EXTRATERRITORIAL APPLICATION OF THE ANTITRUST LAWS: A CONFLICT OF LAWS APPROACH

The necessity of extraterritorial application of the antitrust laws is obvious. At a time when a national economy may be affected by transactions occurring anywhere in the world, it becomes a relatively simple task to introduce restraints upon an economy without entering the affected territory.\(^1\) The single fact that an agreement is consumated in London rather than New York, therefore, should not be sufficient to make an otherwise illegal restraint legal. At the same time, however, such an analysis cannot be extended to condemn any commercial transaction in any part of the world solely on the ground that it might have an effect on the economy of the United States. At some point, therefore, respect for the sovereignty of other nations imposes a limitation upon the extraterritorial application of antitrust policies.

The problems involved in drawing such a line have become particularly acute in the post-war world. Critics have charged not only that many prosecutions involving foreign commerce are not in the national interest,\(^2\) but, more important, that many of the resultant decrees have involved an unwarranted interference in the internal affairs of other nations.\(^3\) It is apparent that the latter view is shared by several foreign governments. The Ontario legislature responded to one decision\(^4\) by passing a statute prohibiting compliance with

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2. Carlson, Foreign Economic Policy and the Antitrust Laws, 40 Minn. L. Rev. 125 (1956) (antitrust prosecutions involving foreign corporations are alienating many of our allies in the cold war).


For a general survey of the extent of foreign opposition, see Brewster, Antitrust and American Business Abroad ch. 3 (1958) (hereinafter cited as Brewster).

foreign court orders involving the production of business records,\(^5\) while a later decision involving a Dutch firm\(^6\) resulted in strong diplomatic protests.\(^7\) More recently, an appellate court in Great Britain enjoined the enforcement of several provisions of an antitrust decree,\(^8\) and commentators on both sides of the Atlantic have interpreted this decision as establishing the "illegality" of attempts to apply the antitrust laws extraterritorially.\(^9\)

For more than half a century, courts have sought to define the limits of extraterritorial application of the antitrust laws. Initially, a restrictive view was taken by the Supreme Court in *American Banana Co. v. United Fruit Co.*\(^10\) In that case, plaintiffs charged that defendant had induced a foreign government to assist it in achieving a monopoly and had itself committed violations of the antitrust laws. The complaint was dismissed on the ground that American courts lacked jurisdiction over either "acts of state" or private transactions which had occurred within the territory of the foreign nation. Some later cases involving similar factual situations avoided the restrictive effect of the *Banana* conclusion by finding "acts" within United States territory.\(^11\) Where the only "act" found was a conspiracy,\(^12\) the court's assumption of jurisdiction disregarded *sub silentio* a dictum in the earlier case that such conspiracies, standing alone, would not confer jurisdiction.\(^13\) *Banana*, however, is still cited with

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approval by the Supreme Court, indicating that some limitations upon extraterritorial jurisdiction still exist.

Later cases assuming jurisdiction over extraterritorial transactions indicate a change in jurisdictional criteria. The antitrust laws prohibit certain types of restraints when they affect the foreign or domestic commerce of the United States, and decisions and commentators agree that jurisdiction is based upon the presence of the prohibited effects on commerce. Consequently, courts have focused upon whether restraints affect United States commerce, and not whether the transaction happened to include certain events or acts which took place within the territorial limits of the United States. Thus *Banana*, in which the court never considered the effect of the acts complained of, is distinguished as a case in which no such effects existed.

The effects test, however, is a potentially limitless charter of jurisdiction: all commercial transactions, no matter where they occur, might reasonably be said to have some effect on the United States economy. This problem was explicitly recognized in *United States v. Aluminum Co. of America*, in which Alcoa was charged with attempting to acquire a monopoly in the United States. Pursuant to this attempt, foreign manufacturers had

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18. Almost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade between the two. Yet when one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them.

148 F.2d 416, 443 (2d Cir. 1945).
agreed, through a contract made in Switzerland, to set up a system of export quotas, and evidence was introduced tending to prove that this agreement affected potential imports into the United States. Alcoa, however, had no direct connection with this quota system, participating only through the medium of a Canadian corporation set up to hold Alcoa's properties located outside the United States.

Judge Learned Hand, speaking for the Second Circuit, held that in such circumstances proof of effects on commerce alone was insufficient as a basis for jurisdiction, and that proof of intent to control the foreign commerce of the United States was required in addition. Judge Hand was attempting to introduce limitations on the effects test; he succeeded only in providing new bottles for the old wine. Once the government had proved intent, it was held that the burden on the issue of effect shifted to the defendant. Given the difficulty involved in establishing such a negative proposition, it seems unlikely that a defendant could discharge this burden. Thus, it would appear that a finding of intent to restrain the foreign commerce of the United States would alone be sufficient to justify the assumption of jurisdiction over foreign corporations. In fact, however, there was no direct evidence on the question of intent. But the rule had already been established in antitrust cases that persons are presumed to intend the natural consequences of their acts, and since the evidence in Alcoa seemed to reveal effects on United States imports, it was apparently on this basis that the Second Circuit found the requisite in-

19. Id. at 444-45. See Note, 49 YALE L.J. 1312 (1940) (discussing the evidence submitted during proceedings at the District Court level). The District Court concluded, however, that effects were not proved. United States v. Aluminum Co. of America, 44 F. Supp. 97 (S.D.N.Y. 1941).

20. The Second Circuit in this case was sitting as a court of last appeal pursuant to a certificate from the Supreme Court. 148 F.2d at 421.

21. Id. at 443-44. This view seems to have been accepted by commentators. See, e.g., ATT’Y GEN. NAT’L. COMM. ANTITRUST REP. 76 (1955); Barton, Foreign Trade-Mark Licensing and American Anti-Trust Laws: Some Observations on the Timken Case, 9 Cath. U.L. Rev. 25 (1960); Brewster 297; cf. Note, 71 Harv. L. Rev. 564, 566 (1958).


23. See Note, 49 YALE L.J. 1312, 1318 (1940).


25. The [district] judge also found that the 1936 agreement did not “materially affect the . . . foreign trade or commerce of the United States”; apparently because the imported ingot was greater in 1936 and 1937 than in earlier years. We cannot accept this finding . . . . It by no means follows from such an increase that the agreement did not restrict imports; and incidentally it so happens that in those years such inference as is possible at all, leads to the opposite conclusion. . . . [T]he proportion of imports to domestic ingot was about 15.6 per cent for the first period and about 12.6 per cent for the second. We do not mean to infer from this that the quota system of 1936 did in fact restrain imports, as these figures might suggest; but we do mean that nothing is to be inferred from the gross increase of imports.

148 F.2d at 444; see FUGATE 144.
In cases decided after Alcoa, pleas of good intent or lack of intent, even when apparently proved, have failed to prevent the assumption of jurisdiction. 26 Judge Hand’s attempt to limit the effects test, as well as the continued deference to Banana, reflects judicial reluctance to give extraterritorial effect to legislation. 28 Neither Banana nor the other cases imposing territorial limits on legislation are, however, based on a lack of jurisdiction in the sense of physical power over the person. Jurisdiction in this sense no longer presents insurmountable problems, even when foreign corporations are involved. The government has lost only one case on this issue, 30 and there is reason to believe that even that case would be decided differently today. 31 Generally, broad interpretations of statutory provisions providing for process in antitrust cases allow jurisdiction to be obtained over foreign corporations by means of service on American subsidiaries or affiliates. 33 Even when foreign defendants are not

26. For an analysis of Alcoa which characterizes the intent-effect discussion as illogical, see Fugate 45.
27. E.g., United States v. National Lead Co., 63 F. Supp. 513, 518, 527 (S.D.N.Y. 1945), aff’d, 332 U.S. 319 (1947) (although National Lead apparently proved that it had been unaware of the possibility of an antitrust violation, it was convicted together with DuPont, which had been unable to prove a similar defense).
29. [W]e are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflict of Laws.' United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945); see, e.g., Foley Bros., Inc. v. Filardo, 336 U.S. 281 (1949); New York Cent. R.R. v. Chisholm, 268 U.S. 29 (1925); cf. Note, U. ILL. L.F. 307 (1953).
31. In De Beers, the attempt to obtain jurisdiction by means of an injunction was based, not upon the libeling powers given the government under § 6 of the Sherman Act, which had been successfully tested in several pre-World War II cases, see Oseas, Antitrust Prosecutions of International Business, 30 Cornell L.Q. 42 (1944), but upon the more general § 4 powers. Furthermore, the later District Court decision relied upon a case which was subsequently reversed by the Supreme Court, United States v. Scophony Corp. of America, 333 U.S. 795 (1948), and it seems probable that this later Supreme Court decision has overruled the De Beers case as well, see Fugate at 70.
33. United States v. Scophony Corp. of America, 333 U.S. 795 (1948); In re Electric & Musical Indus., Ltd., 155 F. Supp. 892 (S.D.N.Y. 1957); In re Siemens & Halske A.G.,
found within the jurisdiction, goods involved in the alleged conspiracy may be libeled in order to provide a basis on which to bring the action.\textsuperscript{34}

Rather, the limitation of jurisdiction involved in both \textit{Banana} and \textit{Alcoa} is based upon principles of the conflict of laws. Thus, \textit{Banana}, in which the cause of action was treated as one sounding in tort, was decided on the basis of the principle that an action in tort is governed by the law of the place where the act occurred,\textsuperscript{35} an approach which accounts for the Court's emphasis on the fact that the acts occurred outside the territorial jurisdiction of the United States.\textsuperscript{36} Judge Hand's concern with the limitations on jurisdiction embodied in conflict-of-laws principles is explicitly stated in the \textit{Alcoa} decision.\textsuperscript{37} His insistence upon proof of intent must, therefore, be regarded as an attempt to find an added element which would serve to satisfy those limitations.\textsuperscript{38}

The jurisdictional limitations imposed by conflict-of-laws doctrines must be distinguished from other jurisdictional criteria. Even in domestic cases, jurisdiction of the person must be supplemented by subject matter jurisdiction—the transaction before the court must fall within the terms of the applicable law.\textsuperscript{39} Once foreign elements are introduced, the court must also decide whether the transaction is such that the law of the forum—rather than foreign law—should be applied. It is subject matter jurisdiction in this second sense which is determined by the application of conflict of laws principles: "the limitations customarily observed by nations upon the exercise of their powers . . . "\textsuperscript{40}

\begin{itemize}
\item [\textsuperscript{34}] United States v. A.B.C. Canning Co., 4 Fed. Trad. Reg. Serv. \textsuperscript{ff} 4213 (S.D.N.Y. 1931) (Norwegian sardines) (consent decree); United States v. Deutsches Kali Syndikat Gesellschaft, 31 F.2d 199 (S.D.N.Y. 1929) (French selling agent for German potash); United States v. Amsterdamische Chinine Fabrik, 4 Fed. Trad. Reg. Serv. \textsuperscript{ff} 4186 (S.D. N.Y. 1928) (Dutch quinine) (consent decree), cited in Brewster 56-57 n.3.
\item [\textsuperscript{36}] For the view that extraterritorial application of the antitrust laws violates conflicts of laws principles in the fields of both tort and contract, see Kahn-Freund, \textit{Extraterritorial Application of Antitrust Laws}, ABA SECTION OF INT'L & COMP. L. RPT. 33 (1957); cf. George Monro, Ltd. v. American Cyanamid & Chem. Corp., [1944] 1 K.B. 432.
\item [\textsuperscript{37}] See note 29 supra.
\item [\textsuperscript{38}] A close and definite connection must be shown in order to justify criminal prosecution of an alien for acts done outside the jurisdiction. 1 \textit{Hyde, International Law, Chiefly As Interpreted and Applied by the United States} \S 241 (2d rev. ed. 1945). Intent is one such connection:
\begin{quote}
Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power. Strassheim v. Daily, 221 U.S. 280, 285 (1911).
\end{quote}
\item [\textsuperscript{39}] See 1 \textit{Moore, Federal Practice} \S 0.60[2], at 605 (2d ed. 1959).
\item [\textsuperscript{40}] See note 29 supra; \textit{Restatement, Conflict of Laws} \S 42 (1934). The distinction between the two kinds of subject matter jurisdiction is discussed in \textit{Goodrich, Conflict of Laws} \S 67 (1949). See also Brewster 74.
\end{itemize}
Failure to distinguish between these three forms of jurisdiction has led some commentators to accept facile solutions to the problem of extraterritorial jurisdiction. Thus the rationale of the leading decision on in personam jurisdiction, that a narrow construction of doing business requirements would serve to impede the broad enforcement needed to maintain the policy of the antitrust laws, has been taken as dispositive of all jurisdictional problems involved in extraterritorial antitrust cases. It is argued, for example, that the wide scope of the antitrust laws support jurisdiction so long as due process standards such as notice and sufficient contacts are met. But this easy assimilation of "jurisdictional" precedents fails to recognize that considerations such as ease of travel, which have led to a gradual expansion of notice and minimum contact doctrines in interstate personal jurisdiction cases, are not relevant to a determination of the existence of subject matter jurisdiction. That some courts have recognized this is indicated by Alcoa itself, for, in that case, jurisdiction of the person had been established in the District Court, and Judge Hand's discussion of intent related solely to the problem of subject matter jurisdiction. Similarly, in a recent unfair competition case involving a Canadian corporation, the complaint was dismissed for lack of jurisdiction before consideration of the validity of the process.

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47. For the view that the finding of intent was needed to obtain jurisdiction, rather than in connection with proof of a violation, see Fugate 143-45.
48. Vanity Fair Mills, Inc. v. T. Eaton Co., 133 F. Supp. 522, 526-29 (S.D.N.Y. 1955) (with leave to amend), aff'd as modified, 233 F.2d 633 (2d Cir.), cert. denied, 352 U.S. 871 (1956). The Court based its holding on the lack of subject matter jurisdiction. 133 F. Supp. 526-29. Since the cause of action was based on the Lanham Trade-Mark Act, however, id. at 526, it is clear that the court was in fact determining the existence of subject matter jurisdiction in the conflicts sense.
Presentation of the problem of extraterritorial jurisdiction in terms of conflict-of-laws principles, however, does not by itself provide a solution. Traditional conflict-of-laws doctrines, products of an earlier age, are not adequate to deal with the complex problems presented by the interdependent economies of the contemporary world. An attempt to define the boundaries of permissible extraterritoriality in these terms, therefore, requires a fresh look at conflict-of-laws doctrines.

THE DECLINE OF THE TERRITORIAL PRINCIPLE:
DISINTEGRATION THROUGH DISTINCTION

The Penal—Remedial Distinction

In conflict-of-laws terms, the argument against the extraterritorial application of antitrust legislation has been based upon the principle prohibiting extraterritorial enforcement of penal laws. An analysis of the present status of this jurisdictional limitation is therefore necessary to assess the validity of this argument. The penal law doctrine has often been utilized in domestic cases to justify refusals to enforce statutes of foreign states which provide remedies deemed penal by the forum. A relaxation of this prohibition, however, was already evident in the early case of Huntington v. Attrill, in which the Supreme Court held that a statute imposing liability for all corporate debts on corporate officers who signed falsified certificates was not penal for conflict-of-laws purposes. Similarly, in Loucks v. Standard Oil Co., Judge Cardozo refused to characterize as penal a Massachusetts wrongful death statute which provided for remedies in excess of compensation.

The constriction of the concept of "penal" and the consequent erosion of the prohibition against extraterritorial enforcement of penal laws typified by the Huntington and Loucks decisions were accomplished on the basis of a distinction between penal and remedial legislation, which was said by the Supreme

49. It does not matter whether the proceedings in question are in form criminal proceedings under section 1 or 2 of the Sherman Act or some other penal provision of antitrust law or whether they are proceedings in equity under section 4. In name these proceedings are 'in equity,' but in fact, and I think most certainly from the point of view of international law, the injunctive relief under section 4 is a governmental remedy for the enforcement of certain economic policies, or, if you like, of certain public law duties imposed by antitrust law.

Kahn-Freund, supra note 36, at 37 (citing Banana); see, e.g., Haight, supra note 9, at 640; Kahn-Freund, supra note 9; Meinhardt, Territorial Limits of the United States Anti-Trust Jurisdiction, 3 Bus. L. Rev. 187 (1956). But see United States v. National Lead Co., 332 U.S. 319, 338 (1947) (§ 4 case civil, not criminal); cf. Vermilya-Brown Co. v. Connell, 335 U.S. 377, 381 (1948) (violation of statutory regulations of labor contracts treated as a civil, rather than criminal, matter).


52. 224 N.Y. 99, 120 N.E. 198 (1918).
Court to depend upon whether the statute in question punished an offense against public justice or provided a remedy for injury to private interests. Such a distinction may have been meaningful in terms of the laissez-faire philosophy of an age which could still clearly distinguish a limited area of public activity from the private sector. But with the continued growth of an industrial society came an expansion of regulatory legislation and an increasing number of new types of statutes such as those in the Huntington and Loucks cases. Such statutes represent declarations of the public interest in private transactions. In one sense, they are public, and might therefore be denominated penal. At the same time, however, the acts they prohibit cannot be characterized as crimes against the state; it is private parties who are protected by the remedies provided.

The antitrust laws are typical. Despite a recent District Court decision characterizing the Sherman Act as a criminal statute, the majority of antitrust proceedings are civil in nature. Similarly, in the Banana opinion, the acts complained of are referred to as crimes in one paragraph and torts in the next. Furthermore, the treble damages provision which was involved in Banana has been treated by the Supreme Court as remedial rather than penal legislation, and Banana has been characterized as a civil rather than criminal proceeding. The impossibility of categorizing regulatory legislation as either penal or remedial renders the penal-remedial distinction useless as a standard for determining whether or not a given regulatory law should be applied extraterritorially.

54. See Katzenbach, supra note 43, at 1087-93.
56. This is primarily due to the overwhelming preponderance of private treble damage actions. Thus, in 1954, the Government litigated 11 civil and 1 criminal proceeding, while private parties brought 163 actions. Similarly, in 1957, the Government litigated 5 civil and 7 criminal actions, while private parties commenced 188 suits. Bicks, The Department of Justice and Private Treble Damage Actions, 4 Antitrust Bull. 5, 6 n.5, 12 n.32 (1959).
60. [W]e are dealing with the unenforceability of agreements in restraint of trade on grounds of public policy; we are not answering the question whether a party guilty of such restraint is punishable for crime or is liable to an injunction or a judgment for damages at the suit of a party injured by the restraint. Most of the cases arising under the Sherman Act, however, involve both kinds of questions at the same time. 6 Corbin, Contracts § 1382, at 478-79 (1951). See also Fugate 21.
The prohibition against extraterritorial application of penal laws, like some other conflict-of-laws doctrines, is based upon a strict identification of jurisdiction with sovereignty, and a conception of sovereignty as limited to the territory of the sovereign. According to this concept, a sovereign can exert its power only against acts which occur within its territorial boundaries. In order to function effectively, a strict territorial doctrine must presuppose that a given transaction affects one and only one jurisdiction. The increasingly industrialized economy to which regulatory legislation is a response, however, is typified by a large number of transactions affecting interests located in more than one jurisdiction. Consequently, it becomes increasingly difficult to define rigid rules which will unerringly identify the one proper law applicable to a transaction.\(^1\) The growth of such an economy has been reflected in the field of conflict of laws by the development of doctrines modifying older rules based on the territorial principle. In the field of torts, for example, the principle that the law to be applied is that of the place where the tortious act was committed has been severely criticized,\(^2\) and there has been a developing tendency to regard the place where the harm occurred as the place of wrong for purposes of determining which law to apply.\(^3\) A similar trend away from the territorial principle even with regard to criminal laws has been seen by some commentators.\(^4\)

On the international scene, the breakdown of the territorial principle has been aided by the existence of shared policies.\(^5\) Thus, in the *S.S. Lotus* case,\(^6\) the Permanent Court of International Justice approved Turkey's assumption of jurisdiction in a case involving a crime on the high seas on the

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63. *E.g.*, Hunter v. Derby Foods, Inc., 110 F.2d 970 (2d Cir. 1940); see Goodrich, *Conflict of Laws* § 93; Restatement, *Conflict of Laws* § 377 (1934); *cf.* Cook, *The Logical and Legal Bases of the Conflict of Laws* ch. 16 (1942) (similar attack on conflict doctrines in the field of contracts).

64. See generally 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). Cook justifies this breakdown of the territorial principle in terms of the shift from punishment to cure in the purpose of criminal law, a shift similar to that from penal to remedial which has occurred in the characterization of regulatory legislation. Id. at 328-29.


66. Permanent Court of International Justice, ser. A, No. 10 (1927). (French officer of a French vessel involved in a collision at sea with Turkish vessel convicted by a Turkish criminal court).

ground that the offense involved was one recognized by all civilized nations. The extraterritorial application of the antitrust laws, however, cannot be defended on the ground that foreign policies concerning economic restraints are similar to those of the United States. The United States approach to the problem of economic restraints is in many ways a unique one. Most foreign nations prefer regulation to outright prohibition, and in many, in order to find a restraint on trade illegal, harm to the public must be shown. Such a standard implies that some restraints may be beneficial, and even nations which at present regulate restraints do so in terms of an historical tradition in which cartelization has often received government approval. These differences in policy extend even to matters of procedure. Reactions to United States attempts to enforce the production of documents extraterritorially have ranged from a British court's refusal to enforce letters rogatory on the ground that the permissible scope of examination in antitrust cases amounted to the allowance of "fishing expeditions," to an Ontario statute making it a crime to send business records outside Canada in obedience to a foreign court order. Despite differences in underlying policy, however, the possibilities for evasion provided by the interdependent nature of national economies require that regulatory legislation must to some extent be extraterritorially enforced if it is to be effective. What is needed, therefore, is a doctrinal framework which can accommodate the necessary limitations on extraterritorial jurisdiction without resorting to the absolute jurisdictional prohibitions based on the outmoded territoriality concept.

**Sovereign Immunity: the Governmental-Commercial Distinction**

The jurisdictional limitations imposed by the penal law doctrine focus on the character of the law being applied. Other restraints on extraterritorial jurisdiction arise from the nature of the act or actor being regulated. United States courts have long refused to entertain actions involving a foreign government.

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67. See Regulation of Economic Activities in Foreign Countries (TNEC Monograph No. 40, 1941); Hexner, International Cartels 45-56 (1945); Kronstein & Leighton, Cartel Control: A Record of Failure, 55 Yale L.J. 297 (1946).

68. See Bennett, Comparison of United States and Foreign Antitrust Laws, 6 U.C.L. A.L. Rev. 560, 561 & n.2 (1959); Edwards, Regulation of Monopolistic Cartelization, 14 Ohio St. L.J. 252, 277-78 (1953) (Report by UNESCO committee also adopted this standard); Anti-Trust Laws: A Comparative Symposium 522 (3 University of Toronto School of Law Comparative Law Series, Friedman, ed. 1956); Junckerstorff, International Antitrust Dilemma, 1 St. Louis U.L.J. 312 (1951).


70. See generally Gill, Problems of Foreign Discovery, in Brewster 474.


72. See note 5 supra.
Foreign governments and their property have been held immune from process,\(^7\) and courts have refused to question the legality of acts done by such governments within their own territory.\(^7\) In large part, these doctrines are the result of a judicial reluctance to interfere with amicable relations between foreign nations and the United States government, a reluctance also evident in *Banana* and *Alcoa*.

The same factors which have led to an expansion of regulatory legislation have brought about an increasing involvement of foreign governments in their national economies.\(^7\) The ramifications of this development are well illustrated by the world wide litigation which resulted from Soviet decrees nationalizing Russian banks and insurance companies.\(^7\) Even without resort to nationalization, however, many governments are themselves engaged in restrictive economic practices.\(^7\) Consequently, cases applying the doctrines of sovereign immunity and "act of state" have become increasingly relevant in decisions involving extraterritorial applications of the antitrust laws.

One recent case has interpreted the *Banana* decision as indicating the continued vitality of the territorial principle in cases involving acts of state.\(^7\) But doubt is cast on such an interpretation by the decision in *United States v. Sisal Sales Corp.*\(^7\) in which the fact that the condemned monopoly was based on discriminatory legislation enacted by a foreign government was treated as irrelevant. *Banana* also holds that no tort is committed in persuading a foreign government to do acts illegal under United States laws since the acts of a foreign sovereign within its own territory are *per se* legal.\(^8\) Precisely such persuasion, however, involving attempts to procure legislation from the Mexican government, was enjoined in a recent antitrust decree which, unlike

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75. For the extent of such involvement, see generally *The Public Corporation: A Comparative Symposium* (1 University of Toronto School of Law Series, Friedman, ed. 1954).


77. See Edwards, *supra* note 68, at 276-77.


79. 274 U.S. 268 (1927).

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Banana, applied to Mexican as well as United States corporations.\textsuperscript{81} These later cases indicate that the "act of state" doctrine, so confidently expounded in Banana, can in fact be ignored or overruled in some circumstances; it is by no means certain today that transactions involving action by a foreign government will always be immune from antitrust prosecution.

A defense based on the doctrine of sovereign immunity was rejected in \textit{United States v. Deutsches Kalisyndikat Gesellschaft},\textsuperscript{82} where the French government owned a majority of the defendant corporation's shares. The court's failure to recognize the immunity plea might indicate a limitation on the doctrine of sovereign immunity in antitrust cases, since it relied on the presumption that a government participating in a trading company has voluntarily divested itself of its sovereign character. But such use of this presumption is doubtful, for it was established by the Supreme Court in an interstate rather than international case,\textsuperscript{83} and there is some question as to the validity of such a transposition of doctrine from one context to another.\textsuperscript{84}

In a more recent antitrust case, a subpoena directed to the Anglo-Iranian Oil Company was quashed following a plea of sovereign immunity on behalf of the corporation by the British government.\textsuperscript{85} The plea was held good on the ground that a supply of oil was necessary to Britain in view of her position as a maritime power, and the question of the extent of governmental stock interests in the company was treated as irrelevant. The court attempted to distinguish the Kalisyndikat decision on the ground that purely commercial interests were involved there, while the supply of oil represented a governmental interest for a maritime power such as Britain.\textsuperscript{86} Given the complex needs of modern industry, it is difficult to appreciate the difference between oil and potash as strategic materials. The attempted distinction is further blurred by the fact that among the cases enunciating the doctrine of sovereign immunity on which the court in this case explicitly relied, two involved state


\textsuperscript{82.} 31 F.2d 199 (S.D.N.Y. 1929).


\textsuperscript{84.} See Whitney, \textit{Sources of Conflict Between International Law and the Antitrust Laws}, 63 \textit{Yale L.J.} 655, 662 (1954). Nor should decisions in which an overriding federal policy was involved, e.g., \textit{New York v. United States}, 326 U.S. 572 (1946) (commercial enterprise subject to taxation), serve as precedent in cases involving other nations.


\textsuperscript{86.} Id. at 291.
owned railways,87 while in a third, no examination was permitted as to whether the corporation involved fulfilled commercial or governmental functions.88 Nevertheless, in 1952 the State Department adopted the governmental-commercial distinction as the basis of a policy limiting the doctrine of sovereign immunity.89

The validity of the governmental-commercial distinction has been severely criticized,90 and its application by the judiciary would appear to be difficult in the light of cases according sovereign immunity to state owned railways91 and a Supreme Court holding that merchant ships owned by foreign governments are entitled to the same immunity from suit enjoyed by foreign warships.92 In any case, the new policy announced by the State Department was directed towards the inequalities involved in granting sovereign immunity to government corporations in suits involving tort and contract actions.93 There is much to be said for a refusal to distinguish between private and public corporations when private persons are attempting to enforce causes of action based on breach of contract or negligence, especially where the plaintiff had no notice as to the public nature of the corporation involved.94 But such reasoning cannot be applied in determining whether or not foreign public corporations should be subject to United States antitrust legislation.

The Public Policy Doctrine

Government regulation of economic activity, as well as active government participation in the economy, are expressions of national economic, moral, and

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87. Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705 (2d Cir. 1930) (railways recognized as a "governmental" function); Bradford v. Director Gen. of Railroads of Mexico, 278 S.W. 251 (Tex. Civ. App. 1925).
91. E.g., Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705 (2d Cir. 1930); Oliver Am. Trading Co. v. Government of the United States of Mexico, 5 F.2d 659 (2d Cir. 1924), cert. denied, 267 U.S. 596 (1925).
92. Berizzi Bros. Co. v. Steamship Pesaro, 271 U.S. 562 (1926). But cf. The Beaton Park, 65 F. Supp. 211 (W.D. Wash. 1946) (refusal to accord immunity to a vessel owned by a corporation, the stock in which was wholly owned by the Canadian government). The Court in Berizzi acted without prior State Department approval of the immunity claim. The case is apparently overruled on this point by Republic of Mexico v. Hoffman, 324 U.S. 30 (1945) (especially the concurring opinion by Mr. Justice Frankfurter, id. at 38).
93. See authorities cited note 89 supra.
political philosophies. Due to differences in national philosophies, transactions affecting more than one economy may be subject to conflicting regulatory policies. Extraterritorial application of the antitrust laws creates such conflicts, for the economic policy of the foreign government affected may allow or even encourage restraints on competition prohibited by United States law. The problem, therefore, is to define the boundary between respect for the policies embodied in a foreign state’s regulation of its national economy and the scope which must be accorded to United States regulatory legislation if it is to be effective. Since some such balancing of interests underlies the entire body of conflict-of-laws rules, accommodations between clashing governmental policies might be developed through the application of traditional conflicts concepts.

Recently, however, some commentators have asserted that any consideration of foreign interests could only weaken the effective operation of national economic policies in a world in which foreign courts refuse to defer to United States interests. As a device for implementing such refusals, they have advocated a broader application of the conflict-of-laws doctrine of public policy, which prevents the maintenance of any foreign cause of action whose enforce-


96. This difficulty is well illustrated by a Supreme Court case which held that foreign ships violated the Prohibition laws by carrying liquor into United States ports as part of ship’s stores, in spite of the fact that many were required to do so by foreign governments. Cunard S.S. Co. v. Mellon, 262 U.S. 100 (1923). Prior to national Prohibition legislation, the courts of many “dry” states refused to enforce actions for the recovery of the price of liquor, even where the transaction had been completely consummated in a state in which liquor could legally be sold. Note, Conflict of Laws as to Sales of Intoxicating Liquor, 61 L.R.A. 417, 418 (1903). One state court, however, enforced an action for the price of liquor sold in Mexico despite the 18th amendment, basing its decision on the overriding importance of trade with Mexico. Veytia v. Alvarez, 30 Ariz. 316, 247 Pac. 117 (1926). Contra, Ayub v. Automobile Mortgage Co., 252 S.W. 287 (Tex. Civ. App. 1923).

97. Many of the pressures placed on American firms abroad are nonstatutory. For descriptions of such pressures, see, e.g., Becker, The Antitrust Law and Relations with Foreign Nations, in How To ComPLY WITH THE CLAYTON Act, CCH ANTITRUST LAW Symposium 51 (1959) (local climate of doing business regarded benevolently if not actively encouraged by the foreign government); Bonsal & Borges, Limitations Abroad on Enterprise and Property Acquisition, 11 Law & Contemp. Prob. 720 (1946) (attempts to force nonparticipants in cartels out of foreign markets); Eder, Some Restrictions Abroad Affecting Corporations, id. at 713 (same); Timberg, Foreign Distribution Arrangements and the Sherman Act, 1 Antitrust Bull. 80, 84-85 (1955) (foreign governments or firms may invite American firms to agree on quotas or price-fixing arrangements). American corporations may also combine abroad where, as in the case of Aramco, the foreign government involved refuses to deal with more than one corporate entity. The Executive has apparently given its approval to a similar Iranian oil consortium, largely on grounds of national security. Brewster at 400.

ment is contrary to the "strong public policy" of the forum. The public policy doctrine was originated in order to justify the application of the territorial law of the forum to citizens of other nations who, under civil law doctrines based on status, were deemed to carry their national law with them wherever they went. As it developed, however, the doctrine was often used to justify application of a domestic rule of law in cases where the forum's own choice-of-law rule would otherwise have dictated the application of foreign law. The parochialism inherent in this use of the doctrine resulted in severe criticism by commentators and, on the basis of the full-faith-and-credit clause, the Supreme Court has restricted its application in the interstate context. In the international sphere, however, totalitarian states have at times practiced an extreme form of this parochialism by refusing under any circumstances to defer to the interests of states which had different economic and political philosophies. Consequently, a partial return to public policy doctrines based on status has been urged, and some commentators have seen the beginnings of a trend towards such a use of public policy by courts applying United States regulatory legislation extraterritorially.


102. E.g., Beach, Uniform Interstate Enforcement of Vested Rights, 27 Yale L.J. 656 (1918); Goodrich, Public Policy in the Law of Conflicts, 36 W. Va. L.Q. 156 (1930). For the similar position taken by British commentators, see, e.g., Wolff, Private International Law 176 (2d ed. 1950).


104. Nazi Germany, for instance, attempted to regulate every aspect of the lives of its citizens, and consequently regarded all German law as public in nature, and refused completely to take into account the impact of foreign legal systems. 2 Rabel, The Conflict of Laws: A Comparative Study 560 (1947).


It was held in the Banana case that the Sherman Act, like all other territorial laws, stopped at the three-mile limit. It is now apparently the contention of the Government here that that is not true, that we carry with us abroad, as under the Roman and the civil law, the laws of citizenship and not the lex soli. We had always supposed that the common law was predicated on the lex soli. No matter whether a man was Roman, Scythian or barbarian, bond or free, he was judged by the law of the place where the legislature had spoken. Now apparently it is not going to be true hereafter of citizens of the United States. They are going to be judged by the lex of their origin and carry with them their privilege or disadvantage as Romans or as citizens of the United States.
Courts have long held that laws essential to governmental functions, such as taxation or the administration of justice, are applicable to all nationals by virtue of their status as citizens, whether or not they are resident within the national boundaries. Recently, however, the Supreme Court appears to have expanded this extraterritorial jurisdiction based on status to cases involving regulatory legislation. One such decision, dealing with the regulation of labor contracts, may have been influenced by the fact that the territory involved was an American military base on foreign soil. In *Steele v. Bulova Watch Co.*, however, the acts complained of took place in Mexico, and the Court stressed Steele's United States citizenship in holding that jurisdiction existed under United States trademark legislation. On close analysis, however, *Steele* does not represent an application of the status doctrine to problems of extraterritorial jurisdiction. The case has been interpreted as holding that United States courts have jurisdiction under the trademark legislation whenever American commerce is affected, and this view is supported by the fact that *Banana* was distinguished in the opinion on the ground that no effects on United States commerce were proved in that case. If the operative factor in the Court's assertion of jurisdiction was an effects test, Steele's United States citizenship must have been irrelevant; as antitrust cases using the effects test have demonstrated, that test confers jurisdiction without regard to nationality.

Given the interdependent nature of national economies, moreover, any attempt to return to doctrines of status must end in a welter of conflicting judgments. The possibility that domestic legislation may be violated by foreign corporations or by means of transactions centered in other nations necessitates reliance on the willingness of other states to allow a measure of extraterritorial enforcement of United States legislation. The need for such comity was explicitly recognized in the recent case of *United States v. Imperial Chem. Indus.*, 106.

106. Cook v. Tait, 265 U.S. 47, 56 (1924) (stressing the "governmental" nature of the taxing power).
110. 344 U.S. 280 (1952); cf. Branch v. FTC, 141 F.2d 31 (7th Cir. 1944) (resident citizen engaged in fraudulent practices in Latin American markets).
112. Note, 41 Geo. L.J. 420 (1953); Note, 21 Geo. Wash. L. Rev. 115, 118 (1952) (noting that such jurisdiction must nevertheless be limited when it comes into conflict with the laws of other nations).
The decree in that case required ICI, a British corporation, to divest itself of certain patents which it had obtained from DuPont. ICI, however, together with another British firm, had already created a corporation known as British Nylon Spinners, to which it had granted an exclusive license under the patents in question. British Nylon Spinners thereupon applied to the British courts for an injunction restraining ICI from complying with the United States decree and ordering it to execute the license, and the decree was granted.\(^{116}\)

These contradictory judgments have been explained as the result of different findings of fact,\(^{117}\) the United States District Court having found that BNS was created in an attempt to circumvent the proposed decree,\(^{118}\) while the British court found that BNS was not a party to the conspiracy.\(^{119}\) The British court, however, did not rely upon this finding of fact, but based its decision on the grounds that BNS had not been before the United States court, and that the territorial principle had been violated by the United States decree, since the contract for the license was a British contract, made in Britain between two British corporations.\(^{120}\)

Despite its reliance on the territorial principle, the British Court of Appeal stressed its desire to maintain comity with the United States judicial system.\(^{121}\) Similarly, the District Court indicated that its decision conformed with a British public policy condemning monopolies.\(^{122}\) But this view overlooks significant differences between British and United States antitrust legislation,\(^{123}\) and, more important, it fails to recognize that the policy of the British patent laws is to foster domestic production at the expense of imports,\(^{124}\) and would thus be opposed to any attempt to subject holders of British patents to foreign competition. In fact, this British patent policy had been proved in the United States court.\(^{125}\) Rather than embarking upon a dubious attempt to find conformity between conflicting policies, therefore, the United States court might have been better advised to recognize explicitly the existence of conflicting policies, to stress the possibilities for evasion which have threatened to render United States regulatory legislation ineffective in the absence of


\(^{117}\) See FUGATE 92.

\(^{118}\) 105 F. Supp. at 230-31.

\(^{119}\) [1955] 1 Ch. 37, 47.

\(^{120}\) Id. at 51-52.

\(^{121}\) Id. at 53. The United States court also recognized the need for comity. 105 F. Supp. at 229.

\(^{122}\) Ibid.


\(^{124}\) See BOOKER, THE PROBLEM OF BRITAIN'S OVERSEAS TRADE 171 (1948); Note, 66 HART L. REV. 924, 926 (1953).

\(^{125}\) 105 F. Supp. at 229-30.
extraterritorial enforcement, and to indicate the factors which led it to regard
the United States interest as the more important in the particular transaction
involved. Had this been done, the British court would have been faced with
the choice between comity and territoriality, and might therefore have found
it more difficult to persist in its refusal \(^{126}\) to accept the District Court's finding
as to the attempted evasion of United States legislation. Had the United States
court's finding of fact been accepted, the Court of Appeal's injunction against
compliance with the United States decree could have been justified only on
the basis that the British interest outweighed that of the United States in
the particular case. Faced with the necessity of making such a determination,
it is at least arguable that the Court of Appeal would have decided the case
differently.

Continued adherence by foreign courts to the territorial principle endangers
successful enforcement of United States regulatory legislation where the events
affecting United States commerce occur abroad. Since the United States anti-
trust laws are more stringent and more strictly enforced than those of any
other nation, our interest in a shift from territoriality to comity is greater
than that of any foreign state. Comity, however, is a notion which implies
reciprocity, \(^{127}\) and it is therefore essential that foreign courts and governments
are made aware that their national interests are receiving proper consideration
in United States adjudications. \(^{128}\)

Doctrinally, this notion of comity can be implemented in terms of the public
policy doctrine. Although the principal use of this doctrine has been to justify
refusals to entertain foreign causes of action or to consider defenses based
on foreign law, it is sufficiently broad to permit its use as a vehicle for the
consideration of foreign interests. \(^{129}\) Arguments for using the public policy
doctrine in this manner are particularly compelling because of the drastic
consequences of the alternative. Where the court refuses to recognize a defense
based on foreign law or foreign public policy, the doctrine of res judicata
prevents a reopening of the question. \(^{130}\) The Supreme Court has recognized

\(^{126}\) [1955] 1 Ch. at 53-54.

\(^{127}\) Story, Conflict of Laws 45 (3d ed. 1846) ("a sort of moral necessity to do
justice, in order that justice may be done to us in return").

\(^{128}\) For the view that such consideration is not at present being given, see Katzenbach,
Conflicts On An Unruly Horse: Reciprocal Claims and Tolerances in Interstate and In-
ternational Law, 65 Yale L.J. 1087, 1149 (1956); cf. Cheatham & Reese, Choice of the
Applicable Law, 52 Colum. L. Rev. 959, 982 (1952).

\(^{129}\) See Restatement, Conflict of Laws § 382(2) & comment (1934).

\(^{130}\) See generally 1 Moore, Federal Practice 4017-50 (1959).

When the doctrine is used to deny enforcement to a foreign cause of action, e.g.,
Union Trust Co. v. Grosman, 245 U.S. 412 (1918); Meacham v. Jamestown, Franklin & Clear-
field R.R., 211 N.Y. 346, 105 N.E. 653 (1914), it is still possible for the plaintiff to
find another forum which will reach a different result.

Such negative uses of public policy are often disguised by basing decisions on the dis-
tinction between penal and remedial statutes, see note 50 supra, or between substance
and procedure, the forum's rules governing the latter, Mackay v. Central R.R., 4 Fed. 617 (C.C.
S.D.N.Y. 1876) (wrongful death statute); Mertz v. Mertz, 271 N.Y. 466, 3 N.E.2d 597
this consideration in interstate cases.\textsuperscript{131} It has utilized the full-faith-and-credit clause—the interstate analogue of comity—severely to limit the power of state courts to reject foreign defenses when those defenses are rejected on the ground that they violate the public policy of the forum.\textsuperscript{132} Indeed, the Court has extended these limitations to cases in which permanent residents of the forum are involved.\textsuperscript{133}

Furthermore, in an international context, United States courts have already made determinations based on a recognition of conflicting policy interests.\textsuperscript{134} Thus, in \textit{Holzer v. Deutsche Reichsbahn-Gesellschaft},\textsuperscript{135} the New York Court of Appeals upheld the validity of a defense based on Nazi racial decrees—edicts which were later characterized as “barbarous” by another state supreme court.\textsuperscript{136} The New York court based its decision on the fact that the contract on which the suit was based was made in Germany between a German corporation and a German national.\textsuperscript{137} As this consideration of the lack of contacts

\begin{itemize}
  \item United States v. Holophone Co., 119 F. Supp. 114 (S.D. Ohio 1954), \textit{aff’d per curiam}, 352 U.S. 903 (1956) (decree affirmed unanimously except for paragraph ordering defendant to sell in Great Britain in violation of valid English agreement not to compete, which was affirmed only by equally divided court). It had been argued that this paragraph violated international law. 25 U.S.L. WEEK 3141 (1956); \textit{cf.} 19 U.S.L. WEEK 3293 (1951).
  \item Vanity Fair Mills, Inc. v. T. Eaton Co., 133 F. Supp. 522, 529 (S.D.N.Y. 1955), \textit{aff’d as modified}, 234 F.2d 633 (2d Cir.), \textit{cert. denied}, 352 U.S. 871 (1956), discussed at note 48 supra and accompanying text. The \textit{Steele} decision was distinguished on the grounds that the defendant in that case was a United States citizen, 133 F. Supp. at 528, and the \textit{BNS} decision cited the difficulties which an assumption of jurisdiction would involve, \textit{ibid}.
  \item In re Investigation of World Arrangements With Relation to the Production, Transportation, Refining and Distribution of Petroleum, 13 F.R.D. 280, 289, 291 (D.D.C. 1952) (court received communication from British government).
  \item 277 N.Y. 474, 14 N.E.2d 788 (1938). A result similar to that in the \textit{Holzer} case was reached by a federal court in \textit{Bernstein} v. Van Heygen Freres S.A., 163 F.2d 246 (2d Cir. 1947), \textit{cert. denied}, 332 U.S. 772. (1947). \textit{But see} the opposite result in Bernstein v. N.V. Nederlandsche-Amerikanische Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954) (decided after a declaration of United States public policy by the State Department).
  \item 348 Pa. 335, 35 A.2d 346 (1944) (dictum).
  \item See Note, 23 VA. L. REV. 288 (1937). Thus, in a similar situation where the contract was to be performed in the forum by a resident corporation, a British court reached the opposite conclusion. Frankfurter v. W.L. Exner, Ltd., [1947] 1 Ch. 629.
with the forum indicates, the validity of a defense based on foreign public policy should be determined, not by the degree to which such policy is similar to our own, but by the relative interests of the forum and the foreign government in the transaction before the court. 138

When the foreign public policy raised as a defense consists of an act by a foreign sovereign, or the public nature of a foreign corporation, the doctrine of sovereign immunity becomes relevant. Courts in cases concerned either with domestic or foreign commerce have recognized official acts by a government and acts specifically required by foreign law as valid defenses to a charge of violating the antitrust laws. 139 But this degree of recognition is not sufficient. In the ICI cases, for example, the British patent policies offended by the United States decree did not require the performance of the acts in question. Thus, an evaluation of foreign governmental interests which relies exclusively on specific administrative or legislative intervention will fail to provide the basis for that degree of comity among nations which is necessary if the antitrust laws are to be enforced effectively. 140 What is needed, rather, in the case of a defense based on sovereign immunity, just as in the case of a conflict of regulatory legislation, is an appreciation of the relative weight of the competing governmental interests: 141 an appreciation informed by the same sophisticated regard for political and economic realities which has resulted in a substitution of an effects test for "acts" as the basis for extraterritorial jurisdiction.

Allowing a defense based on foreign public policy would help to avoid the confusion created by cases such as Timken Roller Bearing Co. v. United

138. For an attempt to apply such considerations in conflicts cases generally, see Katzenbach, supra note 128, at 1117-27.


141. For a test in sovereign immunity cases based on the importance of the policy involved to the foreign government, see Wedderburn, Sovereign Immunity of Foreign Public Corporations, 6 INT'L & COMP. L.Q. 290 (1957).
In that case, a United States company, unable to overcome the restrictions placed on foreign competition by the British government, set up a British subsidiary, the ownership of which was shared with British interests. The British firm then set up a wholly owned French subsidiary. The three firms agreed not to compete with each other in their respective territories, and on this basis, all three were found guilty of violating the antitrust laws.

Mr. Justice Jackson, dissenting, evidenced concern over the application of United States laws to foreign commerce. In articulating this concern, however, his opinion focused on the apparent anomaly involved in holding market divisions between parent and subsidiary illegal, when the same market division could have been accomplished legally through the creation of a foreign branch. Not only is the seeming anomaly unrelated to the majority opinion, but, more important, Jackson's focus on the branch-subsidiary distinction obscures the basic issue of conflicting public policies which is at the root of the distinction between domestic and foreign application of the antitrust laws. Recognition of the fact that it is conflict with the policies of other governments which gives rise to the limit on extraterritorial jurisdiction is essential to proper analysis of cases, such as Timken, which involve foreign elements. Thus if, as is sometimes the case, separate subsidiaries are created, not in deference to foreign economic policies, but only to minimize taxes and escape unlimited liability in foreign courts, it is unlikely that different considerations should govern the application of United States antitrust law than


144. 341 U.S. at 606-08. Cf. his colloquy with government counsel, 19 U.S.L. Week 3293 (1951).

145. The holding seems thoroughly justified in view of the District Court's finding of fact that the three corporations were treated throughout as totally separate entities. 83 F. Supp. at 311. There are several precedents in domestic antitrust cases for a finding of illegal conspiracy between parent and subsidiary corporations. The Lorain Journal Co. v. United States, 342 U.S. 143 (1951); Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211 (1951); Schine Chain Theaters, Inc. v. United States, 334 U.S. 110 (1948); United States v. Yellow Cab Co., 332 U.S. 218 (1947). In any case, and contrary to the view expressed by some commentators, Hale, Joint Ventures: Collaborative Subsidiaries and the Antitrust Laws, 42 Va. L. Rev. 927 (1956); Comment, Foreign Subsidiaries in Antitrust Law, 4 Stan. L. Rev. 559 (1952), the Timken decision was based on the per se illegality of market division, rather than on a holding that jointly owned manufacturing subsidiaries are per se illegal. Thus, while other decrees have required United States companies to divest themselves of stock interests in foreign subsidiaries, United States v. Imperial Chem. Indus., Ltd., 105 F. Supp. 215, 242 (S.D.N.Y. 1952) (decree); United States v. National Lead Co., 63 F. Supp. 513, 534-35 (S.D.N.Y. 1945), aff'd, 332 U.S. 319 (1947), a later decision explicitly recognized that Timken did not require a holding that such joint ventures are per se illegal, United States v. Imperial Chem. Indus., Ltd., 100 F. Supp. 504, 557 (S.D. N.Y. 1951) (opinion), 105 F. Supp. 215, 241 (S.D.N.Y. 1952) (decree).

in the case of domestic subsidiaries. But where a foreign government requires local participation, it is probable that an attempt is being made to regulate all resident corporations in accordance with national economic policies. Furthermore, even in the case of corporate subsidiaries wholly owned by United States interests, some governments regard the production of business records in United States antitrust cases as violating their own national interests. It seems necessary, therefore, that courts should examine the extent to which the given foreign government regards resident corporations, whatever their nationality, as instruments of national economic policy, and the degree to which such policy diverges from that embodied in the antitrust laws.

What recognition there has been of the differences involved in applying the antitrust laws to domestic or to foreign markets has resulted in the demand for a different substantive standard to be applied in all foreign commerce cases—a separate and distinct test of "reasonableness." An early district court case explicitly relied on the rule of reason approach, but the decision has been ignored in subsequent cases involving foreign commerce. More recently, a district court in United States v. Minnesota Mining & Mfg. Co. seemed to be recognizing a "reasonableness" defense when it admitted that no agreement resulting in United States participation in a market which had previously been closed over a sufficiently long period could be classified as a restraint. The defense

147. See Shawcross, English Restrictive Practice Legislation: Extraterritorial Effect of United States Antitrust Laws, ABA, SECTION OF ANTITRUST LAW REPORT 111, 115 (1957) (British government reasoned that directors' primary obligation was to a British company rather than to the United States shareholders).


152. Id. at 958. But see United States v. Imperial Chem. Indus., Ltd., 105 F. Supp. 215, 238 (S.D.N.Y. 1952) (decree) (suggesting that proof that the relevant markets had previously been closed might not constitute a defense to a charge of violating the antitrust laws).
was rejected on the grounds that a profit, although a lower one, could have been made by selling United States products directly rather than through local subsidiaries, and that defendants had failed to prove either a legal ban on United States products or a situation in which no profit whatsoever was possible. But an indication that no recognition will be given to a "foreign commerce rule of reason" is found in an earlier case, in which DuPont's defense that it had to join a cartel or stay out of foreign markets entirely was met by the court's assertion that the Attorney General should have been asked to prosecute the cartel. And although one dissenting opinion in Timken urged adoption of the test, the majority decision was based on a finding of per se illegality, and has been recognized as such in a later case. The Supreme Court's refusal to apply different substantive standards to violations in domestic and foreign commerce seems justifiable, especially in view of the difficulties in distinguishing between foreign and domestic markets.

Moreover, recognition that the problems created by extraterritorial application of the antitrust laws are jurisdictional rather than substantive may facilitate their solution. For example, while jurisdiction in Alcoa was probably based on the effect of market sharing agreements on exports to the United States, and hence on competition and prices within the United States, the

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153. 92 F. Supp. at 958-60.
155. Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951) (citing the famous per se footnote 59 of United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 (1940)).
157. See Katzenbach, supra note 128, at 1152 n.231. For the dangers involved in a "foreign market rule of reason," see Justice Frankfurter's tentative attempt to label the acts of defendant in Banana as "reasonable": Timken Roller Bearing Co. v. United States, 341 U.S. 593, 605 (1951) (dissent).

This Act was regarded by many, including the FTC which administered it, as repealing that portion of antitrust law which applied to foreign trade. See Federal Trade Commission, Letter to Silver Producers, in Export Prices and Export Cartels 125, 126 (TNEC Monograph No. 6, 1940); Sulpher Export Corp., 43 F.T.C. 820 (1947); Ex parte Lamar, 274 Fed. 160, 172 (C.C.S.D.N.Y. 1921) (dictum); Montague, The Webb Bill and the Antitrust Laws, 3 A.B.A.J. 145 (1917); Oppenheim, Cases on Federal Anti-Trust Laws 66 (1948); Note, 44 Ill. L. Rev. 835, 839 (1950). A recent decision, however, United States v. United States Alkali Export Ass'n, Inc., 86 F. Supp. 59 (S.D.N.Y. 1949), has held that antitrust laws are applicable to Webb-Pomerene associations.
159. See note 25 supra and accompanying text.
holding in that case that proof of intent shifts the burden of proving effects might result in the assumption of jurisdiction in a case where the harm was not sufficient to justify it.\textsuperscript{160} There are cases in which the court has assumed jurisdiction without examining the question of effects,\textsuperscript{161} and in one administrative decision, a violation was found on the basis of "broad considerations of policy" in spite of a finding of fact that no restraints existed.\textsuperscript{162} Recognition that foreign governmental interests should be impinged upon only if there is a sufficient effect on United States commerce would avoid such questionable determinations.

One possible objection to a solution involving foreign public policy is that the determinations involved are too complex to be undertaken by the judiciary.\textsuperscript{163} Courts, however, have often been faced with the problem of transactions which are legal in one state and condemned by another, and they have tended to employ conflict-of-laws principles in deciding such cases. Thus, in the cases resulting from Soviet decrees nationalizing banks and insurance companies, it was held that such decrees governed property located within Russia,\textsuperscript{164} while foreign branches and subsidiaries of Russian corporations were not affected.\textsuperscript{165} Similarly, contracts made and to be performed in Russia were held to be abrogated by the decrees\textsuperscript{166} even where residents of the forum were involved,\textsuperscript{167} while contracts made and to be performed in foreign countries

\textsuperscript{160} For hypothetical horribles, see Kahn-Freund, Extraterritorial Application of Antitrust Laws, ABA, Section of Int'l & Comp. L. Report 33, 41 (1957). The position that United States antitrust policy goes beyond any demonstrable impact on American markets is taken by Katzenbach, supra note 128, at 1150.

\textsuperscript{161} In United States v. American Tobacco Co., 221 U.S. 106, 145-46 (1911), the Supreme Court assumed jurisdiction over British corporations on the basis of existent contractual or stock connections with the American company, in spite of the fact that the court below had dismissed the complaint as to the British corporations, on the grounds of their foreign citizenship and the fact that the contracts in question had been entered into in Great Britain, where they were valid. United States v. American Tobacco Co., 164 Fed. 700, 703 (C.C.S.D.N.Y. 1908); cf. United States v. General Elec. Co., 82 F. Supp. 753, 891 (D.N.J. 1949) (extent of effect not proven).

\textsuperscript{162} In the Matter of General Milk Co., F.T.C. 1355, 1410-11 (1947) (Webb-Pomerene case).


\textsuperscript{167} See Nussbaum, Public Policy and the Political Crisis in the Conflict of Laws, 49 Yale L.J. 1027, 1039 (1940).
remained in force.\textsuperscript{168} Foreign laws dealing with currency regulation have been similarly treated.\textsuperscript{169} Even the British courts, which tend strictly to adhere to the territorial principle,\textsuperscript{170} have held contracts aimed at evasion of foreign legislation to be unenforceable.\textsuperscript{171} Moreover, there has been some progress in defining more precisely the factors which would be involved in a balancing of United States and foreign interests in the antitrust context,\textsuperscript{172} and discriminations as fine as those involved in such balancing have already been made in cases involving extraterritorial application of United States trademark legislation.\textsuperscript{173}

\textsuperscript{168} E.g., Sokoloff v. National City Bank, 239 N.Y. 158, 145 N.E. 917 (1924).


\textsuperscript{171} E.g., Regazzoni v. K.C. Sethia, Ltd., 2 All. E.R. 487 (C.A. 1956) (Indian political law boycotting South Africa); Foster v. Driscoll, [1929] 1 K.B. 470 (attempt to smuggle liquor into the United States during Prohibition). Both cases are distinguishable from \textit{BNS}, the first because no British policy was involved; the second because performance was to be in the United States.

\textsuperscript{172} See generally \textit{Brewster} at 446 & ch. 12 (tests designed for administrative officers). See also \textit{Brewster}, \textit{Extraterritorial Effects of the United States Antitrust Laws: An Appraisal}, ABA, Section on Antitrust Law Report 65, 73 (1957).

\textsuperscript{173} In the \textit{Steele} case, for instance, the Court stressed the fact that the Mexican trademark had already been nullified at the time of the decision, 344 U.S. at 285, 289. In an earlier decision, George W. Luft Co. v. Zande Cosmetic Co., 142 F.2d 536 (2d Cir. 1944), \textit{cert. denied}, 323 U.S. 756 (1944), the Second Circuit refused to grant an injunction against acts done within the United States where the goods involved were sold in foreign countries in which defendants had, through successful litigation, established their right to employ a trademark confusingly similar to plaintiff's. See also Vanity Fair Mills, Inc. v. T. Eaton Co., 133 F. Supp. 522 (S.D.N.Y. 1955), \textit{aff'd as modified}, 234 F.2d 633 (2d Cir.), \textit{cert. denied}, 352 U.S. 871 (1956), discussed at note 48 supra. The \textit{Luft} case was distinguished on the ground that the defendants there had successfully concluded their foreign litigation in a post-\textit{Steele} decision, Ramirez & Feraud Chili Co. v. Las Palmas Food Co., 146 F. Supp. 594, 602 (S.D. Cal. 1956), \textit{aff'd per curiam}, 245 F.2d 874 (9th Cir. 1957), \textit{cert. denied}, 355 U.S. 927 (1958), in which an injunction was granted against United States citizens while a Mexican action to have the copyright involved nullified was still pending. If no foreign trademark, and consequently no foreign interest, exists, a United States court would have subject matter jurisdiction even where the fraudulent trademarks are affixed only in foreign countries. George W. Luft Co. v. Zande Cosmetic Co., 142 F.2d 536, 541 (2d Cir.), \textit{cert. denied}, 323 U.S. 756 (1944); Vacuum Oil Co. v. Eagle Oil Co., 154 Fed. 867 (C.C.D.N.J. 1907), \textit{aff'd}, 162 Fed. 671 (3d Cir. 1908), \textit{cert. denied}, 214 U.S. 515 (1909); cf. Ingenohl v. Olsen & Co., 273 U.S. 541, 544-45 (1927) (Alien Property Custodian may not transfer trademark rights in foreign countries contrary to foreign law) (dictum).
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complex, courts have constantly emphasized their capacity for making equally complex findings when considering the reasonableness of domestic economic restraints.\textsuperscript{174}

The burden of establishing the existence of a foreign public policy would rest, not on the court, but on defendant’s counsel. Due to the bulk and complexity of the materials involved even in domestic antitrust cases, firms which specialize in this practice have developed elaborate trial techniques for the proof of complex economic facts and concepts.\textsuperscript{176} Failure of United States courts, however, explicitly to recognize foreign public policy as a defense in antitrust cases has created such uncertainty that even these law firms seem unable adequately to counsel a client contemplating operations abroad;\textsuperscript{176} indeed, this uncertainty has even been said to limit the expansion of foreign trade.\textsuperscript{177} Recognition of the foreign public policy defense would aid in the elimination of such uncertainty by enabling defendants’ lawyers to anticipate possible prosecution by building a record on a basis known to them in advance, making possible reliable and more realistic advice.\textsuperscript{178}

Due to the political nature of the conflicts involved, several proposals have been made advocating nonjudicial solutions to the problem of extraterritorial application of the antitrust laws. While a solution based on an international treaty has received wide support,\textsuperscript{179} the divergence in present national policies makes such an agreement unlikely.\textsuperscript{180} Furthermore, since the relevant United States policies are the most stringent, such an agreement, which would neces-

\textsuperscript{174} This position was taken even in a case decided on per se grounds. United States v. Timken Roller Bearing Co., 83 F. Supp. 284, 309 (N.D. Ohio 1949), modified on other grounds, 341 U.S. 593 (1951).

\textsuperscript{175} See, e.g., the description of the formulation of a defense by Gesell, Legal Problems Involved in Proving Relevant Markets, 2 Antitrust Bull. 463 (1957).


\textsuperscript{178} But see Brewster 307. Compare, however, the author’s estimate of uncertainty under the present system. Id. at 276-83.

\textsuperscript{179} E.g., Note, Inadequacy of National Regulation of Cartels and Proposed Control by United Nations, 14 Geo. Wash. L. Rev. 626 (1946); Hale & Hale, Monopoly Abroad: The Antitrust Laws and Commerce in Foreign Areas, 31 Texas L. Rev. 493, 546-47 (1953); Note, 42 Cornell L.Q. 390, 397-98 (1957). The International Trade Organization charter was signed by the representatives of 53 nations in Havana in 1947. The text is reprinted in 1 World Trade L.J. 446 (1946), and for a history of the negotiations leading to the charter, see Bronz, International Trade Organization Charter, 62 Harv. L. Rev. 1089 (1949).

sarily be based on a compromise, would very likely result in lowering the substantive standards applied in foreign commerce cases.

Nor could Congress unilaterally legislate a solution based on foreign public policy. The statement that foreign public policy is entitled to some consideration in United States courts is, standing alone, almost a self-evident one. The difficult problems, however, concern the scope and application of such consideration, and these decisions, which are essentially matters of degree and involve a multitude of changing factual circumstances, do not seem capable of being legislated prospectively. Moreover, such legislation would involve a departure from the traditional scheme in which the judiciary has assumed the responsibility for defining territorial limits on national legislation. 181 Thus, both Alcoa 182 and Banana 183 represent judicial glosses on congressional intent.

Another proposed solution would authorize decision of these problems by the President or an administrative agency. 184 It is of course obvious that in any determination concerning foreign public policy the courts should, if necessary, obtain all possible aid from the Executive, and courts in sovereign immunity cases do rely heavily upon the views expressed by the State Department. 185 But to create a special administrative solution for extraterritorial antitrust cases would be to ignore the fact that such cases are only the most striking illustration of a widespread problem affecting all regulatory legislation. The continuing expansion of regulatory legislation and of government participation in national economies will require courts explicitly to weigh competing governmental interests in an increasing number of cases involving areas

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182. See note 18 supra.

After demonstrating the increasing need for policy determinations by the judiciary, and recognizing the problems involved as conflict of laws problems, Professor Katzenbach proposes to leave policy determinations in extraterritorial antitrust cases to the Executive. Katzenbach, supra note 128, at 1151-52. Having led his judicial horses to water, Professor Katzenbach inexplicably refuses to let them drink.

185. See Republic of Mexico v. Hoffman, 324 U.S. 30 (1945). Cf. the second Bernstein decision at note 135 supra. The Nazi decrees involved in that case, however, represent an extreme case of conflicting national laws, and the State Department's action is not representative of its position with regard to divergent national economic policies. See, e.g., United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199, 203 (S.D.N.Y. 1929) (Secretary of State refused to comment despite appeal by French ambassador).
other than antitrust.186 Such a development has already occurred, for instance, due to the impact which statutes dealing with the taxation of personality have had upon the legal concept of domicile,187 and a similar trend can be observed in cases dealing with the regulation of contracts.188 In cases involving the extraterritorial effect of workmen’s compensation statutes, the Supreme Court has stated that “the conflict is to be resolved . . . by appraising the governmental interests of each jurisdiction and turning the scale of decision according to their weight . . . .”189 Consequently, the proper course would appear to be not to treat the foreign commerce cases as exceptions requiring nonjudicial solutions, but rather to regard them as providing starting points for the formulation of jurisdictional doctrines, the applications of which are becoming increasingly important and widespread.


