.D.Ohio 1949); modified on appeal, 341 U.S. 593 (1951); United States v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945); affirmed, 332 U.S. 319 (1947). A Note on the Extraterritorial Application of the Antitrust Laws, 69 Harvard L.R. 1452 (1956), comments, at pp. 1460-61, that if there is a distinction between affirmative and negative orders, it does not appear to lie in the greater potentiality of conflict with foreign law, since that law may be as likely to require the performance of an act prohibited by an American Court as to prevent the performance of a required act. However, there would appear to be a valid distinction existing within the category of affirmative acts, based on practical limits inherent in the scope of an equity decree -- for example, difficulties of supervision that the terms of the decree are performed. As a consequence, the particular problem raised by the Holophane decree, in ordering the defendant to use reasonable efforts to promote the sale and distribution of its products in foreign markets, 'would seem to be the application of these practical limits, without regard to a presumption that a greater interference

The defendant contended on appeal before the Supreme Court, that the decree violated international law because it required the company to breach valid contracts between the defendant and the British and French companies involved not to compete in England and France, respectively. The Supreme Court unanimously upheld the finding of illegality but affirmed the order directing development of exports by an equally divided note.[103] As a result, there was no opinion to provide a guide to the Court's view concerning the limits of extraterritorial jurisdiction.

However, in the Oral Argument,[104] the Department of Justice recognized, even though late in the case, the conflict with foreign law. Subsequently moreover, the Solicitor-General for the United States in a letter to the Clerk of the Supreme Court,[105] stated that should a foreign

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with foreign law will necessarily result from an affirmative decree' -- Ibid., at p. 1461.

103. On the affirmation order to compete abroad the Court split four to four. It has been suggested that this reluctance to take any definitive position may be due to the experience of the I.C.I. aftermath -- see Kronstein, Miller, Dommer, Major American Antitrust Laws, c. 12, p. 392 (1965). For further comment on this case, see Oliver, Extraterritorial Application of United States Legislation Against Restrictive or Unfair Trade Practices, 51 A.J.I.L. 380 (1957); Barnard, Extraterritoriality and Antitrust Law in the United States, I.C.L.Q. Supplementary Publication No. 6, at p. 109 (1963).

104. Report of Oral Argument, 25 U.S.L.W. 3141 (Nov. 5, 1956).

105. Letter from the Solicitor-General to the Clerk of

court prohibit a breach of the aforesaid contracts, Holophane would not be required to comply with the trial court's Order, which was mandatory on its face, since the 'reasonable efforts' to export which the defendant had been ordered to undertake included 'only such acts as do not affirmatively violate a foreign statute, regulation or ordinance, or the valid judgment of a competent foreign court.'[106] By interpretation therefore, the administration withheld its hand and did not demand acts which threatened the American company abroad with damage claims and other suits.

International Lawyers' Reaction to United States Jurisdiction in These Areas.

Whilst considerations of comity and harmonious international relations are clearly factors which have been and are influential in the actions of the United States Courts and enforcement authorities, the majority of international law commentators hold that there is no basis under international law for a state to compel conduct abroad by aliens who have been found to have violated a state's restrictive practices laws.

Riedweg, whose Report to the Fifty First Conference

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the Supreme Court of the United States, Nov. 8, 1956 -- quoted in Antitrust Developments 1955-1968, Supplement to Report of the Attorney-General's National Committee to Study the Antitrust Laws, 1955, at p. 53 (1968).

106. Ibid.

of the International Law Association crystallizes the views of many such academics, points out that the basis alleged for extraterritorial application of restrictive trade legislation is the existence of 'effects' upon the trade or commerce of a state.[107] It is obvious that such effects do not therefore exist as to future conduct over which jurisdiction is asserted. The same reasoning is true, he submits, even in the case of orders prohibiting conduct found to produce such effects in the past, and it is certainly true as to orders prohibiting, or requiring conduct deemed 'likely' to prevent, the causing of harmful effects. The United States Courts in practice are therefore forbidding action abroad which is in itself entirely legal, because the Court fears that from such action certain effects may flow which under the law of the United States may be illegal. In such cases, where the only jurisdictional nexus with the enforcing state is not present, what can be the justification for asserting jurisdiction to issue such orders ?[108]

He comments that there are many situations in international law where a state will have a claim against another state for acts of the latter's nationals without

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107. Riedweg, The Extraterritorial Application of Restrictive Trade Legislation -- Jurisdiction and International Law, 51st Conference of the I.L.A., Tokyo 1964, at p. 408.

108. Ibid., at p. 409.

having jurisdiction to punish the offenders -- as, for example, when one state has failed to prosecute its national for murdering an alien within its territory. International law in such cases provides a procedure whereby the wronged state may submit a claim before the International Court of Justice -- but this does not give the injured state jurisdiction to redress the wrong in its own courts. Whilst in certain situations a state is not required to wait for its remedy at international law, for example in the cases of piracy and self-defence, in most situations, including those of restrictive trade practices, a state must seek its remedy against the offending state and may not punish the alien in its own courts.[109]

Moreover, it would appear that, in exercising extra-territorial jurisdiction, as opposed to following recognized international law procedures, the question may arise whether there may possibly be a problem of denial of justice or violation of the minimum standard of treatment of aliens on the part of the United States, when that country, under its laws, purports to compel an alien present before its courts to act or refrain from acting outside the United States in circumstances where obedience to the American command will subject him to civil or penal liability under the laws of the country of his nationality, or of another country having a basis of jurisdiction which

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109. Supra, fn. 107, at p. 409.

international law recognizes. The fact that there have been no cases of this type in the international sphere is perhaps due to the fact that awareness of this problem on the part of the United States authorities, in conjunction perhaps with more politically-orientated arguments, has resulted in the insertion of saving clauses in the relevant decrees, and, in certain instances such as Swiss Watchmakers,[110] to the modification of final judgments.

It appears axiomatic that there is no valid international legal basis for a state to compel conduct abroad by aliens found guilty of violating the state's restrictive practices laws; *a fortiori*, it is difficult to find any basis under international law for the issuance of orders compelling the production of documents from abroad. Whilst the necessity for balancing the national interests of the two sovereign states involved in any such situation has evidently become a salient consideration for the American courts,[111] and in itself represents a considerable step forward in the maintenance of international harmony, the assumption of jurisdiction over such documents in advance of a finding of effect upon commerce raises the greatest doubts amongst non-Americans as to the validity of such orders. To quote Professor Seidl-Hohenveldern

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110. *Supra*, pp. 141-43.

111. *Supra*, pp. 126-28.

on the subject:[112]

> Of enormous dubiety seems to me the possibility...of compelling an enterprise, on which in some way or another a hold can be obtained within the national territory, to produce all its records, including those located abroad, in the hope that from those records it will be possible to prove an offence against the antitrust laws.

It may be concluded therefore, from the many protests against the territorial reach of the United States law and court orders, and the refusal of other states to apply their own diverse antitrust regulations in the same manner, that no one state has a right to exercise jurisdiction in this way. It is also apparent that no consensus has yet been reached amongst states as to the right of anyone to apply its antitrust laws to the past or future activities abroad of the nationals of other states; although the absence of international adjudications on this issue renders it difficult to make definitive statements, nevertheless, the contemporary practice of states, which is per se a recognized source of international law,[113] is an additional factor which clearly demonstrates the lack of jurisdictional competence on the part of the United States.

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112. Seidl-Hohenveldern, Thoughts on German International Cartel Law, quoted by Riedweg, supra, fn. 107, at p. 407.

113. Statute of the International Court of Justice, Article 38(1).

Perhaps the most apposite conclusion on the present aspect of this study is to be found, ironically, in a passage from one of the few United States cases which illustrated caution in the exercise of jurisdiction to compel conduct abroad. In _Vanity Fair Mills Inc. v. T. Eaton Co. Ltd._,[114] where the United States Court refused to entertain jurisdiction of an action against a Canadian company which acted under a Canadian trademark, it was categorically stated:[115]

> If international trade and commerce is to expand and if nations are to live as neighbours, it is necessary that nations observe the first principle of good neighbourly relations, which is: 'Do not try to tell your neighbour how to run affairs in his own household.'

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114. 133 F. Supp. 522 (S.D.N.Y. 1955); affirmed, with modification, 234 F. 2d 633; certiorari denied, 352 U.S. 871, 77 Sup. Ct. 96 (1956). For information on this case, see Chapter I, _supra_, at p. 30; Chapter II, _supra_, fn. 23.

115. 133 F. Supp. 522, at pp. 528-29 (S.D.N.Y. 1955).

CHAPTER IV

EXTRATERRITORIALITY IN PRACTICE -- IMPLICATIONS FOR CANADA AND CANADIAN INTERESTS ARISING FROM UNITED STATES' EXTRATERRITORIAL JURISDICTION.

I. EXTRATERRITORIALITY AND THE EXTRATERRITORIALITY MECHANISMS.

Perhaps no two sovereign states are so closely interlinked, in all senses of the word, as the United States and Canada, yet the 'first principle of neighbourly relations', so strikingly affirmed in Vanity Fair,[1] has been conspicuously absent in certain important aspects of Canadian-American relations.

The problem of the extraterritoriality of United States laws and regulations has been recently recognized by the Watkins Task Force Report on the Structure of Canadian Industry[2] to be one of six major issues[3] facing

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1. Vanity Fair Mills Inc. v. T. Eaton Co. Ltd., 133 F. Supp. 522, at pp. 528-29 (S.D.N.Y. 1955).

2. Foreign Ownership and the Structure of Canadian Industry, Report of the Task Force on the Structure of Canadian Industry (Chairman, M. H. Watkins), Privy Council Office, January 1968. [Hereafter referred to as the Watkins Report] .

3. In addition to extraterritoriality, the other issues delimited are: the benefits and cost of the multinational corporation; the availability of information about corporations; concentration of market power and restrictive trade practices by firms; the performance and efficiency of firms; Canadian participation (i.e. in the benefits of foreign direct investment and in the decision-making of multi-national corporations) -- Watkins Report at p. 355 et seq.

Canada and its policy-makers as a result of foreign ownership and control of Canadian economic activity -- in the words of the Report 'the most serious cost to Canada of foreign ownership and control results from the tendency of the United States Government to regard American-owned subsidiaries as subject to American law and policy with respect to American laws on freedom to export, United States antitrust law and policy and United States balance of payments policy'.[4] It may thus be observed that the extraterritorial application of American antitrust law is but one facet of the wider overall problem of extraterritoriality which is facing Canada at the present-day.

It is important at the outset however, in referring to extraterritoriality, to draw a substantive distinction between the methods in which extraterritoriality is exercised. The Watkins Report stresses the indirect or 'hidden' manner in which the direct investment subsidiary, incorporated and resident in Canada but owned and controlled by American shareholders, is used as a convenient vehicle for the transmission into Canada of American laws and regulations, and thus becomes, in effect, an extraterritorial extension of American foreign policy.[5] This operates via the euphemistically-termed

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4. Supra, fn. 3, at p. 360.

5. Ibid., at p. 310. The Report continues: 'While this might conceivably run both ways, with the host country

system of 'voluntary compliance';[6] that is, informal directives sent by the American Government to the parent American companies, who in their turn relay relevant policy directives to their subsidiaries in Canada. The position of the latter is uncomfortable; whilst expected to comply with the standards of good corporate behaviour laid down by the host country,[6a] it finds itself confronted in many instances by divergent constraints emanating from south of the border -- 'Confronted with two peaks of

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subjecting the parent of the subsidiary to its laws rather than just the subsidiary, both laws of property and the tendency for host countries to be smaller than countries of origin, in practice make the channel run one way, from the country of origin to the host country.' -- Ibid.

6. Supra, fn. 3, at p. 313. 'These informal policy directives do not threaten Canadian legal sovereignty, but, to the extent subsidiaries alter their behaviour to conform with American objectives rather than Canadian objectives, Canada's political independence is threatened.' -- Ibid.

6a. At the end of March, 1966, the Government of Canada issued to subsidiary companies in Canada a set of guiding principles indicating what was expected of them in terms of good corporate practice. The timing of the guidelines, which were issued to larger and medium-size subsidiaries, was related to the application of mandatory guidelines to Canada by the United States authorities. The long-term purpose was to make the firms aware in a general way of desirable patterns of performance, as seen by the Canadian Government, in the hope that they would be built into their operations as conditions warranted. At the same time, the Canadian Government began to collect data from these firms on a continuing and confidential basis on some aspects of their operations. For a delimitation of these guiding principles, and comment thereon, see Safarian, The Performance of Foreign-Owned Firms In Canada, c. 8, pp. 98-101 (Canadian-American Committee 1969).

sovereignty, it is likely to defer to the higher peak on which its foreign owners reside.'[7]

Alternatively, the intrusion of American laws and policies is more manifestly achieved in United States antitrust proceedings. As has been previously indicated,[8] cases subsequent to American Banana[9] have made it clear that -- *vis-à-vis* substantive law -- activities abroad which are designed to have, and do actually have, a substantial effect upon United States commerce with foreign nations are, in American eyes, within the jurisdiction of the American courts.[10] At the very least, this is the situation if such activities are engaged in by United States nationals or are initiated or carried out in the United States;[11] moreover, from the procedural aspect, an American parent may be held liable on the basis of activities abroad on the part of foreign affiliates and subsidiaries within its control.[11a] Consequently,

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7. *Supra*, fn. 6a, at p. 312. 8. *Supra*, Chapter I.

9. *American Banana Company* v. *United Fruit Company*, 213 U.S. 347 (1909).

10. For a detailed analysis of this concept, see *supra*, Chapter I, at pp. 18-26.

11. It is not entirely clear, bearing in mind the particular fact situation in the *Alcoa Case*, whether or not Judge Hand's opinion related to the activities of non-nationals abroad. -- See *supra*, Chapter I, at pp. 24-25.

11a. Thus, the parent may be sued for the conduct of its foreign affiliate if it did or could have directed the affairs of the subsidiary. It should be noted that the

sanctions embodied in a United States antitrust decree are passed on by the parent to its Canadian subsidiary, named in the original suit not as a co-defendant but as a co-conspirator,[12] and in this manner jurisdiction is established over and judgment is cast upon commercial activities taking place within Canada.

Thus, it may be seen that United States foreign investment, in the form of the directly-owned Canadian subsidiary of a United States parent, again provides the environment in which extraterritoriality may actively operate. To crystallize the distinction sought to be established, both the 'overt' and the 'hidden' aspects of extraterritoriality possess a common denominator in the United States investment in Canada, with what may be termed the 'extraterritoriality mechanism' as the variable factor.

Whilst the hidden aspect of extraterritoriality is extremely important, the purview of this paper is to encompass the de jure as opposed to the de facto aspects of extraterritoriality in the antitrust field. Thus, it is the effect of the American legislation as interpreted by the American courts which is the subject under discussion, and not the effect of the informal United States Government directives to parent companies (although paradoxically this latter factor, by its very nature, in all probability

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legal form of separate incorporation has not been an effective bar to accountability under the antitrust laws.

12. For comment, see supra, Chapter III, fn. 13.

poses a greater threat to Canadian sovereignty and the Canadian economy as a whole than the well-publicized decrees of the United States courts.) Accordingly, this Chapter will examine both the political and the economic implications for Canada and Canadian interests arising from selected instances in which the Sherman Act has been judicially applied to Canadian commercial activities, with the result that Canadian interests and activities have been crucially affected and considerable Canadian resentment thereby provoked.

II THE INVOLVEMENT OF CANADIAN INDUSTRY.

Perhaps the two best-known instances in which United States antitrust philosophy has been forced upon Canada involve the break-up of Canadian Industries Ltd., as a direct result of the decree issued in the I.C.I. Case, and the dissolution of the Canadian Radio Patents Pool, again as a result of an United States antitrust suit.

The Dismemberment of Canadian Industries Ltd.

The facts of the I.C.I. Case,[13] and its further ramifications in Nylon Spinners,[14] have been examined in the previous chapter. The case was typical of the 'classic' type of complaint against a world-wide

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13. United States v. Imperial Chemical Industries Ltd., 100 F. Supp. 504 (S.D.N.Y. 1952); opinion on remedies, 105 F. Supp. 215 (S.D.N.Y. 1952); final judgment, Civil No. 24-13 (S.D.N.Y. July 30, 1952).

14. British Nylon Spinners Ltd. v. Imperial Chemical Industries Ltd., [1953] 1 Ch. 19 (C.A.); [1955] 1 Ch. 37.

international cartel which effectively divided world markets, the agreements in question keeping I.C.I. out of the United States market and preventing du Pont from invading foreign markets. However, in many countries the collaboration between the two huge industrial concerns took the form of joint enterprises rather than the exclusive allocation of the relevant market. This situation prevailed in Canada, for one of Canada's largest manufacturing companies, Canadian Industries Limited, was jointly owned by du Pont and I.C.I.[15]

The Court found that this joint ownership was part of a global understanding or conspiracy not to compete anywhere in the world, and thus, *inter alia*, the District Court in New York ordered that the joint ownership of Canadian Industries Limited should be dissolved,[16] du Pont and I.C.I. in this manner being released from any inhibition upon the competitive cultivation of the Canadian market.

This case, whilst not provoking wide-spread popular, or indeed any official protest at the time, did provoke rumblings of outrage in certain legal and financial

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15. I.C.I. and du Pont each held approximately 42% of the stock of the Canadian company, while the balance of 16% was held by Canadians; the management of the company was mainly Canadian.

16. 105 F. Supp. 215, at pp. 236-40 (S.D.N.Y. 1952).

quarters. Judge Ryan's order compelling the dismemberment of a Canadian company with Canadian shareholders as an alternative to divestiture of stock in the Canadian company by one defendant company or the other, was described by a leading Canadian newspaper as 'sheer effrontery', 'American judicial arrogance', 'incredible' and 'irresponsible'.[17] These objections did not appear to be directed toward the actual economic impact of the decision (an aspect which will, however, be considered at a later stage in this chapter) but to the fact that foreign law and its sanctions had intruded into what was considered, in Canada at least, to be primarily a domestic matter.

The Canadian Radio Patents Case.

Particularly trenchant criticism, not only from the Canadian press but this time also from the Canadian Government, followed the institution of proceedings by the United States in the Radio Patents Pool Case, -- or, as it is more correctly known, United States of America v. General Electric Company, Westinghouse Electric Corporation, N.V. Philips Gloeilampenfabrieken.[18] Furthermore, unlike the situation in the I.C.I. Case, the Radio and T.V.

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17. The Globe and Mail, Toronto, August 20, 1952, p. 6, col. 1.

18. Civil Complaint filed November 24, 1958, United States District Court, Southern District of New York. For excellent academic comment on this case, see Feltham, Antitrust Law Symposium, 1 U.B.C.L.R. 340 (1959-63); Brewster, Law and United States Business in Canada, c. 3, pp. 17-19 (Canadian-American Committee 1960).

Patents Complaint was directed at arrangements to be carried out by commercial conduct taking place entirely within Canada.

The Complaint alleged that the three defendants, two American corporations and a Dutch company, Philips, operating through Canadian subsidiaries, among which were Canadian General Electric Company Limited and Canadian Westinghouse Company Limited, engaged with other co-conspirators in an unlawful combination in restraint of foreign trade and commerce between the United States and Canada in radio and T.V. sets, the restraint allegedly being accomplished through the Canadian Patent Pool, Canadian Radio Patents Limited, controlled by the defendants' Canadian subsidiaries.

The basis of the Patent Pool, hereafter referred to as C.R.P.L., was a provision in the Canadian Patent Act[19] which made it an abuse of a patent not to provide for proper working of the patent in Canada.[20] C.R.P.L. always

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19. Patent Act, R.S.C. 1952, c. 203.

20. Ibid., s. 67. In the circumstances of the Radio Patents Case, the patent holders enjoyed the usual protection of rights in industrial property under Canadian law. It may be noted that sections 66-73 of the Act deal with the question of abuse of exclusive rights granted by patents, providing against the following abuses:
(a) Failure to make or work the patented invention;
(b) Importation to the detriment of home manufacture;
(c) Failure to meet the demand to an adequate extent and on reasonable terms; (d) Prejudicing, contrary to the public interest, the country's trade or industry, or that of particular concerns by refusing reasonable licences to others; (e) Attaching certain conditions to the

licensed anyone prepared to manufacture in Canada but refused to license for import where the Canadian market was well served by Canadian manufacturers. From the American viewpoint therefore, the offence of the defendants was to permit their subsidiaries to participate in such a scheme, thus not only restraining competition amongst themselves, but also successfully closing the Canadian market to competition by other competitors, and as a result restraining the export trade of the United States.[21] Correspondingly, the principal interest sought to be asserted by the complaint was the right of independent United States companies who did not have plants in Canada to be able to sell to Canadian customers.[22]

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acquisition, use or working of the patented article or process; (f) Using a patent for a process to prejudice the manufacture, use or sale of materials used in that process. For information on the operation of these sections, see Fox, The Canadian Law and Practice relating to Letters Patent for Inventions, c. 14, p. 540 et seq. (1969); Norman, The Canadian Patent Act, p. 142 et seq. (1960).

21. Attorney-General Robert F. Kennedy stated that as an apparent result of this arrangement, sales of sets manufactured in the United States amounted to only one per cent of the Canadian market in 1956 -- United States Department of Justice Press Release, Friday, August 3, 1962.

22. In other words, the problem centred around the fact that the major United States companies were unwilling to establish manufacturing facilities in Canada and wanted to import. It is interesting to note that the opinion of a senior executive of a Canadian company intimately concerned with this case is to the effect that patent pools have philosophically had their day, even though they do not appear to offend Canadian law. However, he maintains that in the early days of radio it is difficult to see how things could have been arranged to avoid a rash of

> Directing or causing or entering into any agreement with a foreign subsidiary of [Philips/Westinghouse/General Electric] to take, or actively consenting to such subsidiary taking, any action to restrict or prevent any manufacturer in the United States from exporting from the United States into Canada.

It may be observed that the consent decree _prima facie_ ordered the defendant parent corporations to exercise _de facto_ economic power to cause their Canadian subsidiaries to withdraw from the patent pool. Thus, United States law was extended to control activities carried on under the protection of Canadian patent law.

The case provoked enormous journalistic comment and protest. Private Canadian 'protectionism' was asserted to be a matter of Canadian policy to be governed by Canadian law. Furthermore, the instrument of the restraint was the Canadian patents -- a privilege granted by Canadian law. Both commercial and patent policy in the radio and T.V. industry were at the time the active concern of Canadian authorities. Basic patent policy, including the scope and limits of cross-licensing privileges, was a subject of a pending study by the Royal Commission.[25] Moreover, the actual conduct of C.R.P.L. had been and

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25. For the findings of this Commission with respect to Canadian Radio Patents Limited, see Royal Commission on Patents, Copyright and Industrial Designs, Report on Patents of Invention, at pp. 90-93(Queen's Printer, Ottawa, 1960).

continued to be the subject-matter of investigation, negotiation and modification at the behest of the Canadian antitrust authorities under the Combines Investigation Act,[26] and as a result of such attention had periodically altered its policies in the direction of lower royalties and a more liberal licensing programme. Notwithstanding this surveillance however, C.R.P.L. had never been charged with an offence against the Canadian anti-combines legislation. These factors considerably aggravated Canadian displeasure, although in the words of Professor Brewster:[27]

> Resentment was deep and widespread and would have festered even if there had been no patents investigation and no Canadian antitrust apparatus. The essence of the objection was the feeling that the suit constituted an intrusion on legal, political and economic sovereignty.

The Canadian Government was also particularly vocal in adversely commenting on these proceedings, and this instance of executive criticism is perhaps unique in the antitrust sphere in that it resulted in a specific bilateral agreement entered into by the United States which was expressly aimed at ameliorating tension between the two countries.

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26. Combines Investigation Act, R.S.C. 1952, c. 314.

27. Brewster, _supra_, fn. 18, at p. 25.

III AMERICAN-CANADIAN POLITICAL AGREEMENTS IN THE ANTITRUST SPHERE.

The Fulton-Rogers Agreement.

At the time the C.R.P.L. action was pending, official exchanges regarding the matter took place between the two governments, first in Ottawa and later in Washington. Since there was no disposition on the part of the United States to modify or withdraw the pending action, the Hon. D. Fulton, Canadian Minister of Justice at that time, protested against the extraterritorial reach of United States law in a speech before the New York State Bar Association.[28] He delimited three basic Canadian objections to the pending action -- firstly, that it was concerned not so much with strict compliance with United States laws in the United States as with actions in Canada of Canadian companies, such actions being in accordance with Canadian laws and commercial policy; secondly, that compliance with the decree sought might bring these Canadian companies into conflict with Canadian

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28. Speech of the Minister of Justice and Attorney-General of Canada to the New York State Bar Association on January 28, 1959 -- cited in Haight, Extracts of Published Material on Official Protests, Directives, Prohibitions, Comments, etc., Report of the 51st Conference of the I.L.A., Tokyo 1964, at pp. 573-74. For academic comment on the background to the Fulton-Rogers agreement, see Brewster, <u>supra</u>, fn. 18, at p. 18; McWhinney, Canada-United States Commercial Relations and International Law, Canada-United States Treaty Relations, c. 8, p. 142. (Deener Ed., 1963).

law and policy; and thirdly, that the only way in which effect could be given to such a decree would be if American directors of United States companies gave instructions to directors of Canadian companies to do something in Canada which was not in accord with Canadian business or commercial policy but was dictated by American policy.

He emphasized that cases such as that involving C.R.P.L. illustrated 'a tendency, apparent in the field of foreign affairs as well as antitrust, for United States authorities to regard foreign subsidiaries of United States parent companies merely as projections of United States trade and commerce and thereby subject to United States policies in priority to the laws, customs and interests of the countries in which subsidiaries are incorporated and carry on business.'[29]

Immediately following this speech, Mr. Fulton conferred in Washington with the then United States Attorney-General, Mr. William Rogers and senior members of the Antitrust Division of the Department of Justice. At this meeting, which took place on January 29, 1959, a *modus vivendi* was sought which would take adequate account of Canadian interests prior to the filing of suits in the future. Mr. Fulton aired the concern of the Canadian Government in connection with the case, appealed for

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29. *Supra*, fn. 28.

'restraint' by the United States Government in seeking from United States courts measures that interfered with matters of Canadian commerce within Canada, and that in such cases as Radio Patents the United States should raise the matter with the Canadian Government and not seek to alter the situation in Canada by means of 'unilateral action in United States courts.'[30]

The United States Attorney-General denied any United States intent to infringe Canadian sovereignty and also denied, as a question of fact in this particular case, that any threat to Canadian sovereignty was involved -- the position was not that United States laws should supersede the laws of any other country but only that all persons in any way subject to United States laws, including the anti-trust laws, should live and act in accordance therewith.

Mr. Rogers, in adopting this line of argument, appeared to ignore the basic fact that enforcement of United States laws in the manner decreed in Radio Patents in practice produced a quite definite infringement of Canadian sovereignty.

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30. Mr. Fulton suggested that any other United States course could only be based on the 'unacceptable proposition that foreign subsidiaries of United States parent companies are merely projections of United States trade and commerce and subject to United States policy in priority to the laws and commercial interests of the countries in which such subsidiaries are incorporated and carry on business.' -- Cited in McWhinney, supra, fn. 28, at p. 143.

Nevertheless, although there was revealed a wide divergence between the two views as to what amounted to an infringement of sovereignty and as to the restraint which one country should exercise in seeking decrees from its own courts when those decrees might have effects within another country (a divergence which Mr. Fulton stressed to the Canadian House of Commons on his return to Ottawa)[31] the product of the joint meeting was a formula known then as the '<u>Fulton-Rogers Agreement</u>', or, as it has been more recently termed, '<u>Antitrust Notification and Consultation Procedure</u>.'[32]

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31. Mr. Fulton stated: 'I believe that the arrival at an understanding on prior consultation is a real accomplishment. At the same time I do not wish to over-emphasize the extent or effect of this understanding regarding consultation. It should be realized that there was revealed, in the course of these discussions, a wide divergence between our two views as to what amounts to an infringement of sovereignty and as to the restraint which one country should exercise in seeking decrees from its own courts when those decrees may have effects within another country. Until there is a satisfactory reconciliation of views on these points there can be no guarantee that causes for complaint will not arise again.' -- Cited in Haight, <u>supra</u>, fn. 28, at pp. 574-75.

32. During hearings before the Sub-Committee on Anti-trust and Monopoly of the Senate Committee on the Judiciary, the Assistant Secretary of State for Economic Affairs stated: 'The United States and Canada have an informal arrangement on antitrust matters, called 'Antitrust Notification and Consultation Procedure', which had its origin in 1959 in discussions between then Attorney-General Rogers and then Minister of Justice Fulton...The arrangement is termed a Notification and Consultation Procedure for the reason that the circumstances or time schedule may permit not consultation but only notification prior to the institution of an antitrust action. The normal course, however, is that each country notifies the

Whilst this essentially informal arrangement did not bear upon the pending litigation, it did provide that, in any similar situations in the future, discussions should be held by the two Governments 'at the appropriate stage' when it became apparent that interests in one of the two countries were likely to be affected by the enforcement of the antitrust laws of the other. Although the United States authorities could not commit themselves to defer to Canadian objections, and although the Canadians could not promise to be satisfied simply because they were consulted, the procedure promised to prevent a case from being pushed to the point of no-return before adequate consideration was given to possible Canadian

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other prior to the institution of an antitrust suit which involves the interests of the nationals of the other country, and permits time for consultation, concerning the contemplated suit. While not required by the understanding, notification is given during the investigative phase whenever possible. In all cases each Government keeps the other informed of significant developments in negotiations with the parties and in litigation...A prerequisite of this Procedure is that the communications between the two Governments will not be disclosed to any of the companies involved. Moreover, even the fact that there are consultations on a particular case is normally not publicized.' -- Hearing on the International Aspects of Antitrust Before the Sub-Committee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 89th Congress, 2nd Session, part 1, at p. 453. (1967).

Note also that Brewster has echoed the necessity for confidentiality in such intercourse between the two Governments: 'If consultation is to work it must perforce be private and confidential, aimed at anticipating friction rather than at its post mortem protest or justification...Consultation in a goldfish bowl could only become another arena for gratuitous and unnecessary conflict.' -- Brewster, supra, fn. 18, at p. 28.

objections.[32a]

The first case in which this consultation procedure was utilized with effect was in all probability the case of United States of America v. Wilson and Geo. Meyer and Co. and Sunshine Garden Products Limited,[33] otherwise more conveniently known as the Canadian Peat Moss Case.

Here, the Antitrust Division aimed to remove restraints upon the competitive importation and distribution along the west coast of the United States of Canadian sphagnum peat moss from Vancouver. The restraints within the United States, which were alleged to have violated the Sherman Act, took the form of exclusive distributorships, requirements, contracts and re-sale price controls governing the distribution of peat moss

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32a. A useful comparison may be made between the Fulton-Rogers Agreement of 1959, and the Eisenhower-Diefenbaker Joint Statement on Export Policies of July 9, 1958. This latter agreement, once again precipitated by Canadian concern about the effects of American extra-territoriality,in this instance in the realm of export control, recognized that the export policies and laws of the two countries may not be in complete harmony and called for 'full consultation between the two governments with a view to finding through appropriate procedures satisfactory solutions to concrete problems as they arise.' Such formal consultation takes place annually on these and other matters at the ministerial level. -- For additional detail, including a comment on the limitations of this procedure from the Canadian viewpoint, see the Watkins Report, supra, fn. 2, at pp. 320-321.

33. Civil Complaint filed October 21, 1959, in the United States District Court for the Northern District of California, Southern Division.

imported from Canadian Peat Moss Limited, (C.P.M.L.), the joint sales agency of all the major peat moss producers in Canada. The only defendants named were the United States distributors, a Nevada and a California corporation respectively, whilst the joint sales agency and its parents, the Canadian producers, were named as co-conspirators.

American contention about the commercial conduct in question centred around the system of distribution within the United States, whereby the defendants possessed an exclusive distributorship for the products of the members of C.P.M.L., and the Complaint sought injunctions which would affect the arrangements United States firms could make with their Canadian suppliers, and which would restrain the United States defendants from further participation in such monopolistic activities within the United States.

In the event, a consent decree was entered against the defendants which achieved the desired ends.[34]

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34. United States v. Wilson and Geo. Meyer and Co., Civil No. 38606 (N.D. California, May 4, 1961).

The consent decree enjoined the defendant American distributors from entering into agreements to act as distributors for common sales agencies or as exclusive distributors for more than one producer. Also prohibited were price-fixing, allocation of territories, or entering into any exclusive territorial agreement restricting the geographical area in which they would sell, or entering into any requirements contract with jobbers or dealers. For more detail, see Antitrust Consent Decrees, 1906-1966, *supra*, fn. 23, Abstract 500, at pp. 1321-23.

However, the salient point in this context is that the views of the Canadian Ministry of Justice were requested prior to the filing of the complaint. After due deliberation the Canadian authorities voiced no formal objection to the complaint. However, they requested an opportunity to express their views to the American authorities when the time came to fashion a remedy.[35] Brewster has commented[36] that although Canadian interests were obviously affected, the Canadian Government's lack of formal objection to the complaint was consistent with its expressed emphasis on the territoriality principle -- as long as the conduct and the parties complained of were within the United States there was no basis for objection comparable to that afforded by the Canadian Radio Patents

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35. This request may be understood in the light of the somewhat unusual prayer for relief contained in the Complaint, which basically sought to terminate the re-sale controls within the United States and to prevent certain United States trademarks from being used to buttress the re-sale restraints. No Canadian objection could be voiced vis-à-vis these purely domestic issues; on the other hand, the United States also sought to compel each American distributor to deal with only one Canadian producer, contra acting as distributor for C.P.M.L. It could therefore be argued that such compulsory exclusivity appeared to exceed the mere correction of domestic restraints and was designed to precipitate the dissolution of C.P.M.L., the joint sales agency and a Canadian corporation operating solely within Canada. 'However, since the propriety of the relief could clearly not be judged until liability had been established, there was no occasion to raise the issue prior to litigation.' -- Brewster, supra, fn. 18, at p. 20.

36. Supra, fn. 18, at p. 19.

Case.

Thus, in contrast to the Radio Patents Case, the Peat Moss Complaint did not raise problems of jurisdiction in public international law -- its main significance was not in its ultimate outcome, but in proving the efficacy of the newly-originated consultative procedure; proceedings in the case were permitted to take their natural course, and conflicts between the United States antitrust law and Canadian sovereignty and economic interests were avoided.

The Mitchell-Basford Communiqué.

It is clear that this procedure thus provided an extremely effective liaison between the two governments in cases in which the extraterritorial enforcement of the restrictive business practices laws of the United States appeared to constitute an infringement of Canadian sovereignty. The importance of this understanding to both countries and the awareness of the political ramifications that could be involved in this sphere are indicated by a recent joint communiqué issued as the result of a meeting between United States Attorney-General John M. Mitchell and Canadian Consumer and Corporate Affairs Minister R. Basford.[37] The two Ministers discussed the possibilities for closer co-operation between Canada and

37. News Release, Canadian Department of Consumer and Corporate Affairs, Monday, November 3, 1969.

the United States in antitrust matters affecting the two countries. In addition to continuing the informal Notification and Consultation Procedure in accordance with the 1959 Fulton-Rogers Understanding, a procedure subsequently re-affirmed before a Senate Sub-Committee in 1967,[38] the two Cabinet members agreed that a 1967 Recommendation by the Organization for Economic Co-operation and Development should be actively implemented between the two countries. The Recommendation by the O.E.C.D., which includes nineteen European countries, the United States and Japan, called for co-operation on restrictive business practices affecting international trade.[39]

Mr. Mitchell and Mr. Basford stated that in their view, the procedure adopted by the O.E.C.D. 'strengthens the United States-Canadian understanding which has served to eliminate conflicts in antitrust enforcement and has

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38. Supra, fn. 32.

39. Mr. Mitchell and Mr. Basford noted that the United States-Canadian Understanding had been the fore-runner of the O.E.C.D. Recommendation, which provides for inter-governmental co-operation on a purely voluntary basis without impairment of sovereignty and in accord with each country's laws and policy, in three areas: firstly, notification of and consultation on antitrust actions; secondly, exchange of information on antitrust matters where feasible; and thirdly, co-ordination of antitrust enforcement where possible.

For additional information about the Recommendation and the establishment of the O.E.C.D. Restrictive Business Practices Committee, see Chapter V, infra, at pp. 220-25.

provided a common approach to problems affecting both countries.'[40] Whilst each country maintains the responsibility to enforce its own laws and the discussions under the aforementioned procedures do not in any way bind a country, nevertheless, 'in this time of expanding international trade, with special problems being posed by the multi-national corporation, and when most industrial countries have enacted anti-monopoly laws, international co-operation in the antitrust area is essential for carrying out antitrust policy and to avoid conflict in enforcement.'[41] Accordingly, the enforcement agencies of the two countries, each within its own jurisdiction, would, where possible, co-ordinate the enforcement of their respective laws against such restrictive business practices; moreover, to facilitate the implementation of such co-operative arrangements, more regular meetings between the enforcement agencies would take place.

Although the communiqué contains hyperbole typically to be found in any political declaration, nevertheless it appears that a genuine desire on the part of both nations exists to avoid conflicts in this field -- and to this extent at least, the widespread conviction that Canada's political independence is likely to be subject to compromise by the intrusion of United States law

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40. Supra, fn. 37.

41. Ibid.

as the result of American antitrust proceedings does not appear to be a viable proposition.

IV THE ECONOMIC REPERCUSSIONS.

In addition to the political ramifications, the extraterritorial extension of United States laws and regulations produces certain economic repercussions in the foreign country involved. In the ensuing discussion of these economic effects on Canada and Canadian companies, it should be constantly borne in mind that the effects which are being examined arise and have arisen directly as the result of the actual exercise of extraterritorial anti-trust jurisdiction by the United States Courts. Consideration will thus not be given to the economic effects engendered by the 'hidden'aspects of extraterritoriality, referred to above.[42] Neither will attention be paid to the essentially passive impact of American legislation on the day-to-day managerial operations of United States subsidiaries in Canada,[43] a factor which is in any case

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42. Supra, pp. 157-59.

43. The very existence of the United States antitrust legislation has in all probability made a considerable impact upon the conduct of American business in Canada. The ramifications of the Timken Roller Bearing Case, 341 U.S. 593 (1951), for example, in which a majority of the Supreme Court decided that a corporation may be held to have conspired with its subsidiaries or affiliates in violation of the Sherman Act, may critically affect the decision of a United States firm not to permit substantial Canadian participation in its Canadian operations. Whilst various devices exist for avoiding the particular problem presented by the Timken Case -- for example, the establishment of foreign branch operations only -- it is

substantially different from the positive concept of extraterritoriality as dealt with in this paper. In any event, it seems extremely unlikely that this impact on the formulation of business behaviour resulting from the mere presence of such laws could be measured, any more than it would be possible accurately to document the economic effects of the indirect extraterritoriality mechanism.

The Paucity of Information.

Of necessity, therefore, any examination of economic effects must be confined to known instances in which the United States Courts have interpreted American antitrust law to apply to Canadian commercial activities. However, even in this examination, it must be stressed that considerable difficulty is encountered in the compilation of any substantial data relating to economic effects suffered by either Canada or Canadian companies. Letters from senior executives of large Canadian companies which have been subject to United States antitrust proceedings indicated that economic effects on commercial activities

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clearly evident that the greater the foreign participation, and the less complete the American parent's control, the easier it may be to claim that any co-operation is a conspiracy in restraint of trade, and thus subject to anti-trust sanctions. Again, although it is not possible to generalize about the various strands comprising the investment and financial and managerial decisions of various firms, it nevertheless would appear to be a viable hypothesis that antitrust considerations indeed represent a significant element in the composition of any commercial decision, and thus in many instances do place significant limitations on the productive or export potential of Canadian operations of United States firms.

would be extremely difficult, if not impossible, to assess objectively and accurately.[44] The relevant proceedings took place, in these instances at least, more than a decade ago, and thus it seems that, even with the benefit of hindsight, it would be a thankless task to attempt to evaluate, in isolation, economic effects directly resulting from such proceedings; the functioning of a large company or combine is influenced by a large number of variable factors, the amalgam of which comprises the final decision re whether and how to engage in a complex business venture, and one of the least important of these variables may be the judgment of a United States Court.

Moreover, contemporary instances of the economic activities of a company suffering through the attentions of the United States courts are not permitted to come to the ears of any isolated researcher, however well-meaning. Two large Canadian paper companies for example, whilst expressing interest in the present facet of this paper, felt understandably constrained about offering any substantive information or to become involved in any discussion on the subject,[45] due to the fact that at the

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44. For example: 'As to your question about economic effects on commercial activities, I think this would be very difficult to measure...'; and 'It will probably be difficult to obtain specific instances of adverse economic effects on Canadian companies...' -- Personal correspondence.

45. '...We are not anxious to become involved at the present time in an academic discussion on the subject you have chosen'. -- Personal correspondence.

time of the correspondence a Grand Jury hearing was taking place in New York as the result of inquiries, instigated by the Antitrust Division of the United States Department of Justice, into alleged breaches by certain pulp and paper companies of United States antitrust laws.

Again, the Citibank Case[46] produced a certain amount of publicity in North America; one of the most important implications of the case was the probable dimunition of the bank's business activities in Germany, with consequent severe financial loss, resulting from the compliance with the United States subpoena for the production of documents in its Frankfurt branch.[47] Citibank's Vice President, William T. Loveland, who was sentenced to a term of imprisonment for contempt for his refusal to permit production of the aforementioned documents, called attention to the harmful effect that the release would

46. United States v. First National City Bank, 396 F. 2d 897 (2nd Cir. 1968). For an examination of this case, see supra, Chapter III, at pp.122-28.

47. Introduced as testimony during the trial was a message to Citibank Vice President William T. Loveland from Hans H. V. Fluegge, Citibank's resident Vice President in Frankfurt, stating that: '...the release of the Frankfurt bank records to a United States Court might have a tremendously negative impact on Citibank's business activities here. Boehringer [the German company whose documents were sought by the American authorities] will use all their influence to spread details of our action to German industry, with the result that we will lose existing business and it will be very difficult for us to solicit business from any German company.' -- Cited by Guzzardi, Report from Bonn, Fortune Magazine, August 1968, at p. 48.

have 'upon our operation all over the world...if the people in those countries were to realize that process in New York could reach into all of these countries in which we are resident.'[48]

An inquiry to the parent Bank in New York however, about the opinion expressed by Loveland and about the extent to which the judgment in this case in reality affected the Bank's foreign operations, produced a somewhat guarded response -- whilst the Bank re-affirmed their proposition that it was 'detrimental to American business if American establishments abroad are to be regarded as a means by which the process of United States agencies or courts can be given extraterritorial effect', nevertheless with respect to the aspect concerning the economic effect of the judgment 'we prefer not to comment for reasons which should be obvious to you'.[49]

Due to the apparent inaccessibility of material therefore, it is no coincidence that extensive research into a widely-varied selection of texts failed to divulge any study specifically directed at the ancillary effects of extraterritorial jurisdiction. Perhaps the most definitive statement that has appeared on this subject is contained in the 1969 Interim Report on Competition

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48. Cited by Guzzardi, <u>supra</u>, fn. 47.

49. Personal correspondence.

Policy,[50] prepared by the Economic Council of Canada, which comments that:[51]

> ...so far as economic considerations are concerned, it may be said that impacts of any significance on the Canadian economy as a result of U.S. antitrust decisions have up to now been few and far between, and there do not appear to be any strong reasons for supposing that the Fulton-Rogers procedures for advance consultation will not be adequate to head off possible unwanted impacts in the future.

Thus, on an over-all national level, it would appear that generalizations only are possible, even by such a body as the Canadian Economic Council. A more specific formulation, however, may perhaps be made in the context of a particular case study, although once again it should be stressed that any conclusions reached are tentative only and, as may be seen from the following section, are based on date which is somewhat less than precise.

Canadian Industries Limited: A Case Study.[52]

In any consideration of the economic effects of a United States antitrust prosecution on an individual Canadian company, it is tempting, after reviewing the

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50. Interim Report on Competition Policy, Economic Council of Canada, Queen's Printer, Ottawa, July 1969.

51. Ibid., at p. 177.

52. I am greatly indebted to H. J.Hemens, Q.C., Vice-President, Secretary and General Counsel, Du Pont of Canada Limited, and M. H. Pepper Esq., Assistant Secretary, Canadian Industries Limited, for their very considerable interest and assistance in the preparation of this case study.

criticism and concern expressed by the Canadian Government, press and business world over the issue of American extra-territoriality, to make the *a priori* assumption that such effects would necessarily be detrimental to the commercial activities of that company. Despite the absence of definitive statistics on this subject, such a situation would not necessarily appear to be the case.

Reference has already been made to the joint ownership by du Pont and I.C.I. of Canadian Industries Limited (C.I.L.) and the subsequent dissolution of this joint stockholding at the instance of the District Court of the Southern District of New York.[53] Although the order of the Court did not attempt to reach the conduct or internal affairs of the Canadian firm, the stark fact remained that 'the processes of a United States Court were used to effect radical surgery upon the structure of the dominant firm in one of Canada's most significant industries.'[54]

C.I.L. had originally been known as Canadian Explosives Limited, (C.X.L.), and as far back as January 1, 1920, du Pont and I.C.I. had agreed on equal ownership in the company. Under the terms of this agreement 'the policy of the two companies controlling the C.X.L. is to utilize the C.X.L. Company as a medium through which to

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53. *Supra*, pp. 161-63.

54. Brewster, *supra*, fn. 18, at p. 17.

enter any businesses in Canada...'.[55] Agreements relating to the cross-licensing of patent rights were entered into between the three companies in the years following, and in 1927 the Company name was changed to Canadian Industries Limited. Henceforth, C.I.L. was to be the Canadian outlet for the products of the two principal companies -- for example, in 1928 it was agreed that I.C.I. allow C.I.L. to take over the Canadian business of I.C.I. in heavy chemicals and fertilizers whilst du Pont would turn over its Canadian heavy chemical business.[56]

Details of further tripartite agreements, *vis-à-vis* products marketed by C.I.L. or the grant of further patent rights are not necessary -- suffice it to say that C.I.L. performed the function of sales agency for du Pont and I.C.I.; by this means, competition in Canada between the principals was averted, and as an incidental result competition in Canada from other companies was also reduced, including that of American manufacturers who exported to Canada, since C.I.L. was in a position to undercut prices if necessary. In the words of the Pleadings in the case:[57]

The operation of C.I.L. effected its

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55. Pleadings, *United States of America* v. *Imperial Chemical Industries Ltd.*, 100 F. Supp. 504, at p. 559 (S.D.N.Y. 1951).

56. Pleadings, *ibid.*, at pp. 560-61.

57. *Ibid.*, at p. 564.

> purpose; it was a division of foreign trade participated in by du Pont; it was a restraint of American trade and commerce accomplished by the concerted action of du Pont and I.C.I.

Thus, it was upon the basis of these facts that Judge Ryan, having initially entered judgment that the defendants were in violation of the provisions of the Sherman Act, subsequently invoked 'the harsh remedy of divestiture'[58] in his final decree. He stated:[59]

> Joint ownership of these various companies provides an ever present opportunity for further wrong-doing. We cannot guard against the use of most of these jointly owned companies solely by restrictive and injunctive provisions. Something more is required. These companies were organized as instrumentalities through which the defendants sought to divide world territories and thus restrain United States imports and exports. The inclination to continue this basic understanding notwithstanding judicial decree has been established. Opportunities for the fulfillment of this inclination must be removed by means designed to make the severance of these relations permanent and lasting. This cannot be accomplished by permitting the defendants to remain as partners in all these jointly-owned and jointly-operated enterprises.

It is worth pointing out that in his judgment Ryan J. commented on the contention that by directing

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58. United States v. Imperial Chemical Industries Ltd., 105 F. Supp. 215, at p. 237 (S.D.N.Y. 1952).

59. Ibid., at p. 236.

divestiture he was in fact extending the Court's jurisdiction 'beyond places over which the United States has sovereignty or has some measure of legislative control'.[60] He maintained that his direction would not involve such extraterritorial jurisdiction since the decree would not be directed to the jointly-owned companies themselves -- 'they are not parties to this suit; they have not been served with process and this Court therefore has no jurisdiction over them'.[61] Instead, the defendants, over whom jurisdiction had been validly established, would be directed to take definite action to remove restraints of trade placed upon the commerce of the United States, since 'their concerted acts have, in part, been committed here and the result of their agreement has directly affected our trade and commerce.'[62]

It would appear that the learned Judge apparently did not recognize that, whilst <u>de jure</u> the United States court did not exercise specific jurisdiction over C.I.L. since the latter was named only as one of a number of co-conspirators and not as a co-defendant, nevertheless, by exercising jurisdiction over the parent companies, jurisdiction was in fact exercised <u>de facto</u> over the Canadian company. Whilst this result was essentially an incident arising out of the proceedings against the defendants, the divestiture order was nevertheless widely regarded as an

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60. <u>Supra</u>, fn. 59, at p. 237. 61. <u>Ibid</u>. 62. <u>Ibid</u>.

undesirable extraterritorial reach of the United States court's equity jurisdiction.

The judgment of the United States court was finally rendered on July 30, 1952. That part of the judgment which most closely affected the company is quoted as follows:[63]

> Within six (6) months from the date of this judgment du Pont and I.C.I. shall present to this [United States] Court for its approval, and shall serve upon plaintiff [the United States of America] which may propose modifications thereof within sixty (60) days after the filing of each plan, plans for ending their joint interests in and control of C.I.L... Such plans may provide for
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> (1) sale of the shares of stock owned or controlled by du Pont and I.C.I., and their respective subsidiaries, to some person or persons other than a defendant or co-conspirator, and other than an affiliate of or individual in close affiliation with du Pont or I.C.I., or
>
> (2) such sale of the stock of either du Pont or I.C.I., or
>
> (3) sale of the stock of du Pont or I.C.I. to the other, or
>
> (4) segregation or physical division of the plants and properties of C.I.L...between du Pont and I.C.I. so as to create a situation in harmony with [United States] law.
>
> The plans shall provide for their

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63. United States of America v. Imperial Chemical Industries Ltd., Final Judgment, July 30, 1952, Part VIII -- The Jointly Owned Companies, par. 1. (Words in brackets supplied for clarification.).

completion within one (1) year
from the date of their approval...

It may be observed that any plan proposed under paragraphs (1), (2) or (3) of the final judgment would have involved a re-arrangement in the ownership and existing relationships within the company, whilst a plan proposed under paragraph (4) would have entailed the division of the company into two separate organizations.

In letters dated August 14 and December 18, 1952, in the Annual Report for 1952 and in the Summary of Proceedings of the Forty-Second Annual General Meeting, shareholders were informed of the judgment, and of the alternative courses of action open to I.C.I. and du Pont to end their joint interest in C.I.L.

On February 12, 1954, in an open letter from the Board of Directors to the shareholders of C.I.L., it was emphasized that I.C.I. and du Pont both desired to continue and to expand, in partnership with the minority shareholders, their participation in the chemical industry in Canada, and that the only one of the courses proposed by the Court in the relevant judgment which would satisfy this desire was the segregation or physical division of the plants and properties of C.I.L.

Accordingly, the plan for segregation was contained and submitted in a document known as the 'Compromise or

Arrangement',[64] proposed between C.I.L. and the holders of its preferred shares[65] and common shares,[66] under the aegis of Section 126 of the Companies Act of Canada;[67] the Compromise or Arrangement, which was formulated so as to disturb as little as possible the equities and interests of C.I.L. Preferred and Common Shareholders,[68] was duly approved by the shareholders, and segregation became reality in 1954.[69]

In this manner, a jointly-owned Canadian company was transformed into two distinct competitive entities, known henceforth as Canadian Industries (1954) Limited and Du Pont Company of Canada Limited. I.C.I., through its wholly-owned subsidiary I.C.I. of Canada, assumed the

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64. Dated February 12, 1954.

65. Neither I.C.I. nor du Pont directly or indirectly owned any of the preferred shares of C.I.L.

66. I.C.I. and du Pont each owned 41.8 per cent of the common stock of C.I.L., I.C.I.'s shares being held by its wholly-owned subsidiary I.C.I. of Canada Limited.

67. R.S.C. 1952, c. 53.

68. By providing in effect that the preferred shareholders and the minority common shareholders after segregation would have the same proportionate interest (with some increase) as they had at that time in C.I.L.

69. Segregation Agreement, February 12, 1954, which implemented and supplemented the Compromise or Arrangement. Note also that a Patents and Technical Information Allocation Agreement was made on February 12, 1954, again operating in conjunction with the Compromise or Arrangement.

controlling interest in C.I.L. (1954),[70] which, although maintaining the old corporate name,[71] was in fact an entirely new company, whilst Du Pont of Canada, controlled by its American parent remained in effect the continuing company of the ill-fated C.I.L.[72] Senior executives of the two companies kindly agreed to answer questions relating to the commercial consequences, if any,

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70. As the principal common shareholder, the remainder of the issued common shares being held by C.I.L.'s existing Minority Common Shareholders and all the preferred shares being held by C.I.L.'s existing Preferred Shareholders.

71. This was apparently done to retain certain taxation advantages.

72. This was the de facto result. In fact, technically the old C.I.L. corporate entity became a holding company with its name changed to Du Pont of Canada Securities Limited (Du Pont Securities), and was the only shareholder in Du Pont of Canada. In Du Pont Securities, E.I. du Pont de Nemours and Company became the principal common shareholder, the remainder of the issued common shares being held by C.I.L.'s existing Minority Common Shareholders and all the preferred shares being held by C.I.L.'s existing Preferred Shareholders. This arrangement involving Du Pont Securities and Du Pont of Canada was necessary to remove major disadvantages which otherwise would have resulted from the application of technical requirements of tax laws.

It should be noted that the plan provided for increased participation by the Preferred and Minority Common Shareholders of the old C.I.L. The Minority Common Shareholders received, without cost to them, additional common shares in C.I.L. (1954) and Du Pont Securities to the extent of one tenth of their previous shareholdings in C.I.L., and their proportionate shareholdings in C.I.L. (1954) and in Du Pont Securities were thus greater than their shareholdings in C.I.L. Moreover, the annual dividend rate on the preferred shares of C.I.L. (1954) and Du Pont Securities was increased to 7½ per cent from the 7 per cent rate on the existing C.I.L. preferred shares.

which had been suffered as the result of the segregation.[73] The executives in question stressed the lack of precise information and the purely subjective quality of their opinions; nevertheless, the views of men intimately connected with the post-segregation business activities of the two companies seemed likely to provide an accurate indicator of the general trend of effects.

As far as the continuing company, Du Pont of Canada, is concerned, it would appear that the company has benefitted in many respects from the segregation. Whilst it is 74.8 per cent owned by its American parent, E.I. du Pont de Nemours, and thus now is directly a <u>per se</u> subsidiary of the latter, and not merely part of a jointly-owned Canadian company, nevertheless it has never at any time been forced to adopt a course of action as a direct result of this majority shareholding. In the opinion of the executive interviewed, Du Pont of Canada has always had the support of its parent, and the latter has completely respected the guidelines laid down by the Canadian government <u>vis-à-vis</u> the behaviour of American subsidiaries in Canada.[74]

On a specific plane, the employee position greatly benefitted from segregation, which automatically meant a

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73. Personal interviews at the Montreal Head Offices of Du Pont of Canada Limited, and Canadian Industries Limited. See <u>supra</u>, fn. 52.

74. See <u>supra</u>, fn. 6a.

duplication of posts, particularly at managerial and executive levels. The production of new products was also stimulated -- prior to segregation there had been no real competition between the products of the respective parents of the jointly-owned company, but since 1954 this trend was substantially reversed, and there has been quite intensive competition, especially in the fields of artificial fibres and explosives.

Financially, within a short space of time the sales of Du Pont exceeded the sales of the previous joint venture (and this was similarly the case with the sales of C.I.L. (1954).). This is not to say, of course, that the sales volume of the hitherto combined C.I.L. would not have increased proportionately, but the view can certainly be propounded that no financial set-backs accrued as the result of segregation.

On a more general level (although once again evaluation is very difficult), it would seem probable that initiative was stimulated, not only on the part of Du Pont but also on the part of the new company C.I.L., with consequent beneficial growth to the Canadian economy. On the other hand, it is questionable whether segregation in fact produced a correlative benefit by engendering a more efficient utilization of Canadian resources; bearing in mind the size of the Canadian, _contra_ the United States, market and with the destruction of the C.I.L. monopoly and the number of firms now, for example, in the

artificial fibre market, it is a moot point whether the units now producing such fibres are working at their optimum capacity, or indeed whether it is possible for them to do so.[75]

Although C.I.L. (1954) was formed as the new company and thus in this instance it is not possible to categorize 'before' and 'after' positions vis-à-vis effects, the executives interviewed were of a similar opinion vis-à-vis the general benefit of segregation on the Canadian economy, especially in terms of the creation of new employment opportunities.

Contrary to what may have been envisaged therefore,

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75. If this sector of Canadian industry, which would appear to be characterized by too many plants and too short production runs in relation to the size of the market, was subject to a Canadian rationalization scheme (for example, through merger), it is interesting to ponder whether a Canadian subsidiary would be prevented by its American parent from participating, for fear of conflict with United States antitrust laws. To quote the Economic Council of Canada on the potential of such hidden extraterritoriality: 'No categorical answer is possible to this question, but it has been a practice of United States antitrust authorities not to penalize companies for actions they or their subsidiaries undertake abroad at the formal behest of host governments. Assuming the continuation of this practice, a Canadian rationalization scheme that was largely or wholly embodied in a statute or government regulation would seem to be free of United States antitrust consequences, although it would no doubt be wise to utilize the Fulton-Rogers procedures if only as a means of demonstrating to United States representatives how the scheme made economic sense in Canadian circumstances.'

-- Economic Council of Canada, Interim Report on Competition Policy, supra, fn. 50, at p. 177. For further comment, see also the Watkins Report, supra, fn. 2, at pp. 328-29.

it would seem likely that segregation produced no detrimental effects, and in fact produced some decided commercial advantages, both for Du Pont of Canada, the continuing company, and also for the new C.I.L.[76] Indeed, although conflict of economic interest in the international application of antitrust may occur -- as for example in the Peat Moss Case[77] where the economic interest of Canadian sellers and United States buyers could not have been expected to coincide -- a plausible conclusion that may be drawn from the C.I.L. outcome is that the economic interest of Canadians may also be served by prosecutions involving the operations of United States subsidiaries in Canada. This view may be reinforced by reference to two other instances of extraterritorial jurisdiction; the divorcement of the control of Alcan from the dictates of Alcoa[78] would appear to be in line with the oft-repeated Canadian desire for greater independence of Canadian operations from United States corporate control,[79] and in

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76. Note that the '(1954)' was dropped from the corporate name several years after the segregation, primarily, it would seem, for aesthetic reasons -- the company is now simply Canadian Industries Limited.

77. Supra, at pp. 174-77.

78. United States of America v. Aluminum Company of America et al, 148 F. 2d 416 (2nd Cir. 1945). See supra, Chapter I, at pp. 18-26.

79. Note that, in another area, the recent Schlitz-Labatt litigation -- United States of America v. Jos. Schlitz Brewing Co., 253 F. Supp. 129 (N.D. Cal.), affirmed per curiam, 385 U.S. 37 (1966), a case involving

the Radio Patents Case[80] it may be argued that the interest in opening up the Canadian market to United States radio and T.V. exporters may be equated with the best interests of Canadian purchasers of radio and T.V. sets.[81]

Thus, to conclude, it would appear that the economic implications anticipated for Canada and Canadian interests as the result of the application by the United States Courts of the United States antitrust laws to Canadian commercial activities may have been over-exaggerated. Moreover, whilst in the past considerable political resentment was aroused by United States decrees in this sphere, nevertheless the notification and consultation procedures now existing between the two countries would seem likely to be able to negate, or at the very least considerably mitigate, any Canadian fears

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the application of Section 7 of the Clayton Act to mergers involving a foreign participant which affect domestic competition, similarly indicates the manner in which a decree of a United States court benefitted Canadian interests by preventing, albeit incidentally, the American takeover of a large Canadian firm. Here, a contract providing for the sale of Canadian-held shares in a Canadian company (Labatt) to Americans was set aside by a United States court on the grounds that Labatt's control of a United States competitor of Schlitz would grant the latter an unlawful advantage in the California market. It remains open for similar reasoning to be applied where the American take-over of a Canadian concern is viewed as having a detrimental effect on the American import trade, thus bringing such action within the purview of the Sherman Act.

80. Supra, at pp. 163-68.

81. See Brewster, supra, fn. 18, at p. 21.

vis-à-vis the usurpation of Canadian sovereignty arising out of any future United States antitrust proceedings.

This is not to say, of course, that Canada is not faced with severe problems due to her entertainment of United States foreign investment. Despite the undeniable advantages accruing to the host country from such investment, the problems raised by the extraterritorial extension of foreign law and policy through the medium of United States subsidiaries present serious issues for the Canadian Government and the Canadian businessman;[82] the latter

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82. The Watkins Report lucidly delimits the Canadian dilemma with respect to this aspect of extraterritoriality, and indicates the divergent views existing within Canada on this issue. The 'realistic' school of thought is mainly concerned with the estimation of Canadian economic loss with reference to trade opportunities foregone by American-owned subsidiaries, although, as the Report points out, the main difficulty with this approach is Canadian ignorance of, and the impossibility of, determining present and future economic costs. On the other hand, a second approach distinguishes between good extraterritoriality and bad, referring in particular to American antitrust legislation as having beneficial effects in Canada, particularly in the light of the relative weakness of Canadian anti-combines policy. To quote the Report: 'Both of these approaches miss the main point, which is the creation of an elaborate legal and administrative apparatus by the American Government to implement their legislation abroad in regard to American goods, technology, and the actions of subsidiaries. The general picture which emerges from our study is one of a tight legal and administrative network capable of being turned to any objective in foreign policy or to meet any future stringency, such as a further deterioration of the American balance of payments position. This poses for Canada a basic political problem, namely, that for an uncertain future the 'elbow room', or decision-making power of the Canadian Government has been reduced in regard to economic relations involving American subsidiaries. The essence of the extraterritorial issue

indeed, in his capacity as director of a United States subsidiary, may still be 'stretched and shackled...over the international boundary, with Washington putting lighted splinters under his toenails and Ottawa tearing off his fingernails'.[83] Such 'hidden' extraterritoriality appears to engender economic and political repercussions of a far greater magnitude than those resulting from United States antitrust decisions, repercussions which are at the present time the subject of extensive research.[84]

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is not the economic costs -- and in the interacting network of Canada-United States relations, there may even be economic benefits from Canadian compliance -- but rather the potential loss of control over an important segment of Canadian economic life.' -- Watkins Report, supra, fn. 2, at pp. 338-39.

83. Extract from a speech of the Hon. D. Fulton, Minister of Justice and Attorney-General of Canada, when stating the Canadian Government's objection to the filing of the Canadian Radio Patents Complaint in a speech delivered to the New York State Bar Association on January 28, 1959 -- Cited in Timberg, Conflict and Growth in the International and Comparative Law of Antitrust, 4 A.B.A. Section of International and Comparative Law Bulletin 20, at p. 22 (1960).

84. See the Watkins Report, supra, fn. 2, at pp. 295-346, 355-62, 407-10; Economic Council of Canada, Interim Report on Competition Policy, supra, fn. 50, at pp. 174-182; Safarian, supra, fn. 6a, at pp. 95-101; 105-108.

CHAPTER V

EXISTING AND SUGGESTED SOLUTIONS TO INTERNATIONAL CONFLICTS ARISING FROM UNITED STATES ANTITRUST PHILOSOPHY.

It has been seen that extraterritorial application of United States antitrust law results from the adhesion of the United States Courts and of the Department of Justice, through selected initiation of actions, to a jurisdictional concept which extends the operative ambit of the Sherman Act beyond the national boundary -- and that this in its turn creates conflict between the United States and other governments. A realistic view of this problem has been succinctly put by Professor S. Chesterfield Oppenheim, formerly Co-Chairman, United States Attorney-General's National Committee to Study the Antitrust Laws:[1]

> One barrier to international economic progress is out-moded thinking about the jurisdictional reach of American antitrust laws. It is unrealistic to resort to the concept that territorial jurisdiction over subject-matter or persons within the United States, or jurisdiction over our citizens or business nationals in foreign markets, justifies extra-territorial extensions of our antitrust

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1. Address by Prof. Oppenheim at a meeting of the Patent, Trademark and Copyright Foundation of the George Washington University, June 14, 1962 -- Cited in Snyder, Foreign Investment and Trade: Extraterritorial Impact of United States Antitrust Law, 6 Va. J.I.L.2, at p. 21 (1965).

> policy even if it conflicts with foreign laws. The fact that antitrust is now a wide-spread policy in the Free World countries itself makes obsolete the attitude of the immediate post-World War II period when the United States engaged in a mission to export its antitrust policy to other countries in original packages of our own common-law and statutory conceptions.

The purpose of this Chapter is to analyse the various means by which these international conflicts may be ameliorated or even removed entirely from the international scene, firstly, by discussing the preventive measures adopted by the United States at the present time, secondly, by looking at the existing international mechanisms for international co-operation in the antitrust sphere, and thirdly, by reviewing in the light of the present international position, various recommendations which have been made for future action in this area.

I UNITED STATES PRACTICE.

Co-terminous with the judicial application of American antitrust law to foreign commercial transactions, there has arisen in the United States an increased awareness of the need for an exchange of views between nations in order to ameliorate conflicts arising between sovereign states. Indeed, it would appear that 'consultation' is the key word in this context, for, in the decades following the Second World War, the Americans have taken considerable pains to explain their motives and philosophy underlying what they, at least, consider

to be a valid exercise in antitrust jurisdiction. In the words of Victor R. Hansen:[2]

> ...the Department of Justice is always cognizant of the fact that antitrust proceedings involving activities abroad may affect a variety of related government interests and programs, as well as important foreign commerce and foreign relations. The Department of Justice is quite sensitive to these interests, and to our foreign relations. We feel that it is our job to know what these interests are, and to carefully weigh them before any action is taken...

<u>The Restrictive Business Practices Clause</u>[3]

It is probable that the first efforts, in the specifically commercial sphere, towards formulating effective consultation procedures with other sovereign governments were embodied in what is known as the Restrictive Business Practices Clause, which has appeared in some eight or nine Treaties of Friendship, Trade and

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2. Hansen, The Enforcement of the United States Antitrust Laws by the Department of Justice to Protect Freedom of United States Foreign Trade, 11 A.B.A. Section of Antitrust Law Proceedings 75, at p. 76 (1957). Extract from a paper delivered before the Annual Meeting of the Section of Antitrust Law, American Bar Association, London, July 25, 1957, by Mr. Hansen, who was at that time Assistant Attorney-General of the United States in Charge of the Antitrust Division of the Department of Justice.

3. For a most comprehensive review of this subject, see Haight, The Restrictive Business Practices Clause in United States Treaties: An Antitrust Tranquillizer for International Trade, 70 Y.L.J. 240 (1960).

Commerce concluded between the United States and other nations. Such a clause first appeared in the United States Treaty of Friendship, Commerce and Navigation with Italy in 1948, and calls for inter-governmental consultation and action with respect to restrictive business practices which may have harmful effects upon commerce between the two countries. It reads:[4]

> 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 arrangements 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.

This new provision was described at the time by the State Department as 'arising directly from recent developments in international economic relations'.[5] In furtherance of the United States Commercial Treaty

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4. Treaty with Italy on Friendship, Commerce and Navigation, February 2, 1948, Article XVIII, para. 3 (effective July 26, 1949) -- cited in Haight, _supra_, fn. 3, at p. 241.

5. Report from the Secretary of State to the President, April 13, 1948 -- Printed in Message from the President transmitting the Treaty to the Senate, S. Exec.E, 80th Congress, 2nd Sess. 3 (1948) -- cited in Haight, _ibid._, at p. 242.

Program, initiated by the treaty with Italy, approximately twenty commercial treaties have been negotiated by the United States since the end of World War II, of which thirteen have come into force. The Restrictive Business Practices Clause was incorporated substantially without change in eight of them. In addition to the treaty with Italy, the clause is part of the following Treaties of Friendship, Commerce and Navigation: Ireland, Israel, Greece, Japan, Germany, Korea and Nicaragua.[6]

It should be noted that the commitments undertaken by the clause are firstly, to consult, and secondly, to take such action as each party deems appropriate, in its own discretion and in its own way, with a view to eliminating the harmful effects of defined practices on international trade. The holding of consultations is an executive function, although any action taken by the United States is the normal combination of congressional, executive and judicial action that exists apart from the Treaty. Moreover, the clause is drafted so as to avoid conflicts with the Webb-Pomerene Act[7] and other enactments representing exceptions to the basic antitrust law of the United States -- in other words, the clause has not

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6. For the citation of these Treaties, completed in the period 1950-56, see Haight, supra, fn. 3, at p. 243.

7. 15 U.S.C. ss. 61-65 (1964) -- otherwise known as the Export Trade Act, which forms a limited exception to the Sherman Act by authorizing American companies solely engaged in export to band together in selling for export.

been and is not regarded as creating new substantive antitrust law or new procedures of antitrust enforcement in the United States. This latter proposition is substantiated by two cases, United States v. R. P. Oldham Co.,[8] and In re Grand Jury Investigation of the Shipping Industry.[9] In both, federal courts were asked to dismiss antitrust charges because of the existence of the Restrictive Business Practices Clause, in both cases the treaty in question existing between the United States and Japan. However, the Courts here re-emphasized that the

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8. 152 F. Supp. 818 (N.D.Cal. 1957). This was a criminal action charging a conspiracy in restraint of American commerce brought under section 1 of the Sherman Act and section 73 of the Wilson Tariff Act. The indictment named five United States corporations importing Japanese wire nails and an American subsidiary of a Japanese nail export company as defendants, and added several Japanese firms as co-conspirators. The defendants moved to dismiss the indictment, contending that the consultation clause of the United States-Japanese commercial treaty provided the exclusive remedy available to the United States Government in reaching the antitrust conspiracy. This argument however, was not accepted by District Judge Murphy, who found the clause to be permissive, not mandatory or exclusive, and denied the motion to dismiss.

9. 186 F. Supp. 298 (D.D.C. 1960). See Chapter III, supra, at pp. 108-9. During the course of this Investigation, six Japanese fishing lines moved to quash the subpoenas duces tecum on the ground that forced production of documents would violate the clause of the commercial treaty between the United States and Japan. District Judge Walsh held that such production did not violate the clause, which was neither a mandatory nor an exclusive remedy, even though no consultation had preceded the Grand Jury Investigation. (In the event, the Judge reserved his opinion as to the need to produce documents located abroad, in view of a mass of protests from foreign Governments whose lines would be affected).

Restrictive Business Practices Clause was not new law overriding or conflicting with American antitrust legislation -- rather, the purport of the clause was to be a 'tranquilizing agent'[10] to which nations could turn to encourage free international intercourse.

It is evident that the clause is potentially able to serve as a soothing agent prior to deciding to institute antitrust proceedings against foreign nationals in the United States. However, as a corollary, it is essential that, to be effective, the clause be correctly utilized to prevent inter-governmental friction -- and this has not always been the case. If for example, prior to the Shipping Industry Investigation, the Italian Government had been notified under the Restrictive Business Practices Clause embodied in the United States-Italian Treaty, a protest note from the Italians may have

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10. Haight, supra, fn. 3, at p. 249. Despite such an avowal, it would appear that, in the context of the Shipping Industry Investigation at least, the Department of Justice was reluctant to allow the consultative clause to fulfil its primary function. In his opinion, Judge Walsh mentioned, without elaboration, that the official protest against the Investigation by the Japanese Ambassador did not cite the Restrictive Business Practices Clause of the United States-Japanese commercial treaty. Haight comments that if this had specifically been done, in addition to such citation in the motions to quash of the Japanese lines, then 'production under the subpoena could well have been delayed until full and serious consultation had been completed. Such a course would have satisfied the obligations of the treaty, without slighting the power of the United States legislation'. -- Ibid, at p. 249. See also infra, fn. 11.

been avoided, and the actual production of documents located outside the United States expedited.[11]

It is incontravertible that considerable benefits are derived from pre-trial executive action; from a diplomatic standpoint, representatives of two friendly countries are afforded an opportunity to meet and discuss how a business important to the economics of both can be conducted in a mutually amicable manner. From another standpoint, the parties litigant and the populace of each country is permitted to study the controversial aspects

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11. Whilst official protests to the production of documents of foreign shipping lines were made by ten interested Governments, Italy was the only nation which actually invoked, in its protest note to the American Secretary of State, the Restrictive Business Practices Clause of its commercial treaty with the United States. Haight states that the Department of State replied to the Italian protest note in an aide-memoire, attaching a memorandum by the Department of Justice dealing generally with the right of production of documents in Grand Jury Investigations; however neither the aide-memoire nor the legal memorandum made any reference to the treaty clause cited by the Italian Government. Once again therefore, it would appear that the American Government ignored the desire for consultation on the part of another sovereign country, in Haight's opinion 'no doubt because the Italian lines, constituting several of the actual parties to the suit, did not specify the clause as a technical ground for their motions to quash the subpoenas.' -- Haight, supra, fn. 3, at pp. 248-49.

Thus, from the available evidence, it would appear that avoidance of the consultation requirement in the Shipping Investigation was based on somewhat spurious grounds -- on the one hand because the official Japanese protest did not specifically rely on the clause in the United States-Japanese treaty, despite the fact that this was the ground on which the motions of the shipping lines were based, supra, fn. 10; on the other because the motions emanating from the Italian lines made the same specific omission, despite its invocation in the official Italian protest.

of the impending litigation and thus avoid the indignation which too often accompanies a fait accompli.[12]

United States Executive Machinery for the Implementation of Consultative Procedures.

The restrictions in the Restrictive Business Practices Clause for consultation thus provide the relevant keynote; what however, are the specific internal mechanisms existing within United States governmental machinery for the implementation of the consultative procedure suggested by the treaty clause ? Whilst responsibility for effective enforcement of federal anti-trust laws rests in part with the Federal Trade Commission, and in part with other agencies,[12a] it is principally the Department of Justice which is concerned with problems of extraterritorial enforcement of the Sherman Act. Moreover, as a practical matter, an informal liaison procedure between the Departments of Justice and State has developed over the years in which the two departments work closely together in an attempt to produce solutions in

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12. See Young, Extraterritorial Power of the Courts Under the Antitrust Laws, 39 U. of Detroit L.J. 240, at p. 249 (1961).

12a. Other United States Government agencies which are likely to be involved in antitrust proceedings in the international field are, for example, the International Co-operation Administration; Department of Defense; Department of Commerce; the Treasury; the Tariff Commission. On this aspect generally, see Brewster, Antitrust and American Business Abroad, at pp. 414-30 (1958); Fugate, Foreign Commerce and the Antitrust Laws, at pp. 294-300 (1958).

antitrust cases having foreign policy implications, liaison with the State Department taking place through its International Business Practices Division.[13] Thus, the Department of State gives the Justice Department the benefit of its advice with respect to foreign affairs in connection with such matters, and may also be able to supply further information on aspects in foreign countries of which that department or foreign posts have particular knowledge. Accordingly, where it is felt that such procedure is called for, representatives of the Justice and State departments may consult with officials of any foreign government whose interest is affected by some matter pending in the Department of Justice.

The existing internal liaison procedure was consolidated and formalized in October, 1962 when the Department of Justice set up a new Foreign Commerce Section in the Antitrust Division to carry on the substantive work of the Department of Justice in participating in the O.E.C.D. Restrictive Business Practices Committee, and in other matters of international interest, including

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13. For background information on this liaison procedure, see Fugate, The Common Market and the United States Antitrust Laws, 38 N.Y.U.L.R. 458, at p. 473 (1963); Fugate, Enforcement of the United States Antitrust Laws in Foreign Trade, 5 A.B.A. Section of International and Comparative Law Bulletin 20, at p. 27 (1960-62); Young, _supra_, fn. 12, at p. 249. A recent instance in which this liaison procedure has worked with considerable effect is the _Swiss Watchmakers Case_ -- see Chapter III, _supra_, at pp. 140-41.

the co-ordination of antitrust cases and investigations involving foreign trade.[14] In other words, the new section was allotted the dual rôle of liaison with other United States Government departments vis-à-vis cases involving foreign commerce, and hence co-operation and consultation with other nations on these matters.

This then is the existing United States administrative machinery which is used in the amelioration and, perhaps, prevention of international disputes in the antitrust sphere. Once again, however, it must be stressed that such machinery must be utilized to initiate intergovernmental consultations prior to the commencement of the particular antitrust suit in question.[14a] The situation should be strenuously avoided whereby consultations with foreign governments are commenced only as the

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14. See Fugate, The Common Market and the United States Antitrust Laws, 38 N.Y.U.L.R. 458, at pp. 472-73 (1963); Barnard, Extraterritoriality and Antitrust Law in the United States, 6 I.C.L.Q. Supplementary Publication 95, at p. 115 (1963). With respect to the establishment of the Foreign Commerce Section, Attorney-General Kennedy stated that: 'In this era of expanding free trade, it is important that we co-operate effectively with other nations in antimonopoly enforcement, and this new unit will co-ordinate existing functions and enable the Department of Justice to carry out its responsibilities more efficiently in this area.' -- Cited in Fugate, ibid., at p. 474.

14a. 'While consultation prior to the filing of a civil complaint or a criminal indictment is certainly desirable, intergovernment discussions should really begin prior to the investigative stage. When the enveloping tentacles of a grand jury subpoena reach into the dusty files of offices around the world, foreign governments are bound to object to this invasion.' -- Haight, supra, fn. 3, at p.253.

result of strong protests received by the State Department after the Justice Department has instituted the litigation, as for example occurred in the Oil Cartel[15] and Canadian Radio Patents[16] cases. It is moreover clear that in the prevention of inter-governmental friction, bilateral consultation in connection with proposed antitrust legislation in the United States courts is entirely practical. The executive machinery exists for the formulation of such consultation -- and needless to say consultation takes place not only with those governments with whom a commercial treaty exists. It now appears to be a regular practice to notify the relevant embassy through the State Department before any civil proceeding is instituted (although this policy has not been regularly followed in regard to criminal prosecutions.)[16a] In addition, specific established antitrust consultative procedures may exist between the United States and other sovereign states, as for example, the reciprocal Antitrust Arrangement between the United States and Canada, an arrangement

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15. In re Investigation of World Arrangements with Relation to the Production, Transportation, Refining and Distribution of Petroleum, 13 F.R.D. 280 (D.D.C. 1952). For information on this case, and the protests arising therefrom, see Chapter III, supra, at pp. 104-6.

16. United States of America v. General Electric Company, Westinghouse Electric Corporation, N.V. Philips Gloeilampfabrieken, Civil Complaint filed November 24, 1958, United States District Court, Southern District of New York; Consent Decree, Civil No. 140-157 (S.D.N.Y. November 1, 1962).

16a. See Haight, supra, fn. 3, at p. 252.

'designed to eliminate friction and to find a common approach to antitrust problems affecting both countries'.[17] Reference has already been made to this 'Antitrust Notification and Consultation Procedure',[18] and also to the most recent meeting between representatives of the two governments in which it was agreed that the existing procedure should be placed within the context of the 1967 Recommendation of the O.E.C.D. on co-operation between member countries on restrictive business practices affecting international trade, and that this same 1967 Recommendation should be actively implemented between Canada and the United States, and that notification and consultation should continue under both arrangements.[19]

It would appear therefore that in an era of expanding international trade, with special problems being posed by the multi-national corporation, and when most industrial companies have enacted anti-monopoly laws, the United States has recognized that participation in international co-operation in the antitrust area is essential

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17. Statement by the Assistant Secretary of State for Economic Affairs, with respect to the Antitrust Arrangement Between the United States and Canada -- Hearing on the International Aspects of Antitrust Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 89th Cong., 2nd Sess., pt. 1, at p. 453 (1967).

18. Chapter IV, _supra_, at pp. 172-74.

19. Chapter IV, _supra_, at pp. 177-80. For further information relating to the O.E.C.D. Recommendation, see _infra_, at pp. 220-25.

for carrying out antitrust policy and to avoid conflicts in enforcement. The section following will accordingly consider the existing methods for attaining such international co-operation.

II EXISTING MECHANISMS FOR INTERNATIONAL CO-OPERATION.

For legal and practical reasons, isolated and unco-ordinated actions by individual countries trying to enforce their national laws against international restraints of trade cannot be sufficient. Although most industrialized countries have now adopted their own antitrust laws, the application of these laws to international restraints of trade is limited by the fact that on the one hand, national export cartels are generally exempted, and that, on the other, restrictive practices emanating from enterprises in another country are normally subject to national antitrust law only if they have substantial adverse effects on domestic trade.[20] Further, in many cases it is practically impossible to enforce national law against enterprises situated outside national territory unless these enterprises have a domestic nexus sufficient to establish *in personam* jurisdiction; moreover, even though jurisdictional requirements -- both substantive and procedural -- under national law are met and it is

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20. See Markert, Recent Developments In International Antitrust Co-operation, 13 Antitrust Bulletin 355, at pp. 357-58 (1968).

practically possible to enforce administrative and court orders against a foreign enterprise, political conflicts with foreign governments, of the type with which the United States has been repeatedly confronted, may arise.[21] National antitrust law, by its very nature, is only able to serve the national interests of that particular country, a prime reason for the animosity evoked by the extraterritorial enforcement of the United States antitrust laws.

Thus, there is clearly a pressing need for some viable form of international co-operation in the area of restrictive business practices, and, in the absence of a supranational antitrust system, such as at the present time exists only within the European communities,[22] co-operation within an international organization remains the

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21. See Chapter III, supra, at pp. 102-11.

22. The rules of competition of the European Economic Community (the Common Market) embody the most significant element in the establishment of such a system. The Treaty establishing the E.E.C. (the Rome Treaty) was signed on March 25, 1957 by Belgium, Germany, France, Italy, Luxembourg and the Netherlands; Articles 85-94 of the Rome Treaty are directed to the maintenance of competition. In particular, Article 85 prohibits agreements and concerted action among enterprises which have the object, or effect, of preventing, restricting or distorting competition within the Common Market, and Article 86 of the Treaty makes it unlawful to abuse a dominant position in the Common Market or any part thereof. For a clear summation of these supranational antitrust laws, see Fulda, Antitrust in the European Economic Community, 41 Texas L.R. 391 (1962-63); Riesenfeld, Antitrust Laws in the European Economic Community, 50 Cal. L.R. 459 (1962).

sole means for truly multilateral antitrust activity. It would appear moreover that the emergence of some types of multilateral agreements for consultation and co-ordinated policy action has been coincident with the emergence of a vast wave of European antitrust laws in the past two decades,[23] so that, in the words of a former head of the Antitrust Division of the United States Department of Justice, antitrust law has become a 'western world pnenomenon',[24] a phenomenon which in itself is 'tending toward elimination and control of restrictive business practices and restraints of trade.'[25]

Historically, there have been several post-war

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23. Most notably the enactment of antitrust laws by the European Economic Community, the European Coal and Steel Community, and by the members of the European Free Trade Association. (Note that the Euratom Treaty, establishing the European Atomic Energy Community, contains no provisions protecting the free circulation of goods from interference by restrictive agreements or by the abusive exploitation by enterprises of a dominant position). For excellent academic comment re the enactment of the aforementioned laws, see Fulda, supra, fn. 22; Riesenfeld, supra, fn. 22; Snyder, supra, fn. 1, at pp. 7-14; Fugate, supra, fn. 14, at pp. 464-68; Loevinger, Antitrust Law in the Modern World, 6 A.B.A. Section of International and Comparative Law Bulletin 20 (1962); Van Themaat, Rules of Competition and Restrictive Trade Practices, Legal Problems of the European Economic Community and the European Free Trade Association, 1 I.C.L.Q. Supplementary Publication 76 (1961); International Antitrust, Annex A, Summary of Restrictive Trade Legislation, Report of 51st Conference of the I.L.A., Tokyo 1964, at pp. 473-82.

24. Loevinger, supra, fn. 23, at p. 32.

25. Ibid.

attempts at international co-operation in this field -- for example, in Chapter Five of the Havana Charter of 1948, international antitrust rules were proposed for an International Trade Organization, (I.T.O.), but both the Charter and the I.T.O. ultimately became dead letters,[26] and the rules were implemented by national legislation. Following the demise of the Havana Charter, the United Nations Economic and Social Council (E.C.O.S.O.C.) passed a resolution in 1951, recommending to member states of the United Nations:[27]

> ...that they take appropriate measures and co-operate with one another to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets or foster monopolistic control, whenever such practices have harmful effects on the expansion or production of trade, on the economic development of under-developed areas or on standards of living...

The resolution also established an Ad Hoc Committee on restrictive business practices consisting of ten member nations including the United States, and a 1953 Report of the Ad Hoc Committee contained a draft procedure for an

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26. For information on these aspects, see Loevinger, supra, fn. 23, at pp. 20-21; Fugate, supra, fn. 14, at p. 471; Carlston, Antitrust Policy Abroad, 49 Northwestern U.L.R. 711, at pp. 724-26; Kopper, The International Regulation of Cartels -- Current Proposals, 40 Va. L.R. 1005, at pp. 1008-12 (1954).

27. Cited in Loevinger, supra, fn. 23, at p. 21.

international tribunal to hear complaints as to restrictive practices harmful to international trade.[28] However, this proposal was unsuccessful and was never ratified or implemented.[28a]

These earlier attempts to establish an international antitrust system under the auspices of the United Nations failed, so Markert believes, mainly because their ambitious programmes did not correspond with the amount of agreement of the participating countries concerning their attitudes with respect to restraints of trade in general, and in international commerce in particular.[29] However, these prior endeavours provided the experience on which to build future multilateral agreements, of which the most important at the present time are a complaint and consulting procedure among member nations of the General

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28. Report of the Ad Hoc Committee on Restrictive Business Practices, U.N. EcoSoc Council Off. Rec. 16th Sess., Supp. No. 11, at pp. 7-9 (E/2380)(1953) -- Cited in Fugate, supra, fn. 14, at p. 471. For general information re the operation and work of this Committee, see Carlston, supra, fn. 26, at pp. 725-33; for further information regarding this Report, see Kopper, supra, fn. 26, at pp. 1013-27; Domke, Notes -- The United Nations Draft Convention on Restrictive Business Practices, 4 I.C.L.Q. 129 (1955).

28a. The Report of the Committee engendered a critical attitude and great differences of opinion on the part of the international business community -- see Kopper, supra, fn. 26, at pp. 1021-28; Domke, supra, fn. 28, at pp. 131-40.

29. Markert, supra, fn. 20, at p. 355.

Agreement on Tariffs and Trade (G.A.T.T.), and a development which has taken place within the structure of the Organization for Economic Co-operation and Development, (O.E.C.D.), the United States being a member of both these organizations.

The General Agreement on Tariffs and Trade.

The General Agreement on Tariffs and Trade, (G.A.T.T.) signed on October 30, 1947, was the result of the first large scale post-war international trade conference held in Geneva in 1947.[30] G.A.T.T. consisted of two parts: firstly, an agreement by the participant countries to certain specific tariff reductions, and the second part containing general provisions relating to trade and procedure for consultation and co-operation -- the latter was expected to remain in force only pending final approval of the I.T.O. The United States accepted the G.A.T.T. protocol at the beginning of 1948, and despite the failure of the I.T.O., G.A.T.T. has continued in effect until the present day. A Resolution of the General Assembly of November 18, 1960 firmly established a complaint and consulting procedure among the member nations of G.A.T.T.,[31] and bilateral or multilateral consultations between the interested governments were

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30. See Loevinger, supra, fn. 23, at pp. 20-21; Markert, supra, fn. 20, at pp. 355-56.

31. Decision of November 18, 1960, G.A.T.T. Basic Instruments and Selected Documents 28 (Supp. 9, 1961) -- Cited in Fugate, supra, fn. 14, at p. 471.

recommended. However, at the present time, the 1960 Resolution has not so far been utilized,[32] although it remains in force and it is possible that discussions of the antitrust problem within G.A.T.T. may be re-opened at any time.

The O.E.C.D. Recommendation of 1967.

Perhaps the most important development in international antitrust co-operation has been the O.E.C.D. Recommendation of October 5, 1967.[33] Briefly, the O.E.C.D. is the successor of the Organization for European Economic Co-operation (O.E.E.C.) whose primary function was the distribution of the United States Marshall Plan Aid in Europe -- in fact the O.E.C.D. officially succeeded

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32. Possibly because the Resolution did not provide for an alternative course of action -- for example, arbitration by an expert body, should the intergovernmental consultations not lead to a mutually satisfactory solution -- see Markert, *supra*, fn. 20, at p. 356.

33. Recommendation of the Council of the O.E.C.D. Concerning Co-operation Between Member Countries on Restrictive Business Practices Affecting International Trade -- adopted by the Council at its 149th Meeting on October 5, 1967 (the delegate for Switzerland abstaining). For comment on this Recommendation, see Markert, *supra*, fn. 20, at pp. 360-63, and Appendix; Fugate, Antitrust Aspects of Transatlantic Investment, 34 Law and Contemporary Problems 135, at pp. 144-45; Report of the Committee on the Extraterritorial Application of Restrictive Trade Legislation, 53rd Conference of the I.L.A., Buenos Aires, 1968, at pp. 36-38; News Release, Canadian Department of Consumer and Corporate Affairs, November 3, 1969. For previous reference to this Recommendation in the Canadian-American context, see Chapter IV, *supra*, at pp. 177-80.

O.E.E.C. as the organization for economic co-operation among nations of the western world on September 30, 1961.[34] The O.E.C.D. is made up of eighteen European countries, Canada, the United States, and the European Economic Community and the Coal and Steel Community. On December 5, 1961, the Council of the O.E.C.D. officially established a Committee of Experts on Restrictive Business Practices. The Committee is composed, for the most part, of officials in the Restrictive Business Practices field in each of the member countries -- for example, the American delegation to the Committee has included representatives of the Departments of Justice, State and Commerce and the Federal Trade Commission.[35] The terms of reference of the Committee are cautiously phrased, the Committee merely being instructed to 'develop agreed definitions of specific business practices which may have an adverse effect on international trade and commerce and on the basis of such definitions, review developments in this field.'[36]

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34. For the historical background, see Loevinger, supra, fn. 23, at p. 22; Fugate, supra, fn. 14, at p. 472.

35. It would seem likely that the establishment of this Committee was a considerable factor in the decision of the United States Department of Justice to set up the Foreign Commerce Section of the Antitrust Division in October 1962, one of the primary functions of which was participation in the O.E.C.D. Restrictive Business Practices Committee. For further comment on the Foreign Commerce Section, see supra, at pp. 210-11.

36. Cited in Markert, supra, fn. 20, at p. 360.

The first years of work of the Committee were largely taken up with a comparative study of antitrust developments;[37] however since 1963 the Committee has also been concerned with restraints of trade in international commerce, and working parties were accordingly set up, one with a mandate to look into the factual side of the problem and the other to study the procedural aspects. It was the latter which studied the various ways and means of antitrust co-operation within O.E.C.D. -- and the result was the issue of the aforementioned Recommendation to the member countries on October 5, 1967.

While setting out that closer co-operation between member countries is needed in the field of restrictive business practices affecting international trade, the Recommendation recognizes that the unilateral application of national legislation, in cases where business operations in other countries were involved, raises questions as to the respective spheres of sovereignty of the countries concerned. The Recommendation further states that it was understood that the envisaged co-operation should not in any way be construed to affect the legal position of member countries with respect to such

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37. This resulted, inter alia, in the publication of a 'Guide to Legislation on Restrictive Business Practices', a 'Glossary of Terms Relating to Restrictive Business Practices', and a comparative summary of the antitrust laws of the member countries.

questions of sovereignty, and in particular the extra-territorial application of laws concerning restrictive business practices, as might arise.[38]

Issued on the basis of these considerations, the Recommendation follows a system of bilateral consultation and co-operation which had for a number of years been in force between the United States and Canada. It aims at three basic steps: firstly, inter-governmental notification and consultation on antitrust actions, so that diplomatic difficulties arising in connection with antitrust actions against foreign enterprises are avoided;[39] secondly, the exchange of information on antitrust matters where feasible,[40] and thirdly,

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38. See Report of the Committee on the Extraterritorial Application of Restrictive Trade Legislation, <u>supra</u>, fn. 33, at p. 36.

39. <u>Paragraph I, Section 1(a)</u>:...Notification should, where appropriate, take place in advance in order to enable the proceeding Member country, while retaining full freedom of ultimate decision, to take account of such views as the other Member country may wish to express and of such remedial action as the other Member country may find it feasible to take under its own laws to deal with the restrictive business practice.'

40. <u>Paragraph I, Section 2</u>, dealing with perhaps the most crucial problem of international antitrust -- the procurement of information on foreign and international restraints of trade. This procurement was intended by the Council to be facilitated by recommending the Governments of Member countries 'to supply each other with any information on restrictive business practices in international trade which their laws and legitimate interests permit them to disclose.' -- Section 2, <u>ibid</u>.

co-ordination of antitrust enforcement where possible.[41]

It must be stressed that the co-operation and co-ordination provided for in the Recommendation is on a purely voluntary basis, and it is therefore an academic question whether the recommendations by the Council of the O.E.C.D. have binding effect on member states. Moreover, as has been observed, the Recommendation does not pretend to solve the international law problem of extraterritorial application of the antitrust laws. On the contrary, it is evident from its text that this matter had been the subject of apprehension on the part of several member states, and it is significant that in the Council of Ministers, Switzerland abstained from voting. Whether or not the Recommendation will have practical results 'will thus depend entirely on the co-operative spirit and initiative of the national authorities'.[42] In any event, the Council has instructed the Committee 'to keep under review developments connected with the present Recommendation and to examine periodically the progress made in

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41. Paragraph I, Section 1(b): '...where two or more Member countries proceed against a restrictive business practice in international trade, they should endeavour to co-ordinate their action in so far as appropriate and practicable under national laws'. As a corollary, Paragraph I, Section 3 recommends co-operation by Member Governments in 'developing or applying mutually beneficial methods of dealing with restrictive business practices in international trade.'

42. Markert, *supra*, fn. 20, at p. 363.

this field'.[43] Whatever progress is in fact made however, it is fair to say that the Recommendation is an important step along the road to full co-operation on the international level between sovereign governments.

Thus, O.E.C.D. and G.A.T.T. symbolize an increasing effort at co-operation in the antitrust field between the United States and friendly foreign governments and international communities. The practical efficacy of these efforts however, is still not proven -- in Markert's words:[44]

> The crucial point in all the attempts and proposals has been and still is that, although many countries have newly adopted or strengthened antitrust control under national law during the last ten years, there still does not seem to exist (at least within the O.E.C.D. and G.A.T.T.) a sufficient common basis for the development of uniform standards of evaluation of private restraints in international trade. Therefore it appears to be premature to endeavour to develop such standards and such forms of antitrust co-operation as are workable only on the basis of a common standard.

Nevertheless, such co-operation as at present exists undoubtedly represents a significant advance in the search for the solution to problems of antitrust enforcement and jurisdiction with respect not only to United States foreign trade, but also to conflicts between other sovereign nations.

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43. Recommendation, Paragraph II.

44. Markert, *supra*, fn. 20, at p. 368.

III PROPOSALS FOR FUTURE ACTION.

International Jurisdictional Concepts to meet International Jurisdictional Needs.

Heretofore, consideration has been given to the diverse procedures at present in existence for the reduction or amelioration of international jurisdictional problems engendered by the extraterritorial application of restrictive trade legislation. Attention will now be focused on a number of suggested judicial methods which are being put forward as viable solutions to such problems. It should be stressed at the outset however that such a discussion will not encompass the whole area of the judicial settlement of existing disputes and the practicability of international adjudication;[45] essentially consideration will be given to the manner in which jurisdictional conflicts resulting from the extraterritorial application of restrictive practices legislation may be prevented from originating by means of agreement on the governing principles of law.

There has been a considerable amount of juristic writing advocating a fresh approach to the whole question of the delimitation of jurisdictional competence in this area. In fact, 'there may be discerned in the writings

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45. For a concise overview of this aspect of the subject, see Baxter, Judicial Settlement of Disputes, Report of the Committee on the Extraterritorial Application of Restrictive Trade Legislation, Report of the 52nd Conference of the I.L.A., Helsinki 1966, at pp. 115-24.

of such scholars a desire to break out of the orthodox concepts and categories of jurisdiction and to adopt towards questions of jurisdiction in public international law methods of analysis borrowed from private international law'.[46] Those of this opinion suggest that what is needed in this context is an evaluation of the interests which are being protected, the strength of the link between the particular law maker or court and the activity in question, and the fairness of a certain jurisdiction. Rigid concepts of territoriality, nationality and the like, often preserved only as forms and as fictions, are not fully able to provide the answers to these questions.[47] It is certainly apparent from the preceding chapters that the classical territorial principle of jurisdiction, though always a useful starting point, is not alone capable of providing a solution to every type of problem. The doctrine of 'effects' has frequently been applied by the United States Courts for this purpose; but experience has shown that, once it is

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46. Baxter, The Extraterritorial Application of Domestic Law: General Principles, 1 U.B.C.L.R. 333, at p. 338 (1959-63). See, in this connection, Brewster, Antitrust and American Business Abroad, at pp. 339-49 (1958); Falk, The Rôle of the Domestic Courts in the International Legal Order, at pp. 27 - 52 (1964); Timberg, Extraterritorial Jurisdiction Under the Sherman Act, 11 Record of the Association of the Bar of the City of New York 101, at pp. 111-13 (1956).

47. See Baxter, *supra*, fn. 46, at pp. 338-39.

applied outside the simple cases of direct physical harm where it was originally developed, it becomes so very malleable that it ceases to be an effective limiting factor and becomes rather a sanction for indefinite extensions of jurisdiction.[48]

In connection with these developments, specific reference should be made to the important work of the International Law Association, whose Committee on the Extraterritorial Application of Restrictive Trade Legislation (including antitrust legislation) has, at the request of the Association, a standing brief to define the extent to which the actions of states in applying this legislation extraterritorially are subject to the rules of international law, and, as far as possible, to formulate such rules.[49]

A leading member of the Association, Professor Jennings, in propounding a formulation of his own,[50] maintains that the primary rule of international law is that a state may not exercise its power in any form on the territory of another state, and that jurisdiction in

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48. See Chapter II, supra, at pp. 67-70.

49. See Document 'A', Report of the Committee on the Extraterritorial Application of Restrictive Trade Legislation, supra, fn. 45, at pp. 309-10.

50. See Jennings, Plenary Session of the Committee on the Extraterritorial Application of Restrictive Trade Legislation, supra, fn. 45, at pp. 311-12.

matters of a public law character is territorial. Exceptionally, it may be permissible for a state to extend jurisdiction of a penal or quasi-penal character beyond its territory, but such extraterritorial jurisdiction must be sanctioned by principles of international law founded in the general practice of states; the determinative issue in such cases, however, is whether such an exercise of jurisdiction or regulatory power by a state is or is not in essence an attempt to infringe upon a jurisdiction that belongs in priority to another state.

Professor McDougal comments that the most fundamental policy underlying all the principles for the allocation of competence among states is that each state is authorized to make -- and when it has effective control, to apply -- law for events, even when occurring beyond its territorial boundaries, which substantially affect its own community process.[51] Thus, this policy does not derive from a single established jurisdictional principle, but is 'rather the fundamental thrust of all relevant principles.'[52] In McDougal's view, Jennings' 'priorities' formulation merely adds to this existing policy a demand for identification of the state most

51. See McDougal, Plenary Session, supra, fn. 50, at pp. 328-32.

52. Ibid, at p. 331.

substantially affected by certain events. He emphasizes that the determination either of whether a state is substantially affected by certain events or of what state is most substantially affected 'requires an investigation of facts, not mere exercise in logical derivation from postulated principles.'[53] Such a factual inquiry would involve questions vis-à-vis the interests at stake for each particular state,[54] the alternatives open to each state for protecting itself, by what legal method each state seeks to assert its jurisdiction,[55] and so on. This type of inquiry, he continues, would appear comparable with that employed in settling disputes in connection with conflicting jurisdictional claims concerning the oceans and other shared domains. Consequently, McDougal advocates adding empirical indices to Jennings' priorities concept, so that in determining jurisdictional priority, account will be taken of the relative impact of activities upon different states.[56]

This line of thought is adopted by Professor

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53. Supra, fn. 52.

54. For example, whether these are economic interests alone, or whether other considerations such as national health or security are involved.

55. For example, by prescription of law, application of law, geographic range of impact, degree of coercion etc.

56. Supra, fn. 51, at p. 332.

Jaenicke, although he is somewhat more specific;[57] he contends that the criterion in determining the limits of extraterritorial jurisdiction should be whether the legitimate interest of a state in protecting its economic order should be valued more highly than the equally legitimate, but more general, interest of another state in regulating conduct in its territory exclusively, determination again being by a careful consideration of the factual situation of the different categories of cases and the interests of the states concerned.[58]

It should be stressed that thinking along these lines is not confined to academics; an eminent practitioner, Arthur H. Dean, voiced similar thoughts in a speech before the American Bar Association in 1957:[59]

> My own guess as to the direction of judicial decisions (assuming the problem is left with the Courts and is not otherwise disposed of) is that ultimately the Courts will come to a test which gives further recognition to the international ramifications and problems of extraterritorial application. <u>Possibly such a test would balance the interests of the countries involved and instead of</u>

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57. See Jaenicke, Plenary Session, <u>supra</u>, fn. 50, at pp. 318-20.

58. <u>Ibid</u>., at p. 320.

59. Dean, Extraterritorial Effects of the U.S. Antitrust Laws: Advising the Client, 11 A.B.A. Section of Antitrust Law Proceedings 88, at p. 99 (1957). -- Extract from a paper delivered before the Annual Meeting of the Section of Antitrust Law, A.B.A., London, July 25, 1957. (Emphasis added).

> <u>rigorously pursuing each arrangement to the ends of the earth because of an impact on United States commerce</u>, <u>would apply a new rule of reason which would balance the extent of that impact and, in the conflict of law sense, of the other United States 'contacts' against the extent of the interest of foreign governments and states in the transaction</u>, as indicated by all evidence including the policy of their law, the degree to which their government is otherwise interested and involved in it, and the significance of that portion of the transaction occurring abroad as compared to that in the United States.

The test therefore, should be a relative one -- namely not that of merely whether the effect on United States commerce is significant, but also of how its significance compares with the status of the transaction in the context of other jurisdictions concerned; for the subject-matter to which the antitrust legislation applies is in all probability a matter in which other states have a far greater legitimate and significant interest that the United States itself.

Thus, in essence, this test comprises that which Brewster has termed a 'jurisdictional rule of reason';[60] like antitrust's substantive rule of reason, this involves a weighing process in each case, but, unlike the

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60. See Brewster, Extraterritorial Effects of the U.S. Antitrust Laws: An Appraisal, 11 A.B.A. Section of Antitrust Law 72 (1957). See also Dean, <u>supra</u>, fn. 59, at pp. 99-101.

traditional rule of reason,[61] focuses instead on the factors[62] which make for foreign conflict rather than upon economic consequences and business justifications. Such a framework could thus accomodate the necessary limitations on extraterritorial jurisdiction without resorting to absolute jurisdictional prohibitions based on the out-moded territoriality concept, or extended jurisdictional latitude based on the similarly inapposite objective

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61. See Introduction, supra, at p.3 , fn. 5 , for a brief reference to this concept.

62. Brewster, supra, fn. 60, suggests that some of the relevant variables might be: the relative significance to the alleged offence of conduct within and conduct without the United States; the extent to which the arrangement complained of was gratuitously and explicitly designed to affect adversely American consumer or business opportunity interests; the relative significance of American effects and effects outside the United States; the nationality or allegiance of the parties, their corporate and business location and the fairness of applying American law to them; the degree of conflict with foreign laws and policies; the extent to which conflict can be avoided without serious impairment of American interest or the interest of a foreign country. -- Ibid., at p. 73. See also, in this connection, Snyder, supra, fn. 1, who states, at pp. 30-31: 'The rule of reason that has long obtained in antitrust law interpretation could be injected with additional "reasonableness" by carefully determining those restrictive practices in foreign commerce that might be considered irrelevant in domestic situations. Reasonableness is not a concept of unchanging content. It takes its meaning from dominant considerations in the area under scrutiny... In this nexus, United States courts may take a more tolerant attitude toward what would admittedly be a violation within the domestic arena...'. For a comment on the difficulties which may be encountered with this type of approach, see Reynolds, Extraterritorial Application of Federal Antitrust Laws: Delimiting the Reach of Substantive Law Under the Sherman Act, 20 Vanderbilt L.R. 1030, at p. 1060 (1967).

territoriality doctrine.[63] Indeed, Reynolds has suggested that this proposition 'is consistent with the continuing judicial trend away from a view of legal isolationism in the field of foreign commerce antitrust law,'[64] thus indicating the manner in which the strict territoriality of American Banana gave way to the more liberal 'effects' principle.[65]

The progressive development of jurisdictional criteria *vis-à-vis* the extraterritorial application of the Sherman Act should not be regarded as a startling breakthrough in judicial thought. The American Courts, under the aegis of the translucent concept of comity, have

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63. For a contrary viewpoint, see Katzenbach, Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law, 65 Y.L.J. 1087, at p. 1152, who states: 'Conceivably, despite the difficulties of formulating economic criteria translatable into legal norms, a balancing of sovereign interests would be sound American policy...But such questions are not properly within the judicial function and are well beyond even the advanced fact-finding process of judicial administration of the antitrust laws. An approach that attempted to determine case by case what was "reasonable" conduct in view of foreign laws and the facts of cartelization in the world economy would seriously weaken our political hand without adding certainty or predictability to the Sherman Act's operative scope.'

64. Reynolds, *supra*, fn. 62, at p. 1060.

65. For jurisprudential comment on the progressive weakening of the territorial concepts of jurisdiction and the espousal of a more universalistic technique, see Wiesner, A Half Century of Jurisdictional Development: From Bananas To Watches, 7 U. of Miami L.R. 400 (1952-53). See also Chapter I, *supra*, at pp. 12-35.

hitherto considered conflicting economic policies and antitrust laws of foreign countries as a delimiting factor in deciding quite how far afield the Sherman Act could be made to reach,[66] and the judgments in, for example, the General Electric,[67] I.C.I.[68] and Swiss Watchmakers[69] cases illustrate the recognition, by the Antitrust Division and the Judiciary, of the importance of the maintenance of good international relations. It is thus submitted that the espousal of the aforementioned jurisdictional theories signifies no more than an attempt to engender greater precision in the area of foreign commerce antitrust law than the judicially-malleable comity doctrine affords.

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66. See Comity and Judicial Restraint, Chapter III, supra, at pp. 146-50.

67. United States v. General Electric Co., 115 F. Supp. 835 (D.N.J. 1953). Note the insertion of the saving clause in the decree upon the protest of the Netherlands Government -- see Chapter III, supra, at p. 145.

68. United States v. Imperial Chemical Industries Ltd., 100 F. Supp. 504 (S.D.N.Y. 1952); opinion on remedies, 105 F. Supp. 215 (S.D.N.Y. 1952); final judgment, Civil No. 24-13 (S.D.N.Y. July 30, 1952). Note Judge Ryan's plea for the British recognition of his judgment as a matter of comity -- Chapter III, supra, fn. 73.

69. United States v. The Watchmakers of Switzerland Information Centre Inc., 1963 Trade Cas. par. 70,600 (S.D.N.Y. 1962); final judgment, Civil Action No. 96-170 (S.D.N.Y. January 22, 1964); modified, 1965 Trade Cas. par. 71,352 (S.D.N.Y. January 7, 1965). Note particularly the recognition and acceptance of a generally over-riding Swiss sovereignty re matters within Swiss jurisdiction contained in the Amended Final Judgment -- see Chapter III, supra, at p. 143.

The movement towards a conflicts-type of approach,[70] involving the specific balancing of varying national interests contra adherence to a distorted public international law concept of jurisdiction, has been lent considerable impetus by Section 40 of the Restatement, Second, Foreign Relations Law of the United States, 1965,[71] which essentially embodies this type of relatavistic approach to jurisdictional problems. The parallel between the Section and the conflicts viewpoint is clear -- in both cases the question is not one of lack of jurisdiction but of the desirability of exercising power in a

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70. See Reynolds, supra, fn. 62, at p. 1060, who suggests that this approach, which calls for the consideration, in the conflict of laws sense, of competing foreign laws and policies, also coincides with a parallel development in the area of conflict of laws generally.

71. Section 40 states: Where two States have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each State is required by international law to consider, in good faith, the possible moderating of the exercise of its own enforcement jurisdiction in the light of such factors as

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

hardship situation (from the standpoint of the person concerned), or of international difficulty or tension (from the standpoint of states concerned).[72] The utilization of this Section by Kaufman J. in his judgment in United States v. First National City Bank[73] has, it is submitted, provided a source of encouragement to those international lawyers who recognize, and are working towards, a more specific jurisdictional delineation of American jurisdictional competence in this area.

The International Law Association continues to lend its support to this aim; the 1968 Report of the Committee on the Extraterritorial Application of Restrictive Trade Legislation contained a tentative framework of research submitted by Dr. K. Ioannou relating to a conflict of laws approach to the extraterritorial application and enforcement of antitrust legislation.[74] Dr. Ioannou

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72. See comments of Oliver, The Harmonization of Laws and the Development of Principles for the Resolution of Conflicts of Enforcement Jurisdiction as to Transnational and Monopolistic Trade Practices: A Preliminary Examination of Possible Lines of Approach, Part IV of the Report of the Committee on the Extraterritorial Application of Restrictive Trade Legislation, Report of the 51st Conference of the I.L.A., Tokyo 1964, at pp. 557-564.

73. 396 F. 2d 897 (2nd Cir. 1968). See the examination of this judgment, Chapter III, supra, at pp. 122-28.

74. Ioannou, Conflicts of Antitrust Laws, Part IV of the Report of the Committee on the Extraterritorial Application of Restrictive Trade Legislation to the International Law Association, Buenos Aires 1968, at pp. 45-46.

maintains, it is suggested, correctly, that rules of public international law, even if universally accepted, cannot provide answers to all problems in connection with international restraints of trade, and that a conflict of laws approach is apposite in view of the fact that states are less sensitive in entering agreements about certain regulatory conflict rules than in accepting universal standards of public international law. He emphasizes that a major part of the problem of the extraterritorial application and enforcement of antitrust legislation concerns a legal struggle between highly industrialized countries, with the result that 'legal orders with feeble economic foundation are easily susceptible to quasi-obligatory deviations from public international law standards, whereas, on the contrary, conflict of laws rules are less susceptible to enforced violation. These latter rules may offer a means of uniform and just solution of some of the aspects of our multilevel problem.'[75]

In discussing this suggested approach, it may advantageously be assumed that at the present time the Courts alone can most properly evaluate the effect of conflicting antitrust laws and policies on the intended

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75. Supra, fn. 74, at p. 45.

extraterritorial reach of the Sherman Act.[76] Despite doubts which have been expressed about their capabilities in this area,[77] it has been pointed out[78] that the judicial ability to make such an evaluation has already been illustrated in other areas of the law where the extraterritorial reach of American statutes has been in issue. In Lauritzen v. Larsen,[79] for example, an

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76. See Reynolds, supra, fn. 62, at pp. 1052-53; Dean, supra, fn. 59.

77. See Timberg, Remarks on the Extraterritorial Effects of the U.S. Antitrust Laws, 11 A.B.A. Section of Antitrust Law Proceedings 105, at p. 110 (1957): '...I do not believe that the United States courts can give full effect to [the] ...admonition that they take into account not only the laws and policies of the United States, but the laws and policies of other countries that may be involved in international restrictive agreements. The mandate of the United States courts is to apply the law and public policy of the United States, in itself an awesome and difficult burden. That law does, of course, include the doctrine of comity, but comity, as the cases well indicate, is something which national courts request of (as well as accord to) the laws and judicial institutions of a foreign jurisdiction...'

78. See Reynolds, supra, fn. 62, at pp. 1052-1055.

79. 345 U.S. 571 (1953). The plaintiff was a Danish seaman, who, while in New York, had signed aboard the Danish defendant's ship, of Danish flag and registry, under ship's articles providing in Danish that plaintiff's rights be governed by Danish law, and under a contract with a Danish seamen's union to which the plaintiff belonged. The plaintiff was negligently injured aboard ship, in the course of his employment, whilst in Havana, and suit was brought in a federal district court in N. York for damages under the Jones Act.

Jackson J. outlined the foreign law, pointing out the differences in coverage and extent of liability between the law of the flag and the Jones Act. Quoting the famous dictum of Marshall C.J. in The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) that a

in personam action under the Jones Act,[80] the Supreme Court refused to apply the statute extraterritorially where to do so would conflict with the law of another country having a greater concern with the transaction; in *Steele* v. *Bulova Watch Company*,[81] the extraterritorial application of the Lanham Trademark Act[82] was permitted only after the Court had determined that such application would not infringe Mexico's sovereignty. Moreover, whilst the necessary economic determinations are admittedly complex, a balancing of United States and foreign interests in the antitrust context would be no more complicated than the similar weighing process employed at the present time by the judiciary when considering the reasonableness of domestic economic restraints.[83]

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statute will not be construed to violate the law of nations, if another construction is tenable, he thus held the Jones Act inapplicable -- *ibid*., at p. 578; he also found that the preponderance of significant contacts indicated that foreign rather than American law should govern -- *ibid*., at pp. 582-93.

Note similar reasoning by the Supreme Court in *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), in which the international discord that might have resulted from the concurrent application of the American National Labor Relations Act and the Honduran Labor Code precluded the application of American law.

80. 46 U.S.C. S.688 (1964).

81. 344 U.S. 280 (1952). For previous reference to this case, see Chapter II, *supra*, at p. 56.

82. 15 U.S.C. s. 1114(1) (1964).

83. See Extraterritorial Application of the Antitrust Laws: A Conflict of Laws Approach, 70 Y.L.J. 259, at p. 285 (1960).

Perhaps a more valid criticism however, is that conflicts of jurisdiction in such cases are essentially political in nature, that doubts are automatically cast about the independence of the judiciary in the nation concerned, and that it is consequently inappropriate for the Courts to trespass on the Executive's domain and to enter the field of foreign affairs.[84]

Non-Judicial -- From Treaties to Congressional Legislation.

For this reason, there have been several proposala advocating non-judicial solutions to the problem of the extraterritorial application of the antitrust laws. There are, for example, suggestions for further improvements to the operation of existing international procedures for the amelioration of international disputes. Baxter has pointed out that in certain contexts, there has already been a sorting out of jurisdictional claims on a functional basis,[85] and contends that the agreements concluded between nations *vis-à-vis* the status of their forces abroad,[86] and the international agreement on

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84. See Brewster, Antitrust and American Business Abroad (1958), at p. 414, who regards a consideration of conflicting foreign laws and policies as involving basically a political question of foreign affairs.

85. See Baxter, The Extraterritorial Application of Domestic Law: General Principles; 1 U.B.C.L.R. 333, at p. 339 (1959-63).

86. Note the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, signed at London, June 19, 1951, 199 U.N.T.S. 67.

jurisdiction over crimes committed aboard aircraft[87] reflect the allocation of jurisdiction through international agreement.[88]

Oliver agrees that treaty arrangements which do not merely provide for consultation but which specifically designate the exclusive exercise of enforcement jurisdiction to one of several states having jurisdiction may be the answer, commenting that this suggestion derives by analogy from what various countries have done with respect to the problem of multiple taxation of income or of death and gift transfers of property.[89] Taxation treaties of this type are usually strictly bilateral, and are generally quite selective in their allocations of competence, vast experience with tax administration and practical knowledge as to equities having gone into their

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87. Note the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft -- opened for signature at Tokyo, September 14, 1963 -- 2 Int. Legal Materials 1042 (1963).

88. In past years a solution based on an international treaty has received wide support -- see, for example, Note, Inadequacy of National Regulation of Cartels and Proposed Control by United Nations, 14 Geo. Wash. L.R. 626 (1946); Hale and Hale, Monopoly Abroad: The Antitrust Laws and Commerce in Foreign Areas, 31 Texas L.R. 493, at pp. 546-47 (1953); Note, 42 Cornell L.Q. 390, at pp. 397-98 (1957).

89. See Oliver, The Harmonization of Laws and the Development of Principles for the Resolution of Conflicts of Enforcement Jurisdiction as to Transnational Monopolistic and Restrictive Trade Practices, Part IV of the Report of the Committee on the Extraterritorial Application of Restrictive Trade Legislation, Report of 51st Conference of the I.L.A., Tokyo 1964, at p. 549.

formulation. Oliver stresses that if the analogy were followed for antitrust, there would have to be very careful, expert, legal and economic studies of each of the types of economic conduct with which the antitrust laws usually deal.[90] However, considerable difficulties may be encountered here in the delimitation of the restrictive practices commonly recognized between two or more states and the formulation of relevant guidelines;[91] and since the relevant United States policies are the most stringent, such an agreement would necessarily be based on a compromise and thus would very likely result in lowering the substantive standard in foreign commerce cases.[92] Moreover, in any such arrangement there must be a

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90. Supra, fn. 89.

91. Oliver, supra, fn. 89, questions the possibility of taking the types of restrictive practices commonly recognized and working out rules as to which of the two or more states with regulatory interests in the particular practice should be able to assume jurisdiction. He posits the following example, modelled on the Holophane Case, supra, Chapter I, fn. 59: A French, a British and an American company manufacturing speciality glass under a patent agree in France to allocate markets in the three countries in accordance with the nationalities of each producer. Should each country be allocated exclusive jurisdiction over its national, assuming the laws of each cover the restrictive practice, or should exclusive jurisdiction be given to the country where the major economic effect (say on its internal price level) arises ?

92. See Note, Extraterritorial Application of the Antitrust Laws: A Conflict of Laws Approach, 70 Y.L.J. 259, at pp. 285-86 (1960). In fact, the divergence of national policies makes such an agreement unlikely -- see, for example, Carlston, Antitrust Policy Abroad, 49 Northwestern U.L.R. 713, at p. 723 (1955); Kopper, The International Regulation of Cartels -- Current Proposals, 40 Va. L.R. 1005 (1954).

considerable amount of give and take in allocation of jurisdiction, as is the principle in taxation treaties, and in antitrust particularly a fine balance of competing national interests is imperative for the maintenance of international harmony. Such a balance could perhaps be achieved by the institution of an appropriate international tribunal, to which states would agree to submit to third party decision differences of view on jurisdictional issues, including issues of fact, as to the applicability of the general law of jurisdiction in any particular situation. However, whilst a panel of wise men administering 'palm-tree' economic justice has much to commend it, and whilst there have been some uses of such impartial experts in other sectors of international economic co-operation, Oliver expresses doubt, in the light of past experience, as to whether this particular suggestion would prove viable in this field.[93] Moreover, a supranational agency of this type would prove likely to be acceptable to all countries only in the light of a truly international competition policy, a concept which realistically must be regarded as lying at some distance in the future.[94]

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93. Oliver, supra, fn. 89, at pp. 550-51.

94. The Economic Council of Canada, in its Interim Report on Competition Policy, Queen's Printer, Ottawa, July 1969, at pp. 176-77, maintains that elements of such an agency may be discerned in that section of the E.E.C. -- the E.E.C. Consultative Committee -- which is concerned with

In conjunction with the treaty approach, greater co-operation and co-ordination between national antitrust administrators is advocated, in addition to, or perhaps as a replacement for, existing notification and consultation procedures. An international 'administrators co-operation' treaty is suggested, which would provide a permanent basis for consultations and exchanges of view-points between the various national agencies charged with initiative in antitrust matters.[95] Markert also has come to the conclusion that, at the present time, co-operation in and co-ordination of enforcement of national antitrust laws would appear to be the only practical way to deal internationally with private restraints upon international trade, and that this would lead to better results than is the case with isolated extraterritorial antitrust enforcement.[96] He maintains that one of the prime

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the administration of the clauses of the Treaty of Rome dealing with restrictive practices. See also in this connection, Markert, Recent Developments in International Antitrust Co-operation, 13 Antitrust Bulletin 355, at pp. 356-57 (1968).

95. See Oliver, _supra_, fn. 89, at p. 550. Oliver maintains that the precise contours of such a treaty would have to be worked out, but included would probably be provisions for (i) channels for consultation (whether directly, through foreign ministries, the O.E.C.D., U.N., etc.); (ii) exchanges of information (including, possibly, that from reports filed under antitrust laws making provisions for reporting certain types of business arrangements); (iii) authority to make _ad hoc_ agreements as to where action should be taken in particular cases; and (iv) co-operation in enforcement measures ordered by the acting state. -- _Ibid_.

96. Markert, _supra_, fn. 94, at p. 369.

obstacles to such enforcement which would be removed by co-operation between the enforcement authorities of the countries concerned, would be with respect to the obtaining of information about the enterprises and practices involved. National antitrust laws continue to impose restrictions as to the disclosure of information to other governments, and under the proposed arrangement these restrictions could be removed or at least substantially loosened so as to permit the exchange of information on a confidential and reciprocal basis, which would be of proportionate benefit to the participating countries.[97]

Returning to the domestic sphere, there have been a considerable number of proposals advocating Congressional legislative action of one form or another, as the only answer to the jurisdictional and substantive snarl involved in the extraterritorial application of the United States antitrust laws.[97a] As far back as 1955, for example, the American Chamber of Commerce advocated

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97. Supra, fn. 96. Moreover, it is also eminently likely that by co-ordinated action the national enforcement authorities could cope more effectively with international restraints of trade that have harmful effects in several countries. -- Markert, ibid.

97a. For a concise summation of these legislative proposals, the ramifications thereof, and recommendations for future policy, see Antitrust Problems in International Trade, Report of Working Group on Antitrust Policy in International Trade, 1963 A.B.A. Section of International and Comparative Law Proceedings 70, at pp. 73-90.

complete statutory exemption from the antitrust laws for foreign trade,[98] and in 1954 the Report of the Committee on Antitrust Problems in International Trade maintained the necessity for legislative clarification of the antitrust law applicable to foreign commerce, including statutory recognition of the legality of certain foreign agreements and ventures.[99]

Others have recommended congressional legislation vesting power in the President to exempt certain activity abroad from federal antitrust laws. The Report of the Special Committee on Antitrust Laws and Foreign Trade of the Association of the Bar of the City of New York, published in 1957, suggests such an approach.[100] The

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98. See the discussion in the American Chamber of Commerce in London, The American Antitrust Laws and American Business Abroad, at pp. 22-26 (1955).

99. Report of the Committee on Antitrust Problems in International Trade, 4 A.B.A. Section of Antitrust Law Proceedings 206, at pp. 219-20 (1954). The agreements and ventures in question were agreements between American parents and their foreign subsidiaries; joint ventures between American firms and their competitors where no direct and substantial effect on American commerce occurred, and no substantial decrease in competition occurred between the joint venturers; participation in a cartel arrangement producing no substantial effect on American commerce; foreign licensing agreements dividing markets providing they did not produce an unreasonable restraint of American commerce.

100. National Security and Foreign Policy in the Application of American Antitrust Laws to Commerce with Foreign Nations, Preliminary Report of the Special Committee on Antitrust Laws and Foreign Trade of the Association of the Bar of the City of New York -- Cited in Dean, Extraterritorial Effects of the U.S. Antitrust Laws: Advising the Client, 11 A.B.A. Section of Antitrust

Committee stated that the application by United States Courts of the antitrust statutes to cases involving enterprises abroad aroused considerable resentment in foreign nations and emphasized that an antitrust violation in the United States might not only be condoned abroad but might be positively encouraged as a means of expanding business and developing industry.[101] The Committee felt that such an extraterritorial application of the law violated principles of international law which seek to 'prevent a country's reaching beyond its borders to attach activities carried on within foreign nations.'[102] Accordingly, the Committee proposed that Congress legislate to vest in the President power to grant exemption from the antitrust laws to any one or more persons, firms or corporations desiring to engage in any activity raising questions under the antitrust laws as applied to foreign commerce, exemption to be granted if the President finds the grant to be in furtherance of the national security or foreign policy of the United States.[103]

Other ideas follow similar lines -- for example,

Law Proceedings 88, at pp. 94-95 (1957).

101. See Meek, Restrictive International Trade Agreements and Application of United States Antitrust Laws, 7 De Paul L.R. 16, at p. 24 (1957-58).

102. Cited in Meek, *ibid*.

103. See Dean, *supra*, fn. 100, at p. 95.

the development of an advanced clearance procedure under the Attorney-General has been advocated;[104] where for example, the restraint on United States commerce stems from statutory requirements of a foreign government, prior examination may 'permit the acquiescence of the Department of Justice in the restraint as a matter of antitrust policy.'[105] Again, it has been proposed that the whole question of the inter-relationship of the antitrust laws and foreign commerce be vested in the Federal Trade Commission,[106] the function of which would be to ascertain whether or not the act or conduct in question (a) complied with the laws and regulations of a competent authority of a foreign government and (b) directly and significantly affected the foreign commerce of the United States.[107] There are, of course, problems inherent in these suggestions. On a general plane, any attempt to legislate an exemption policy for foreign operations, faces, as

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104. Report of Working Group on Antitrust Policy in International Trade, _supra_, fn. 97a, at p. 77.

105. _Ibid_.

106. Recommendation by the Committee on International Trade Regulation of the A.B.A. Section of International and Comparative Law for the Revision of the Antitrust Laws -- cited in the Report of the Working Group on Antitrust Policy in International Trade, _supra_, fn. 97a, at p. 74.

107. _Ibid_., at p. 74.

Devine points out,[108] the almost insoluble problem of drawing a line between activity which is reasonably necessary to foster foreign trade and not unduly restrict American commerce, and activity which violates basic antitrust policies by unreasonably restricting existing competition. A complete exemption for foreign commerce would be contrary to American antitrust philosophy, whilst anything less than total exemption would result in the legislature's drawing lines to determine illegality, and under American common law tradition such delineation is more properly made by the judiciary in the process of adjudicating the legality of a particular fact situation.

Specifically, the proposal to vest exemption power in the President encourages, rather than discourages, American courts to ignore conflicting foreign laws and policies in determining the reach of the statute and to disregard the fact that the President's concern is with a question of foreign affairs and national security rather than a question of statutory interpretation.[109] Moreover, this suggestion was predicated upon a national security

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108. Devine, Foreign Establishment and the Antitrust Law: A Study of the Antitrust Consequences of the Principal Forms of Investment by American Corporations in Foreign Markets, 57 Northwestern U.L.R. 400, at p. 454 (1962).

109. See Reynolds, Extraterritorial Application of Federal Antitrust Laws: Delimiting the Reach of Substantive Law under the Sherman Act, 20 Vanderbilt L.R. 1030, at p. 1050.

rationale, and thus there would in all probability be little chance that activity usually subject to antitrust attack would ever be scrutinized by the Executive, with the consequence that the exemption would be granted only infrequently.[110] Again, vesting the same power in the Attorney-General is hardly conducive to objectivity and, moreover, 'to give him an absolute veto is to put a responsibility on the Attorney-General for which he is not fitted and which he would not in all likelihood want to assume.'[111]

Neither does the alternative of vesting initial authority over the antitrust laws in the Federal Trade Commission seem likely to provide a more convenient solution. At the present time there is combined in the Commission the dual function of prosecutor and judge; in addition, in view of its position as an enforcement agency in domestic commerce, there is considerable doubt

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110. Supra, fn. 109.

111. Brewster, Antitrust and American Business Abroad, at p. 407 (1958). Note that the 1957 New York Bar Report, supra, fn. 100, recommended that the Attorney-General should not have the authority to make the decision re whether court proceedings should be instituted for activities affecting, directly or indirectly, commerce with foreign nations. It considered it undesirable to leave the determination of the political questions often involved in such activities in the hands of one not charged with responsibility for them under the American system of government. -- Cited with approval in the Report of the Working Group on Antitrust Policy in International Trade, supra, fn. 97a, at p. 74.

as to whether the Federal Trade Commission would be able to give effect to other governmental policies.[112] Traditionally, the Federal Trade Commission is independent, and, as now established, seems in Brewster's words, to be 'an inappropriate locus of responsibility for foreign commerce antitrust if the objective is more rather than less responsiveness to high-level foreign policy.'[113]

Bearing in mind the foregoing problems therefore, a good argument may be propounded for the establishment of a Special Commission which would not only investigate alleged antitrust transactions but also determine the validity of the extraterritorial reach of the Sherman Act with a greater facility than the American courts.[114]

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112. See Reynolds, supra, fn. 109, at p. 1052.

113. Brewster, supra, fn. 111, at p. 415.

114. See Reynolds, supra, fn. 109, at p. 1051, fn. 117. See also in this connection, Snyder, Foreign Investment and Trade: Extraterritorial Impact of United States Antitrust Law, 6 Va. J.I.L. 1, at p. 38 (1965). Note that the A.B.A. Section of International and Comparative Law, in the Report of the Working Group on Antitrust Policy in International Trade, supra, fn. 97a, recommended that Congress should: '(a) transfer from the Attorney-General and the Federal Trade Commission to another existing or to a new agency responsibility for antitrust policy in foreign commerce; (b) authorize this agency to grant advance clearances or immunity from antitrust suits; (c) require the Attorney-General and the Federal Trade Commission to obtain the approval of this agency before commencing any suit or proceeding involving foreign commerce...We recommend that the Agency be so constituted that it will have the competence, power and authority to weigh conflicting policy considerations, and determine what policy should prevail in the matter before it...' For further details, and the reasons in support of this

Members of such a Commission would necessarily be experts in the field of antitrust law and possess special knowledge to deal with complex antitrust cases involving foreign commerce. This type of agency would thereby be in a far better position to make an optimum evaluation of a case than the courts are able to at the present time.[115] It would possess final authority to permit or prohibit initiation of antitrust actions when either a foreign investor or business or a United States investor or business in a foreign nation is involved, and by fully and knowledgably analysing the complexities involved, would be able to arrive at a more equitable and just solution in any given case. Moreover, such an agency would be independent in the fullest sense of the term, so that justice would not only be done but very clearly be seen to be done.[116]

Once again however, it appears necessary for legislation to be enacted to establish such an independent body; Snyder suggests that it could be established by executive order to avoid this necessity, and thus become the unofficial amanuensis of the President[117] -- although in this case the same difficulties present themselves as

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recommendation, see the Report, ibid., at p. 83 et seq.

115. Reynolds, supra, fn. 114.

116. Snyder, supra, fn. 114.

117. Ibid., at p. 40.

were discussed vis-à-vis the vesting of an exemption power in the President. Moreover, it has been convincingly argued that to create a special administrative solution for extraterritorial antitrust cases would be to ignore the fact that such cases are only the most striking illustrations of a wide-spread problem affecting all regulatory legislation, and that the continuing expansion of such legislation and of government participation in national economies requires the Courts explicitly to weigh competing governmental interests in an increasing number of cases involving areas other than antitrust.[118] Such a development has already occurred, for example, in cases dealing with the impact of taxation of personalty statutes on the concept of domicile, and in cases dealing with the regulation of contracts.[119] The fact also remains that the passage of legislation in this sphere is problematic; the Executive Branch of the United States Government has undertaken studies relating to the foreign application of the antitrust laws, and the Senate has conducted a further investigation, but whilst these studies have doubtless changed the outlook of apposite agencies of the Executive Branch, Congress has enacted no new legislation.[120]

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118. Note, Extraterritorial Application of the Antitrust Laws: A Conflict of Laws Approach, 70 Y.L.J. 259, at pp. 286-87 (1960).

119. For further details, see Note, *ibid.*, at p. 287.

120. See Snyder, *supra*, fn. 114, at p. 29.

IV THE OUTLOOK FOR THE FUTURE.

It is clear from the foregoing discussion that no easy solutions to this problem exist. The writer hesitates to resemble the lawyer in Lord Denning's aphorism who ignored solutions for every difficulty and concentrated on the reverse process, but a realistic outlook is essential, even in an academic appraisal, and the fact remains that whatever 'solution' is advocated, there is a corresponding problem.

Moreover, as an adjunct to the great antitrust legislative movement in the past three decades (for example European Coal and Steel Community 1953, European Economic Community 1957, Japan 1947, United Kingdom 1948, France 1953, Sweden 1953, Germany 1957, Spain 1963), new difficulties will arise to test the United States courts in the field of international restraints of trade. Henceforth, future conflicts will in all probability be between varying national antitrust laws and exemptions rather than between United States antitrust law and foreign law in another field, as occurred with contract rights in the I.C.I. - B.N.S. litigation.[121] For example, the permissive provisions of the Treaty of Rome which sanction restrictive trade practices that can be economically justified[122] may be urged as a defence in American

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121. See Chapter III, *supra*, at pp. 131-38.

122. See Buxbaum, Antitrust Regulation within the European Economic Community, 61 Col. L.R. 402, at pp. 409-14 (1961).

antitrust proceedings; alternatively, it is possible that the European Economic Community might hold the actions of a Webb-Pomerene Association to be in violation of Articles 85 and 86 of the Treaty.[123] Thus, as has been observed,[124] the issue in these fact situations would not be whether an United States court in antitrust proceedings

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123. These possibilities are discussed by Fugate, The Common Market and the United States Antitrust Laws, 38 N.Y.U.L.R. 458, at pp. 470-71 (1963).

124. See Note, Limitations on the Federal Judicial Power to Compel Acts Violating Foreign Law, 63 Col.L.R. 1441, at pp. 1494-95 (1963). See also Ellis, Comment on Extraterritorial Effects of Trade Regulation, 111 U.Pa. L.R. 1092, at pp. 1132-36 (1963), for a point of view emphasizing the probability of conflict because of the difference between American and European concepts of antitrust regulation. However, for a viewpoint minimizing such conflict, see Fugate, _supra_, fn. 123; Fugate, Antitrust Jurisdiction and Foreign Sovereignty, 49 Va. L.R. 925, at pp. 935-37, who states that 'the adoption by foreign countries of a policy that restrictive practices are harmful to trade should aid in the enforcement of our own laws, as well as lessen the friction occasionally generated in their enforcement.' -- _ibid_., at pp. 935-36. For further academic comment in this particular area, see Crawford, Antitrust Problems of the American Exporter _vis-à-vis_ the European Common Market, 39 Tulane L.R. 227, at pp. 239-52 (1965); Seward, Antitrust Law Problems of American Business in Dealing with Common Market Countries, 18 Bus. Law 275 (1962); Van Cise, Application of U.S. Antitrust Laws to the European Community, 6 Antitrust Bulletin 145 (1961); Schwartz, Common Market Antitrust Laws and American Business, 1965 U. Ill. L.F. 617 (1965); National Industrial Conference Board, Antitrust Problems of Expanding Business Abroad, Transcript of Workshop Addresses, Fourth Conference on Antitrust in an Expanding Economy, New York 1965. Note, in addition, that the Special Committee on the European Common Market of the Association of the Bar of the City of New York is currently engaged in a study of conflicts between the American system of antitrust law on the one hand and the European Common Market systems on the other.

should attempt to compel the violation of foreign criminal statutes or disregard foreign judgments, but whether it should risk frustrating the economic policies of, and thereby diplomatically estrange, the Common Market countries. This consideration was merely an ancillary factor in the Swiss Watchmakers Case[125] but 'it is likely to become a burning issue in the application of American law to international commerce.'[126]

It is moreover clearly apparent that neither at the present time nor in the immediate future will such international difficulties be circumvented by the development of a truly international antitrust law. Antitrust legislation is guided in the various countries by the necessity to protect their respective economic structures; in view of the considerable variations therein, complete harmonization of antitrust law seems only a remote possibility. Even in the E.E.C. area, where the member states have agreed to a supranational antitrust law,[127] there are apparent and permanent problems between the supranational standards imposed by the Treaty of Rome and the varying national antitrust laws of the participating

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125. See Chapter III, supra, at pp. 138-43.

126. Note, supra, fn. 124, at p. 1495.

127. See supra, fn. 22.

countries.[128]

Against this background, it is trite to comment that any evaluation of the respective merits of the solutions which have been discussed is an extremely difficult task. It is clear that there is no simple and straightforward way out of what has become an international jurisdictional maze. Rather, the best and most practical approach for the future is to concede that international cartels and international trade restraints do not affect merely the United States but are a specifically international problem and must be dealt with on that basis. Thus, it may be assumed at the outset that any independent action on the part of the United States, be it legislative or otherwise, in connection with this subject, may, at best, provide only a partial solution to any conflicts arising between that country and another sovereign government over the application of American antitrust laws to her foreign commerce.

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128. See Friedmann, The Changing Structure of International Law (1964), at p. 185, who points out that such problems of adjustment are well illustrated by the 1962 decision of the Court of Justice of the European Communities in the Bosch Case -- Kledingverkoopbedrijf de Geus en Uitdenbogerd v. Robert Bosch (GmbH) and Maatschappij tot Voortzetting van de zaken der Firma Willem Van Rijn, 8 Jurisprudence de la Cour 89 -- the first to arise from an interpretation of the Regulations issued by the E.E.C. Commission, and their relation to the national laws of the Treaty countries. See also in this connection, Friedmann, ibid., at pp. 104-106.

It has previously been stated that co-operation within an international organization remains the sole means for truly international antitrust activity.[129] Such an organization could be set up as the result of a multilateral convention which deals with, among other subjects, the allocation of jurisdiction in the international antitrust sphere. However, in view of the demise of the Havana Charter and of the International Trade Organization,[130] the failures of the 1951 E.C.O.S.O.C. Resolution and the 1953 Ad Hoc Committee Report,[131] and the non-implementation of the 1960 G.A.T.T. Resolution,[132] any such Convention would appear to be but a speck on the horizon at the present time. This being the case, and since the acceptance of the international jurisdictional theories applicable to this field[133] will doubtless take a considerable period of time to crystallize into accepted public international law doctrines, every effort must be made in the future to improve existing international co-operation and co-ordination in this field. The 1967 O.E.C.D.[134] Recommendation was a giant step forward

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129. Supra, at pp. 215-16.

130. Supra, at p. 217.

131. Supra, at pp. 217-18.

132. Supra, at pp. 219-20.

133. Supra, at pp. 226-38.

134. Supra, at pp. 220-25.

in this context, re-inforcing as it did consultative procedures already existing between the United States and other nations.

A solid foundation having thus been laid, there is much to be said for the formation of bilateral (or even multilateral if possible)[135] treaty arrangements providing for the specific allocation of jurisdiction in foreign commerce situations, and also in the concept of an international 'administrators' co-operation' treaty.[136] In fact, the bilateral treaty approach, whether on a specific or a general plane, would appear at the present time to provide the most efficacious solution to the problem of the conflicts engendered by the extraterritorial application of restrictive trade legislation[137] -- and hopefully such treaty arrangements will presage a not-too-distant period when the economic and political climate of the western world may permit the harmonization of antitrust laws, and

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135. This of course, has a practical advantage over the bilateral approach in that, since practically all important cartel or alleged cartel situations involve the world's major trading powers and not merely two countries, such situations cannot be completely resolved unless all the trading powers involved agree in advance to some continuing modus vivendi and some minimum terms of reference.

136. See Oliver's suggestion, *supra*, at p. 245.

137. See Riedweg, Plenary Session of the Committee on the Extraterritorial Application of Restrictive Trade Legislation, Report of the 52nd Conference of the I.L.A., Helsinki 1966, at p. 29. Note however, the inherent problems in such an approach -- see *supra*, at pp. 243-44.

the development, whether by international treaty or otherwise, of universally accepted principles for the solution of conflicts.

CONCLUSIONS

UNITED STATES EXTRATERRITORIAL JURISDICTION: A QUESTION OF LAW OR POLITICS ?

Churchill is said to have remarked that it makes a considerable difference which end of the rifle one is looking at. Policies which may seem consistent, desirable and even noble to their framer will not necessarily so appear to those subjected to their impact. These sentiments would appear to be apposite in the context of the preceding study, for it is clearly apparent that foreign sovereign nations have reacted adversely when confronted with the 'missionary zeal'[1] with which the American antitrust laws are often applied to commercial activities taking place outside the territorial confines of the United States.

The essence of the problem is of course the great difference between United States and foreign law with respect to restrictive trade practices, and the importance of this whole question of the extraterritorial effect of domestic laws and philosophies has been compounded by the growth of the so-called international companies,[2] so many

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1. Timberg, Extraterritorial Jurisdiction Under the Sherman Act, 11 Record of the Bar of New York 101 (1956).

2. 'The multi-national corporation is a growing feature of the embryonic world economy. Many industries, including those based on new technologies, are characterized by large corporations whose operations span the

of which are domiciled in the United States. Various estimates have been made of the extent of their influence over the next decade or so on world trade, but no matter what figures are used the colossal impact they are able to make cannot be denied.[3] On occasion, the United States courts can take effective jurisdiction over a restrictive arrangement and thereby weaken it by forbidding American corporations to participate. But the application of the Sherman Act can only do a limited part of the job, and its enforcement against foreign corporations, or even foreign subsidiaries of American corporations, is bound to create international problems and political friction.

The 'capacious bosom of international law'[4] has given support to the arguments of both those commentators who claim that the American efforts at unilateral and extraterritorial enforcement of the Sherman Act has undermined the foundations of International Law and sapped the

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globe. This international business integration adds new dimensions to national policies...' -- Foreign Ownership and the Structure of Canadian Industry -- Report of the Task Force on the Structure of Canadian Industry, Chairman, M. H. Watkins, at p. 2 (Privy Council Office, January 1968).

3. See Mackenzie, The Long Arm of American Law, Canadian Business, November 1969, at p. 9. Further: '...international companies are a fact of life -- they are here to stay and ways to mesh their interests with national aspirations should have high priority in discussions of international trade.' -- Ibid.

4. Timberg, Conflict and Growth in the International and Comparative Law of Antitrust, 4 A.B.A. Section of Int. and Comp. Law Bulletin 20, at p. 21 (1960).

unity of the free world,[4a] and the United States Government advocates who maintain that their activities represent no more than normal applications of the objective territorial principle of jurisdiction.[4b] To an impartial observer however, it is very apparent that such jurisdiction indeed offends against the principles of jurisdiction embodied in classical international law, and will continue to do so until new principles are accepted by the community of nations to deal with what is very much a newly-emergent problem. In Timberg's words:[5]

> ...it is not likely that the prevention of similar conflicts of national policies in the future will depend on the invocation of Judge John Bassett Moore's classic opinion in the *Cutting Case*, the memorable opinion of Chief Justice Marshall in *The Schooner Charming Betsy*, and the well-named *S.S. Lotus Case*, which has bemused countless generations of international law commentators.

Moreover, the question arises whether international law, even when instilled with somewhat more pragmatic concepts of jurisdiction, will ever really provide the answer to the problems engendered by the extraterritorial application of restrictive practices legislation. It is evident, for example, that the basic principles of international law will always be subjugated to the priorities

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4a. See Chapter II, *supra*, at pp. 81-87.

4b. See Chapter II, *supra*, at pp. 87-96.

5. Timberg, *supra*, fn. 4, at p. 21.

of the state asserting jurisdiction.[6] Again, 'whatever may be the pros and cons of various international legal concepts for testing the propriety of extraterritorial jurisdiction, the resentment it engenders is a fact of international political life.'[7]

Thus, it is submitted that the question is not a purely legal one, and cannot be solved by rigid application of inflexible legal doctrines and precedents. It is, in reality, primarily a question of international relations or, more specifically, a question of international economic relations, which may only be solved with the help of legal doctrines and precedents which are sound in the context of the current economic and political world structure. Thus, if national conflicts arising from conflicting

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6. Note, for example, the following section embodied in the Antitrust Notification and Consultation Procedure at present in force between the United States and Canada: '...While such consultations are designed to eliminate friction and to find a common approach to antitrust problems affecting both countries, it is understood that each country takes the right and responsibility to take such action as it considers appropriate and necessary to enforce its own laws. The consultations do not give one country a veto over the actions of the other country. Nor does the fact that consultation has taken place necessarily imply approval of whatever action may be taken.' -- Statement by the U.S. Assistant Secretary of State for Economic Affairs, Hearing on the International Aspects of Antitrust before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 89th Cong., 2nd Sess., pt. 1, at p. 453 (1967). For further information on this United States-Canadian arrangement, see Chapter IV, supra, at pp. 169-80.

7. Brewster, Law and United States Business in Canada, at p. 22 (Canadian-American Committee, 1960).

antitrust policies are to be more effectively avoided in the future, it will be predominantly on the premise that they interfere with sound international economic relations.[8] This keynote was sounded as far back as 1958 when Mr. Fulton, then Canadian Attorney-General, stated the core of his Government's objection to the filing of the Canadian Radio Patents Complaint:[9]

> ...I do not put the issue upon the restricted and somewhat inconstant basis of International Law. Even were it to turn out that, in coming to bear upon persons within the United States in order to bring about these results outside the United States, the antitrust cases could be supported on some theory or view of public international law, that nevertheless would not be a practical solution to a practical problem.
>
> The situation, as it strikes us, can be put in this way: that these cases reach into affairs that we regard as relating to our own sovereignty. These cases involve on the part of the United States more interference, and apparent assertion of a right to interfere, in commercial projects in Canada than is fitting or acceptable between two friendly but independent countries.

The contention that United States extraterritorial jurisdiction is more a political than a legal problem is,

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8. See Timberg, supra, fn. 4, at p. 21.

9. Extract from a speech of the Hon. D. Fulton, Minister of Justice and Attorney-General of Canada, delivered to the New York State Bar Association on January 28, 1959 -- Cited in Timberg, supra, fn. 4, at p. 22.

to some extent, supported by the writings of academics.[10] Moreover, there are many indications in the preceding chapters which inevitably lead to the conclusion that the issues discussed possess an essentially political orientation. The very fact that an internal liaison procedure operates between the Departments of Justice and State,[11] the fact that saving clauses are inserted in antitrust decrees,[12] the consistently expressed judicial adherence to the concept of comity,[13] the Department of Justice practice of omitting foreign nationals from the list of defendants in antitrust suits,[14] all indicate that the entire field of foreign commerce antitrust law is recognized as representing an extremely delicate and sensitive area of foreign affairs. Again, the manner in which bilateral treaties, prefaced by extensive negotiation and consultation between sovereign governments,

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10. See, for example, Brewster, Antitrust and American Business Abroad, at p. 414 (1958); Rosen, Notes, Antitrust Laws: Applicability to International Agreements, 42 Cornell L.Q. 390, at p. 398 (1957); Whitney, Sources of Conflict Between International Law and the Antitrust Laws, 63 Y.L.J. 655, at p. 662 (1954); Timberg, Remarks, The Extraterritorial Effects of the U.S. Antitrust Laws, 11 A.B.A. Section of Antitrust Law Proceedings 105, at p. 110 (1957); Timberg, *supra*, fn. 1, at p. 118.

11. See Chapter V, *supra*, at pp. 209-11.

12. See Chapter III, *supra*, at pp. 143-46.

13. See Chapter III, *supra*, at pp. 143-50.

14. See Chapter III, *supra*, fn. 13.

appear to provide the most efficacious solution[15] to what is all too often a jurisdictional impasse supports the premise that many cases in the future will follow the Swiss Watchmakers[16] pattern and become 'a judicially noted diplomatic compromise'.[17]

It is true it is a somewhat less than radical approach ultimately to consider the subject-matter of this study in a political as opposed to a purely legal light, but anyone who would appraise or prescribe in this field cannot help coming face to face with the policy considerations[18] underlying the judgments of the American courts. In a community of nations where the tendency is toward an increasingly closer relationship and an increasing number of overlapping and intertwining arrangements, it is hardly surprising that greater emphasis is attached to feelings about sovereignty and popular opinion about economic self-determination than to technical legal concepts and the substantive facts of national economic interest.[19]

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15. See Chapter V, supra, at pp. 260-61.

16. See Chapter III, supra, at pp. 138-43.

17. See Drucker, Plenary Session of the Committee on the Extraterritorial Application of Restrictive Trade Legislation, Report of the 52nd Conference of the I.L.A., Helsinki 1966, at p. 47.

18. See Brewster, Extraterritorial Effects of the U.S. Antitrust Laws: An Appraisal, 11 A.B.A. Section of Antitrust Law Proceedings 65, at p. 70 (1957).

19. See Brewster, supra, fn. 7, at p. 28.

The passage of reactive legislation by other sovereign countries in answer to American demands[20] epitomises the keenly-felt sense of encroachment upon national identity. The issues, for example, behind the moving of the British Shipping Contracts and Commercial Documents Act[21] through Parliament in 1964 were highly political -- what had originally been a dispute between a government regulatory agency and foreign traders became, in Osborough's words, 'elevated into the cause of awkward, self-conscious whisperings at gatherings of diplomats.'[22] A former Junior Minister who was intimately involved with the passage of that Act has reinforced this viewpoint;[23] he comments that some two years prior to the British legislative action, a considerable amount of negotiation took place with the other European shipping nations with the aim, ultimately unfulfilled, of collectively frustrating the American demands, and stresses the manner in which concerted action between the nations at that stage could possibly have forced the Federal Maritime Commission to retract, thus facilitating settlement of

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20. See Chapter III, supra, at pp. 111-17.

21. See Chapter III, supra, at pp. 111-16 for comment on the provisions of this Act.

22. Osborough, The Extra-Jurisdictional Impact of Anti-Trust Enforcement, 16 N. Ireland L.Q. 239, at p. 241 (1965).

23. Personal Correspondence.

of the whole explosive issue at the international conference table.[24]

From the foregoing study, it is clearly apparent that the problem of the control of restrictive business practices in the international sphere, as epitomised by the problem of the extraterritorial application of United States antitrust law and policy, must be approached in a larger setting than the confines of any particular litigated case.[25] The courts have approached the problem, up to the present time, in the context of the broad language of the Sherman Act and of precedent. Henceforth however, if the interests of the United States are to be protected and international harmony retained, jurisdiction must be exercised in the light of what the impact of any particular decision may be upon the relations of the United States with other states, and not merely upon the

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24. Such a settlement ultimately transpired. An Agreed Minute was signed on December 15, 1964 in Paris under the auspices of the O.E.C.D., between the United States and the relevant foreign governments to end the shipping dispute with the Federal Maritime Commission. This Minute, which was in the nature of a treaty, transferred the dispute to an intergovernmental level and provided, in particular, that, in recognition of the readiness of the foreign governments concerned to use their good offices to secure the information required by the F.M.C., the United States Government would not continue with enforcement proceedings under the 1916 Shipping Act to obtain such information. For details of the provisions of this Minute, see 4 Int. Legal Materials 356 (1965).

25. See Carlston, Antitrust Policy Abroad, 49 Northwestern U.L.R. 713, at p. 735 (1955).

sole consideration of the protection of large American commercial interests.

The problem of the international control of restrictive business practices is a massive one, and involves establishing a working system of control, not merely emanating from one all-powerful state which authoritatively characterizes the factual situation in order to bring its assertion of jurisdiction into harmony with the broad jurisdictional principle invoked,[26] but which will take into consideration the varying interests and views of the several national societies. It occurs to the writer that the following words of the eminent economist, J.B. Condliffe, written as far back as 1938, remain as relevant today and provide an equally fitting conclusion to this study:[27]

> ...The organization of peaceful international relations is an extremely complex problem not to be solved by a simple formula embodied in a single institution, but requiring specific action by varying methods in many different fields, sometimes on a world scale, sometimes in smaller regional units...It is inconceivable that international economic problems can be effectively handled unless their various

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26. See Falk, The Rôle of Domestic Courts in the International Legal Order, at p. 28 (1964). For the prime example of such characterization, see Chapter II, _supra_, at pp. 68-70.

27. Condliffe, Markets and the Problem of Peaceful Change, at pp. 385-86 (1938). -- Quoted in Carlston, _supra_, fn. 25, at p. 733.

aspects -- migration, labour, production, trade, finance, investment and money -- are considered in relation to one another.

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