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# The Prescriptive Jurisdictional Reach of U.S. Antitrust Law: Judge Learned Hand's Requirement of a "Substantive Anticompetitive Effect"

Michael F. Kelley

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## SPECIAL FEATURE

# THE PRESCRIPTIVE JURISDICTIONAL REACH OF U.S. ANTITRUST LAW: JUDGE LEARNED HAND'S REQUIREMENT OF A "SUBSTANTIVE ANTICOMPETITIVE EFFECT"

MICHAEL F. KELLEY

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### I. INTRODUCTION

The jurisdictional reach of U.S. antitrust law has frequently been criticized, especially abroad, as being an institutional exercise

of "legal imperialism." Few would argue that jurisdiction is restricted to cover events which occur within the territory of a sovereign state. In the realm of U.S. antitrust law, however, both U.S. courts and commentators lack a consensus as to the extent of jurisdiction, especially with regard to the Sherman Antitrust Act. Central to the problem is a friction between the prescriptive jurisdictional restraints of international law and the broad language of the antitrust statutes which seemingly encompass any commercial activity related to the United States.

Defining the jurisdictional reach of United States antitrust law involves three essential issues: (1) whether the United States, as sovereign, has the power under international law to exercise prescriptive jurisdiction over certain acts of foreigners abroad; (2) whether Congress has the power, under the Constitution, to enact laws dealing with such foreign acts; and, (3) whether the Sherman Act's prohibitions intend to cover the allegedly illegal foreign activity in question. These inquiries involve the interpretation of Judge Learned Hand's controversial and widely misunderstood "effects" test for the exercise of "transnational" jurisdiction as espoused in *United States v. Aluminum Co. of America* ("Alcoa").<sup>1</sup>

This Comment defends Judge Hand's opinion in *Alcoa* and maintains that it is consistent with the objective territorial principle of international law, as long as the test is read to require a "substantive anticompetitive effect" on U.S. foreign commerce. The proper exercise of prescriptive jurisdiction under the Sherman Act requires actual proof of a "substantive anticompetitive effect" caused by foreigners abroad. Thus, a constituent element of the offense charged must occur in the United States, as was the case in *Alcoa*. Read otherwise, the Act takes on the character of an overextended body of commercial tort law.

## II. UNITED STATES ANTITRUST LAW: THE SHERMAN ACT

The Department of Justice (DOJ or Department) characterizes U.S. antitrust law as being the legal embodiment of the nation's commitment to a free market economy.<sup>2</sup> The two basic philosophical tenets underlying the antitrust laws are: (1) that the

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

2. See, e.g., U.S. DEP'T OF JUSTICE, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS (Nov. 10, 1988), reprinted in 55 ANTITRUST & TRADE REG. REP. 899 S-3 (1988).

competitive process in the marketplace must be preserved to ensure the most efficient allocation of the world's finite resources, and (2) that the protection of the full and vigorous operation of competitive market forces will maximize consumer welfare.<sup>3</sup> Thus, preservation of the market's competitive structure, rather than the protection of each individual competitor, is the goal of antitrust law.<sup>4</sup>

Sections 1 and 2 of the Sherman Act ("Act")<sup>5</sup> are the United States antitrust laws of principal concern in this study. Section 1 declares it a felony to contract or conspire to restrain trade or commerce among states or with a foreign nation. Section 2 states that it is also a felony to monopolize any part of such trade.

### III. JURISDICTION OVER TRANSNATIONAL ACTIVITY BY ALIENS

#### A. *Constitutional Limitations*

The power of Congress to enact any statute, such as the Sherman Act, must be enumerated under the United States Constitution.<sup>6</sup> Such congressional power is derived from the Commerce Clause which provides Congress with the power to regulate commerce between the States and with foreign nations.<sup>7</sup> The only limit imposed upon Congress's regulatory power in this context is that a nexus exists between the regulated activity and United States commerce. Apart from this requirement, the United States Supreme Court has described congressional power to regulate foreign and interstate commerce as complete in itself, plenary, and limited only by the Constitution.<sup>8</sup>

In *Gibbons v. Ogden*, Chief Justice Marshall asserted that the broad scope of the Commerce Clause and the corresponding congressional power to regulate trade covered every kind of commer-

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3. While other antitrust philosophies and goals have been advanced, the maximization of consumer welfare is, or should be, the most enduring objective for this legal discipline. For an in-depth analysis of the proposition that the only legitimate goal of American antitrust law is the maximization of consumer welfare, see ROBERT BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978).

4. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (antitrust laws are designed to protect competition, not competitors).

5. 15 U.S.C.A. §§ 1-7 (1990).

6. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819).

7. U.S. CONST. art. I, § 8, cl. 3.

8. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 196-97 (1824).

cial transaction.<sup>9</sup>

United States courts must apply congressionally enacted law even if the application defies customary international law.<sup>10</sup> This does not immunize Congress or any other actor from the consequences of an international law violation. Although U.S. laws may permit such an actor to engage in a certain type of conduct, the actor remains subject to penalty in the international arena. Accordingly, in an effort to minimize potential conflict, U.S. courts follow a rule of statutory construction which mandates an interpretation consistent with international law unless a contrary interpretation is inescapable.<sup>11</sup> Indeed, in the *Paquette Habana*<sup>12</sup> case, the Supreme Court stated, "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction. . . ."<sup>13</sup> In the *Alcoa* decision, Judge Hand warned against a broad reading of the Sherman Act without regard to the internationally accepted customs which limit the reach of one nation's powers over another.<sup>14</sup>

Thus, United States courts have traditionally incorporated and followed customary international law despite the absence of any congressional or constitutional mandate to do so. As a result, when a particular case has international implications, identifying the international legal customs is a paramount concern.<sup>15</sup>

9. *Id.* at 193-94. The United States Supreme Court described congressional power to regulate foreign and interstate commerce as follows:

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specific objects, is plenary as to those objects, the power over commerce with foreign nations . . . is vested in Congress as absolutely as it would be in a single government . . . .

*Id.* at 196-97.

10. *Id.*

11. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). As early as 1804, the Supreme Court stated, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ." *Id.* at 117-18.

12. *The Paquette Habana*, 175 U.S. 677 (1900).

13. *Id.* at 700.

14. 148 F.2d at 443.

15. One commentator sums up the United States domestic treatment of international law as follows:

[N]either the constitutional grants to Congress and the federal courts, nor any act of Congress, declared or necessarily implied that the law of nations was incorporated as self-executing domestic law, or that it had the status of law of the United States rather than of the states. Nevertheless, from our national beginnings both state and federal courts have treated customary international law as

### B. *Limitations Under International Law*

International law derives from customs and treaties which nations recognize as legally binding.<sup>16</sup> The international community has acknowledged various bases upon which a state may exercise legal jurisdiction, as well as limitations upon such exercise.<sup>17</sup> The United States Supreme Court has recognized similar sources of international law in international disputes.<sup>18</sup> In this context, "jurisdiction" refers to "prescriptive jurisdiction" which involves a sovereign state's competence and capacity under international law to apply domestic law to an international dispute.<sup>19</sup> In 1935, research-

incorporated and have applied it to cases before them without express constitutional or legislative sanction.

Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1557 (1984).

16. 1 LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 4-5 (Sir Hersch Lauterpacht 8th ed. 1955).

17. Article 38 of the Statute of the International Court of Justice is generally regarded as the authoritative statement of the sources of international law. Article 38 provides the following sources of law to the International Court of Justice for purposes of resolving international disputes before it: (1) international conventions; (2) international custom; (3) general principles of law that civilized nations recognize, and (4) subject to Article 59, judicial decisions and highly respected scholarly works as subsidiary means to determine rules of law. Article 59 states that "the decision of the Court has no binding force except between the parties and in respect of that particular case." Statute of the International Court of Justice, arts. 38, 59, 59 Stat. 1055, T.S. 993, 3 Bevans 1179 (1945).

18. In the case of *Paquette Habana*, the Court stated that:

[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

*The Paquette Habana*, 175 U.S. 677, 700 (1900).

19. In § 401, the American Law Institute defines the different categories of jurisdiction in the *Third Restatement of the Foreign Relations Law of the United States* as follows: Sec. 401. Categories of Jurisdiction

Under international law, a state is subject to limitations on

(a) jurisdiction to prescribe, i.e., to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court;

(b) jurisdiction to adjudicate, i.e., to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings;

(c) jurisdiction to enforce, i.e., to induce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987) [here-

ers in international criminal jurisdiction, working under the auspices of the Harvard Law School, identified two theories addressing a state's right to exercise its jurisdiction.<sup>20</sup> Under the first theory, international law must explicitly provide the authority for the state to competently apply its laws. The second theory, a more liberal approach, holds that the absence of an express prohibition by international law empowers, through negative implication, a state to freely apply its jurisdiction.<sup>21</sup>

In the case of the *S.S. Lotus*,<sup>22</sup> the Permanent Court of International Justice noted these two competing theories and ultimately favored the second one. The Court resolved the issue in favor of the Turkish government, holding that a state may exercise jurisdiction over foreigners within its own territory as long as no principle of international law prohibits such an exercise.<sup>23</sup> The International Court of Justice, the successor of the Permanent Court of International Justice, provided additional support for the *S.S. Lotus* rationale in *Barcelona Traction, Light & Power Co.*<sup>24</sup> The *Barcelona* decision, however, indicated that there are some implied limits on a state's ability to assert its jurisdiction.<sup>25</sup>

inafter THIRD RESTATEMENT].

20. RESEARCH IN INTERNATIONAL LAW UNDER THE AUSPICES OF THE HARVARD LAW SCHOOL, WITH COMMENT, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. SUPP. 435 (1935) [hereinafter *Draft Convention*].

21. *Id.* at 467-68.

22. The *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

23. The Court provided an extensive analysis of the issue:

Now 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. 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.

It does not, however, follow that international law prohibits a state from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. . . . *Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.*

*Id.* at 18-19 (emphasis added).

24. *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, at 105 (Feb. 5).

25. The International Court of Justice agreed that states have "wide discretion," but also suggested two levels of restraint regarding that discretion:

It is true that, under present conditions, international law does not impose hard

The 1935 Draft Convention on Jurisdiction with Respect to Crime, which identified five principles that nations accept as justifications for the exercise of jurisdiction, is a useful guide for determining the limitations acknowledged in *Barcelona Traction*.<sup>26</sup> The five principles are the territorial principle, the nationality principle, the protective principle, the universality principle, and the passive personality principle. Under the territorial principle, the courts must determine jurisdiction by referring to the place where the offense occurred.<sup>27</sup> The nationality principle provides that jurisdiction hinges on the nationality or national character of the person committing the offense.<sup>28</sup> The third principle, the protective principle, allows jurisdiction where the offense threatens the state's interests.<sup>29</sup> Pursuant to the universality principle, the court's jurisdiction depends upon the location and custody of the offender.<sup>30</sup> Finally, the passive personality principle provides that the victim's nationality or national character is the determining factor for the court's exercise of jurisdiction.<sup>31</sup>

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and fast rules on States delimiting spheres of national jurisdiction in such matters (and there are of course others—for instance in the fields of shipping, “anti-trust” legislation, etc.), but leaves to States a wide discretion in the matter. It does however (a) postulate the existence of limits—though in any given case it may be for the tribunal to indicate what these are for the purposes of that case; and (b) involve for every state an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State.

*Id.* para. 70, at 105.

26. *Draft Convention*, *supra* note 20, at 445. The five principles of the Draft Convention were derived from national penal codes, jurisprudence, and scholarly writings.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* Regarding the acceptance of these principles, the introductory comment to the *Draft Convention* had the following to say:

Of these five principles, the first is everywhere regarded as of primary importance and of fundamental character. The second is universally accepted, though there are striking differences in the extent to which it is used in the different national systems. The third is claimed by most States, regarded with misgivings in a few, and generally ranked as a basis of an auxiliary competence. The fourth is widely though by no means universally accepted as the basis of an auxiliary competence, except for the offence of piracy, with respect to which it is the generally recognized principle of jurisdiction. The fifth, asserted in some form by a considerable number of States and contested by others, is admittedly auxiliary in character and is probably not essential for any State if the ends served are adequately provided for on other principles.

*Draft Convention*, *supra* note 20 at 445.



A state or nation's right to exercise jurisdiction over all persons, objects, and property within its territorial limits is well settled under international law.<sup>32</sup> This right, otherwise known as the

32. The THIRD RESTATEMENT describes the limits of a State's prescriptive jurisdiction in the following way, which, depending upon circumstances, may be broader or narrower than under the principles stated in the *Draft Convention*:

Section 402. Bases of Jurisdiction to Prescribe

Subject to § 403, a state has jurisdiction to prescribe law with respect to

- (1) (a) conduct that, wholly or in substantial part, takes place within its territory;
- (b) the status of persons, or interests in things, present within its territory;
- (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
- (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
- (3) certain conduct outside its territory by persons not its nationals that it directed against the security of the state or against a limited class of other state interests.

THIRD RESTATEMENT, *supra* note 19, at 237-38.

Section 403, "Limitations on Jurisdiction to Prescribe," states:

(1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.

(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

- (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
- (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
- (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
- (d) the existence of justified expectations that might be protected or hurt by the regulation;
- (e) the importance of the regulation to the international political, legal, or economic system;
- (f) the extent to which the regulation is consistent with the traditions of the international system;
- (g) the extent to which another state may have an interest in regulating the activity; and
- (h) the likelihood of conflict with regulation by another state.

(3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's interest is clearly

territorial principle, is the most frequently cited basis for the exercise of prescriptive jurisdiction, particularly with regard to criminal violations.<sup>33</sup> Chief Justice John Marshall recognized this international precept in 1812, calling it "exclusive and absolute."<sup>34</sup>

Although the territorial principle *per se* has achieved universal acceptance,<sup>35</sup> legal controversy has emerged regarding its application. As comment c of section 402 of the *Third Restatement* explains, the controversy surrounds not simply whether a person or property is properly deemed present in a nation's territory, but also whether that presence is necessary at all.<sup>36</sup>

From this controversy, two forms of the territorial principle—the "objective" and "subjective"—have arisen.<sup>37</sup> The subjective territorial principle establishes the state's jurisdiction for conduct commenced within the state but completed or consummated abroad; the objective territorial principle establishes jurisdiction over conduct commenced outside of the state's territory but consummated within its territory.<sup>38</sup> Due to the penal nature of the Sherman Act,<sup>39</sup> one can infer that the criminal applications of the

greater.

*Id.* at 244-45.

33. *Draft Convention*, *supra* note 20, at 480-84.

34. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812). Justice Marshall provided a resolute opinion on this principle:

The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty, to the same extent, in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself.

*Id.* at 135.

35. *See Draft Convention*, *supra* note 20, at 480.

36. *THIRD RESTATEMENT*, *supra* note 19, § 402, cmt. c at 238-39.

[I]n some circumstances there may be a controversy as to whether a person or property can properly be deemed present in the state's territory for purposes of jurisdiction, or whether the territorial principle can be satisfied without the physical presence of the person or thing being subject to jurisdiction.

*Id.*

37. *Draft Convention*, *supra* note 20, at 484.

38. *Id.* at 484-88. Regarding the objective territorial principle, one commentator has observed "a State may exercise penal jurisdiction over a foreign national in certain types of cases where a consummating act within the State's territory was a constituent element of a crime committed abroad." George H. Haight, *International Law and Extraterritorial Application of the Antitrust Laws*, 63 *YALE L.J.* 639-40 (1954)[Hereinafter Haight] (citing *Draft Convention*, *supra* note 20, at 487-503).

39. *See Haight*, *supra* note 38, at 640.

territorial principle are pertinent to the transnational reach of U.S. antitrust law. Despite the plausibility of this inference, some authors remain concerned about the civil nature of the Act's domestic proceedings.<sup>40</sup> Others have answered these concerns by arguing that the domestic manifestations of the Act are irrelevant for purposes of international law. Moreover, commentators have characterized the Act's civil proceedings as unusually penal in nature.<sup>41</sup> Section 7 of the Sherman Act, which provides a civil action for treble damages, is more akin to a criminal penalty than an ordinary civil remedy.<sup>42</sup>

Emanating from the objective territorial principle, the "effects test" for prescriptive jurisdiction has played an important role in international law. In short, the "effects test" allows a state to exercise jurisdiction where the results of the conduct manifest themselves inside the state's territory, regardless of the place the conduct occurred.

The *S.S. Lotus* decision produced a classic statement of the effects doctrine.<sup>43</sup> The *Lotus*, a French ship, collided with a Turkish ship, the *Box-Kourt*, on the high seas, killing eight Turkish nationals.<sup>44</sup> The Turkish Government brought criminal proceedings for manslaughter against Lieutenant Demons, the lookout officer on board the *Lotus*.<sup>45</sup> The French Government argued that the Turkish courts did not have jurisdiction, under principles of international law, to prosecute Demons. The Permanent Court, holding that Turkey had the right to exercise jurisdiction under the circumstances, asserted the importance of effects for conferring jurisdiction.<sup>46</sup> Lieutenant Demons's presence (or lack thereof) inside Turkish territory was not essential. In the Court's view, for purposes of jurisdiction, an event has taken place within a country's territory ". . . if one of the constituent elements of the offence,

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40. *Id.*

41. *Id.*; R.Y. Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 33 BRIT. Y.B. INT'L L. 146, 147-48 (1957).

42. See Jennings, *supra* note 41, at 148.

43. The *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

44. *Id.* at 10. The rule in *Lotus* as applied to collisions at sea has been changed by the 1958 Geneva Convention on the High Seas, Article 11, and the 1982 United Nations Convention on the Law of the Sea, Article 97, both of which reserve penal and disciplinary proceedings in such cases to the authorities of the state in whose vessel the defendant served or, if different, the state of his nationality.

45. *Id.*

46. *Id.* at 23.

and more especially its effects, have taken place there.”<sup>47</sup>

The Permanent Court’s perception of “effects” was that “[t]he offence for which Lieutenant Demons appears to have been prosecuted was an act . . . having its origin on board the *Lotus* [or, in France], whilst its effects made themselves felt on board the *Box-Kourt* [or, in Turkey]. These two elements are, legally, entirely inseparable, so much that their separation renders the offence non-existent.”<sup>48</sup> Thus, the *Lotus* opinion limits the effects which can permit the exercise of jurisdiction to those which comprise an essential element of the crime. A broader holding might produce an extension of the territorial principle of jurisdiction to cover any imaginable conduct. Naturally, such an “extraterritorial” extension would be logically inconsistent with the territorial principle.<sup>49</sup>

Under the Act, the characterization of the United States assertion of jurisdiction as “extraterritorial” has resulted in confusion—especially when the conduct or the actors, or both, are outside United States territory. The effects doctrine, however, clarifies the confusion by justifying the Act’s reaching conduct and actors outside United States territory when the requisite effects inside the United States are present.<sup>50</sup> As such, the exercise of jurisdiction is not “extraterritorial;” rather it is “transnational,” as are the effects which the prohibited conduct produces.

#### IV. THE TRANSNATIONAL SCOPE OF U.S. JURISDICTION IN ANTITRUST CASES

The attempted application of the Sherman Act to international trade dates back to the *American Banana*<sup>51</sup> decision in 1909. In this case, American Banana, an Alabama company, claimed that United Fruit, a New Jersey corporation, had violated the Sherman Act by monopolizing and restraining the banana trade between Central America and the United States.<sup>52</sup> The defendant, pre-

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47. *Id.* (emphasis added).

48. *Id.* at 30.

49. See Jennings, *supra* note 41, at 160.

50. In *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984), the court criticized the inaccurate practice of referring to the effects doctrine as an “extraterritorial assertion of jurisdiction.” *Id.* at 923. The court recognized that such a description is improper because prescriptive jurisdiction may exist if sufficient territorial effects on United States commerce are present. *Id.*

51. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

52. *Id.* at 354.

vented the plaintiff from competing by seizing his plantation and halting construction of his railway. These acts were carried out with the cooperation of Costa Rican officials and soldiers. Plaintiff turned to the United States Court for relief claiming a violation of the Sherman Act.<sup>53</sup>

The Court, rejected the complaint finding no case arising under the Sherman Act. The Courts reasoning was twofold: First, the acts were sanctioned by the local government and therefore, were not torts at all; and second, because the acts were committed outside the United States, the Sherman Act was not applicable.<sup>54</sup>

The *American Banana* decision has been cited as authority for the argument that the antitrust laws can only be applicable when the subjective territorial principle is satisfied. If this is so, however, (i.e., if the case is read to say that effects can never be the basis for jurisdiction) it has been effectively overruled.<sup>55</sup> A more compelling argument would be that there was no jurisdiction in *American Banana* because any effects that may have been felt in the United

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53. *Id.* The specifics of the case are as follows: In accordance with the laws of the United States and Colombia, McConnell started a banana plantation in Panama (then a part of Colombia) and began building a railway which would be the exclusive means of export from the plantation. Soon thereafter, the Governor of Panama allegedly recommended that Costa Rica administer the territory through which the railroad was to run. The plaintiff believed that United Fruit instigated this recommendation. Then, the defendant and the Costa Rican government, supposedly at the defendant's inducement, interfered with McConnell's operations. McConnell soon sold his interests to the plaintiff. One month later, again allegedly at the instigation of the defendant, Costa Rican soldiers and officials seized a part of the plantation, thereby ceasing its operations and stopping the construction of the railroad. Soon thereafter, one Astua, a third party, initiated an ex parte proceeding in a Costa Rican court, and obtained a judgment declaring the plantation to be his. The plaintiff, however, alleged that the proceeding was not within the jurisdiction of Costa Rica, and was contrary to its laws and void. United Fruit's agents then bought the property from Astua. The plaintiff alleged that the damage he suffered was that he was deprived of the use of his plantation and the railway, plantation and supplies were injured, and that the defendant drove purchasers out of the banana market by outbidding competitors and compelled producers to come to its terms; thus preventing the plaintiff from buying for export and sale. *American Banana* argued that the defendant violated the Sherman Act. *Id.* at 354-55.

54. With regard to this notion, Justice Holmes made the following statement, indicating his extreme concern with overreaching jurisdiction:

[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. . . . For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent. . . .

213 U.S. at 355-57.

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

States were unrelated to the plaintiff's injury and cause of action. Since any injuries to the plaintiff occurred abroad and were not related to effects on the U.S. market, the Court was not required to address issues of effects and objective territoriality. Two years later, however, the Supreme Court faced the effects issue. Justice Holmes provided the very language relied upon by Judge Hand in *Alcoa* and asserted that the objective territorial principle is a proper basis for the exercise of prescriptive jurisdiction. In *Strassheim v. Daily*,<sup>56</sup> Justice Holmes stated that: "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 [it] had been present at the effect . . . ."<sup>57</sup>

Thus, the United States does not adhere exclusively to a subjective territorial approach to prescriptive jurisdictional determinations. In *United States v. American Tobacco Co.*,<sup>58</sup> the United States Supreme Court held that the Sherman Act's prohibitions applied to a British company that contracted in England with a U.S. tobacco company to ensure that the competitors were to limit their business to their respective home territories.<sup>59</sup> Clearly, the judicial departure from *American Banana* was underway, at least to the extent that the Sherman Act applied to a foreigner's participation with United States parties in a conspiracy based in the United States even though the formal execution of the illegal agreement occurred abroad.

In *United States v. Pacific & Arctic Railway & Navigation Co.*,<sup>60</sup> American and Canadian railway and steamship companies were found to have entered into an illegal scheme whereby the companies agreed to, and effectively excluded independent transportation lines as factors of operation between the United States and Canada.<sup>61</sup> While the defendants, relying on *American Banana*, argued that the Sherman Act could not be extended to cover their foreign carriage activities,<sup>62</sup> the Court disagreed stating that:

This is but saying that laws have no extra-territorial operation; but to apply the propositions as defendants apply it would put

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56. 221 U.S. 280 (1911).

57. *Id.* at 285.

58. 221 U.S. 106 (1911).

59. *Id.* at 172, 184.

60. 228 U.S. 87 (1913).

61. *Id.* at 103.

62. *Id.* at 99-100.

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.<sup>63</sup>

In *Thomsen v. Cayser*,<sup>64</sup> foreign shipping line owners were accused of charging discriminatory rates on shipments between New York and South Africa. The foreigners were operating according to an agreement that was reached in England. The Court, following the *Pacific & Arctic* case, held that the foreign owners were subject to the Sherman Act because "the combination affected the foreign commerce of this country and was put into operation [in the United States]."<sup>65</sup>

Similarly, in *United States v. Sisal Sales Corp.*,<sup>66</sup> the Court distinguished the circumstances in *American Banana* from the case then at hand by stating:

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. 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.<sup>67</sup>

*Sisal Sales* involved a scheme between U.S. banks and the sole Mexican selling agent of sisal to the United States. The plan was undertaken to control the sisal trade between the United States and Mexico, which supplied more than eighty percent of the binder twine used for harvesting grain crops in the United States.<sup>68</sup> Since the U.S. and foreign defendants had "brought about forbidden results within the United States," jurisdiction was found to

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63. *Id.* at 106.

64. 243 U.S. 66 (1917).

65. *Id.* at 88.

66. 274 U.S. 268 (1927).

67. *Id.* at 276.

68. *Id.* at 272-73.

exist under the Sherman Act.<sup>69</sup> The facts and outcome differ from *American Banana*. The plaintiff in *Sisal Sales* complained of a substantial injury which was a violation of the Sherman Act as evidenced by the effects in U.S. territory. On the other hand, the plaintiff's injuries in *American Banana* occurred exclusively abroad.

## V. THE EFFECTS DOCTRINE IN THE UNITED STATES

The *Alcoa*<sup>70</sup> case, considered the furthest departure from the *American Banana* case and the decision exhibiting the broadest transnational reach of the Sherman Act, is the seminal judicial opinion applying the so-called "effects" doctrine.

Judge Learned Hand's 1945 opinion essentially provides that prescriptive jurisdiction under the Sherman Act may be exercised in situations where foreign nationals acting abroad are shown to have: (1) intended to affect U.S. commerce, and (2) caused an anticompetitive effect on such commerce.<sup>71</sup> This "intent" and "effects" test has been the subject of great controversy because the test lends itself to numerous interpretations. It has been a considerable stumbling block for courts which have consequently failed to develop a consistent standard.

The confusion may stem from the lack of consensus on how far the jurisdictional reach of U.S. antitrust law should go. Judicial attempts to redefine or interpret the effects test have created a prolific menu of descriptions which would be appreciated by the student of semantics. For those involved with the law, however, the various characterizations have caused considerable difficulty. For example, the "effects" test has been expressed in the following ways: "the combination affected the foreign commerce of this country";<sup>72</sup> "though there is no showing as to the extent of commerce restrained, [the contract] deleteriously affected [U.S.] commerce";<sup>73</sup> "a direct and influencing effect on trade . . . between the United States and foreign countries";<sup>74</sup> "a conspiracy . . . which

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69. *Id.* at 276.

70. 148 F.2d 416 (2d Cir. 1945).

71. *Id.*

72. *Thomsen v. Cayser*, 243 U.S. 66, 88 (1917).

73. *United States v. General Elec. Co.*, 82 F. Supp. 753, 891 (D.N.J. 1949).

74. *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284, 309 (N.D. Ohio, 1949), *modified and aff'd*, 341 U.S. 593 (1951).



affects American commerce;"<sup>75</sup> and "a substantial and material effect on our foreign and domestic commerce."<sup>76</sup>

An in-depth analysis of the *Alcoa* opinion will be undertaken to determine the "effect" necessary to trigger the application of Judge Hand's test. Relevant post-*Alcoa* decisions will then be discussed and measured for their worth as valid law vis-a-vis the *Alcoa* standard.

### A. *Alcoa: The Opinion*

In *Alcoa*,<sup>77</sup> the United States Government charged the Aluminum Company of America (*Alcoa*) with monopolization of interstate and foreign commerce in the manufacture and sale of "virgin" aluminum ingots in violation of Section 2 of the Sherman Act. The United States also alleged that *Alcoa* and Aluminum Limited (*Limited*), a Canadian corporation, formed a conspiracy to restrain such commerce in violation of Section 1 of the Act.<sup>78</sup> *Limited* was incorporated in Canada to take over *Alcoa*'s properties located outside the United States.<sup>79</sup> *Limited* participated in the "Alliance," a Swiss-based international cartel composed of French, German, Swiss, and British aluminum producers.<sup>80</sup> Despite significant connections of ownership and control between *Alcoa* and *Limited*, Judge Hand recognized that the two companies were formally separated,<sup>81</sup> that they had not coalesced in their operations, and that *Alcoa* had not participated in the international aluminum cartel.<sup>82</sup> The question was whether the Sherman Act could be applied to invalidate a foreign cartel when its only connection to the United States was the importation of aluminum ingot to the U.S. market.

The Alliance's original agreement, alleged to be in violation of the Sherman Act, was completed in 1931 and provided for the formation of the cartel under which a Swiss corporation would issue

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75. *United States v. Imperial Chem. Indus., Ltd.*, 100 F. Supp. 504, 592 (S.D.N.Y. 1951).

76. *United States v. Watchmakers of Switzerland Info. Center, Inc.*, 1963 Trade Cases (CCH) ¶ 70,600, at 77,457 (S.D.N.Y. 1962).

77. Since a quorum of six justices of the Supreme Court could not be obtained, the case was certified to the United States Court of Appeals for the Second Circuit as a special statutory court pursuant to 15 U.S.C. § 29 (1988).

78. 148 F.2d at 421.

79. *Id.* at 439.

80. *Id.* at 442.

81. *Id.* at 440.

82. 148 F.2d 416, 442 (2d Cir. 1945).

shares, essentially representative of an aluminum production quota.<sup>83</sup> Each shareholder was limited to a specific quantity of production measured by the number of shares it held, but was free to sell its allotted quantity at any price. The corporation fixed a price every year at which it would purchase any part of a shareholder's quota that the shareholder did not sell.<sup>84</sup> This agreement, however, was silent as to whether it extended to sales made in the United States.<sup>85</sup>

The 1931 agreement was supplanted in 1936 with an agreement which substituted a system of royalties for the quota system.<sup>86</sup> Each shareholder was to have a free fixed quota for each share it held, but was required to pay a royalty to the Alliance graduated progressively in proportion to any excess production above the sum of its quotas; such royalties would then be divided among the cartel members in proportion to their shares.<sup>87</sup> This agreement did not explicitly state that unsold inventory would be purchased by the Alliance; but one provision was thought to have impliedly recognized such an obligation.<sup>88</sup> Although the 1936 agreement, like the 1931 agreement, was silent as to imports into the United States, "all the shareholders agreed that such imports should be included in the quotas."<sup>89</sup>

Thus, Judge Hand was faced with the issue of whether Sherman Act jurisdiction existed with regard to an agreement between foreign corporations.<sup>90</sup> The court then stated that the focal point of the jurisdictional inquiry should be whether Congress intended to impose liability upon the conduct of foreign actors, and whether the Constitution permitted it to do so.<sup>91</sup> In framing the inquiry in this manner, the court correctly recognized that a United States

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83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 443.

87. *Id.*

88. *Id.*

89. *Id.*

90. The jurisdictional question was posed in the following fashion:

Did either the agreement of 1931 or that of 1936 violate § 1 of the Act? The answer does not depend upon whether we shall recognize as a source of liability a liability imposed by another state. On the contrary 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.

*Id.* at 443.

91. *Id.*

court should not look beyond its own law in determining a jurisdictional issue. Nonetheless, Judge Hand recognized the court's duty to construe the broad language of the Sherman Act in a manner consistent with the limitations of international law.<sup>92</sup>

In summary, Judge Hand recognized that although Congress has the constitutional power to enact laws contrary to international law, he correctly stressed that a court is bound to read general words capable of extremely broad and overreaching interpretation as consistent with international law.<sup>93</sup>

With regard to foreign activity having consequences in the United States, however, Judge Hand recognized that the exercise of United States jurisdiction is proper and consistent with both the *S.S. Lotus* decision and the objective territorial principle of international law, asserting that: "[I]t is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize."<sup>94</sup>

At this stage of the opinion, the court cites *Strassheim v. Daily*<sup>95</sup> to support the notion that the objective territorial principle is the proper basis for the exercise of jurisdiction. In that case, Justice Holmes asserted that: "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."<sup>96</sup>

By citing the Supreme Court decision in which Justice Holmes recognized the objective territorial principle, Judge Hand clearly adopted this principle as the basis for invoking jurisdiction in *Alcoa*.

Using two hypothetical situations, Judge Hand examined "intent" and "effects." First, he postulated that there may be agreements made abroad, not intended to affect U.S. imports or exports, but affecting such trade nonetheless.<sup>97</sup> The Judge observed that:

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92. *Id.*

93. *Id.*

94. *Id.*

95. 221 U.S. 280, 285 (1911).

96. *Id.* (emphasis added).

97. 148 F.2d at 443.

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.<sup>98</sup>

In the second hypothetical, Judge Hand examined agreements intended to include imports into the United States but which appear to have no effect upon such imports.<sup>99</sup> The Judge noted that this situation might fall within one of two doctrines. The first doctrine is that intent may be a substitute for performance in the case of a contract made in the United States; thus proof of effects is not a prerequisite to invoke jurisdiction.<sup>100</sup> On the other hand, the second doctrine supports the principle that a statute should not be interpreted to cover acts abroad which have no consequence in the United States; thus proof of effects is necessary to assume jurisdiction.<sup>101</sup> Judge Hand refused to choose between these alternatives. Instead, Judge Hand, citing such decisions as *Pacific & Arctic*, *Thomsen*, and *Sisal Sales*, concluded that jurisdiction only exists over activities abroad if the actions are both intended and actually affect the commerce of the United States.<sup>102</sup>

Judge Hand recognized that the liable parties in the cases he cited had sent agents into United States territory to perform part of the illegal agreement. He noted, however, that "an agent is merely an animate means of executing his principal's purposes, and, for the purposes of this case, he does not differ from an inanimate means; besides, only human agents can import and sell ingot."<sup>103</sup> Accordingly, where both conditions of "intent" and "effect" are satisfied, the exercise of jurisdiction is proper.

After announcing the prerequisites to properly exercise jurisdiction, the *Alcoa* court found the requisite intent on the part of the members of the international cartel in their 1936 agreement, expressly made to accomplish an effect upon imports into the

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98. *Id.*

99. *Id.*

100. *Id.* at 444.

101. *Id.*

102. 148 F.2d 416, 444 (2d Cir. 1945).

103. *Id.*

United States.<sup>104</sup>

With regard to proof of "effects," Judge Hand held that the burden of proof shifted to the defendant, Limited, after the intent to affect imports was proved.<sup>105</sup> The rationale for this shift of the normal burden was as follows:

The [district court] 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, based as it was upon the fact that, in 1936, 1937 and the first quarter of 1938, the gross imports of ingot increased. *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.<sup>106</sup>

The *Alcoa* court made findings that average imports of ingot increased from about fifteen million pounds during the period from 1932-1935, and that during 1936, 1937, and the first quarter of 1938, the average imports were approximately thirty-three million pounds; but that the average domestic manufacture of ingot in the 1932-1935 period was about ninety-six million pounds, and about 262 million in the latter period. Thus, the proportion of imports of ingot to domestically manufactured ingot was about 15.6 percent for the first period and about 12.6 percent for the second period.<sup>107</sup> From all of this information, Judge Hand stated:

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. We shall dispose of the matter therefore upon the assumption that, although the shareholders intended to restrict imports, it does not appear whether in fact they did so. Upon our hypothesis the plaintiff would therefore fail, if it carried the burden of proof upon this issue as upon others.<sup>108</sup>

Accordingly, Judge Hand saw fit to shift the burden of proof to the defendant once the plaintiff proves an intent to affect

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104. *Id.*

105. *Id.* at 444.

106. *Id.* (emphasis added).

107. *Id.*

108. *Id.*

imports.<sup>109</sup>

The only remaining question involving Limited was whether the assumed restriction on imports had an influence upon prices.<sup>110</sup> Judge Hand responded that the *Socony-Vacuum*<sup>111</sup> case answered the question in the affirmative, and stated that:

It will be remembered that when the defendants in that case protested that the prosecution had not proved that the "distress" gasoline had affected prices, the court answered that was *not necessary*, because an agreement to withdraw any substantial part of the supply from a market would, if carried out, have some effect on prices, and was as unlawful as an agreement expressly to fix prices. The underlying doctrine was that all factors which contribute to determine prices, must be kept free to operate unhampered by agreements. For these reasons we think that the agreement of 1936 violated § 1 of the Act.<sup>112</sup>

### *B. The "Substantive Anticompetitive Effect" Requirement*

Because Judge Hand's effects test is susceptible of several possible interpretations, the question of what effect is required has been particularly troublesome. Courts and commentators disagree as to whether an intent to restrain the commerce of the United States will support the exercise of jurisdiction under the Sherman Act without proof of an actual anticompetitive effect on such commerce.<sup>113</sup> It is proposed here that actual proof of a "substantive anticompetitive effect" caused by foreign actors abroad must be shown for the proper exercise of prescriptive jurisdiction under the Sherman Act. In other words, the "effects" prong of Judge Hand's jurisdictional test is met only when the effect of foreign actions abroad upon the United States market violates the law, meaning that a constituent element of the offense charged must occur in the United States. Read in this way, Judge Hand's test is consistent with the objective territorial principle of international law.<sup>114</sup>

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109. *Id.* The court felt that this was the proper approach because the defendants had a greater accessibility to the facts of the activities abroad that gave rise to the cause of action.

110. *Id.* at 445.

111. *Socony-Vacuum Oil Co. v. United States*, 310 U.S. 150 (1940).

112. 148 F.2d at 445 (emphasis added).

113. See *supra* notes 35-42 and accompanying text.

114. The use of Chapter Eight of a draft copy of Professor Alan C. Swan's recently published textbook, ALAN C. SWAN, *CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS* (1991), and numerous discussions with him must be acknowledged for providing the inspiration for dealing with this subject matter, and

Another view, however, is that Judge Hand's test was meant to exclude unintended or *de minimis* foreign restraints on United States commerce.<sup>115</sup> Under this view, once the requisite intent is shown, then the restraint must either occur "in the course" of interstate or foreign commerce. If the restraint is not "in the course" of such commerce, then it must "substantially affect" such commerce.<sup>116</sup> It must be noted here that the showing of a sufficient effect differs in domestic interstate commerce cases and those involving foreign commerce.

Recall, the Sherman Act applies to restraints of trade or commerce among the several states, or with foreign nations. Restraints "in commerce" require no showing of an "effect" on interstate commerce. When "intrastate" commerce is involved, however, a sufficient "effect" on interstate commerce must be shown to invoke jurisdiction under the Sherman Act.<sup>117</sup> With regard to domestic cases involving alleged illegal activity not "in the stream" of interstate commerce, courts have generally held that the sufficient effect must be "not insubstantial" nor *de minimis*.<sup>118</sup>

The problem with the "mechanical" approach to jurisdiction is that it inappropriately transposes the "interstate" jurisdictional test to the "foreign commerce" setting. The test is satisfied if an allegedly illegal restraint occurs before or after the foreign commerce phase, where the restraint was obviously "in commerce." Alternatively, if the restraint is tangent to such commerce, then the effects are deemed sufficient to confer jurisdiction so long as the amount of commerce affected is not *de minimis*.<sup>119</sup> By this latter theorem, commentators argue that the "mechanical" view borrows the effects requirement from the domestic setting, where the activity is not "in the course" of interstate commerce, and applies it to situations involving activities that are not "in the course" of for-

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noted as a source of a number of the ideas behind the arguments made in this Comment.

115. 1 WILBUR L. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* 71 (3d ed. 1982).

116. *Id.*

117. *See, e.g.,* McLean v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232 (1980); Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738 (1976).

118. McLean v. Real Estate Bd. of New Orleans, Inc., 44 U.S. 232, 246 (1980); Fortner Enterprises, Inc., v. United States Steel Corp., 394 U.S. 495, 498 (1969); Rosebrough Monument Co. v. Memorial Park Cemetery Assoc., 666 F.2d 1130 (8th Cir. 1981).

119. *See* James A. Rahl, *American Antitrust and Foreign Operations: What Is Covered?* 8 CORNELL INT'L L.J. 1, 6-9 (1974); James A. Rahl, *Foreign Commerce Jurisdiction of the American Antitrust Laws*, 43 ANTITRUST L.J. 521-25 (1974).

eign commerce.<sup>120</sup>

Dean Rahl commented on the “mechanical” view, asserting that:

I do not believe that the effect must be “adverse” in the sense that the volume of commerce must be reduced. It is the effect on competition, not on commerce, which must be adverse. What is required, I believe, is that commerce in some way be distorted from the path it would take if competition were not illegally interfered with. Judge Wyzanski made this point in *Minnesota Mining* when he said, “Congress has not said you may choke commerce here if you nourish it there.” It was made again recently in the *Occidental Petroleum* decision, where the District Court said that “when control of an item in commerce is wrested from one competitor by another, the commerce of the article is to that extent ‘affected.’” I would have to say, based on interstate commerce cases, that even if the volume of U.S. commerce were *increased*, . . . this would be a sufficient effect for jurisdictional purposes.<sup>121</sup>

Thus, the effects test would be met, under this view, if a foreign restraint has some—not insubstantial—repercussion on foreign commerce. The connection between the restraint and some commerce determines jurisdiction, but no specific quantum of commerce is determinative as long as the volume or amount is not *de minimis*. Likewise, where the restraint is found to apply to goods, services, money, or technology that are “in commerce,” jurisdiction is established without more.

Few would argue that this construction of the “mechanical” view is consistent with the objective territorial principle of international law. The following scholarly criticism of Judge Hand’s effects test illustrates this inconsistency,<sup>122</sup> via query and observation:

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120. Dean Rahl has rejected the mechanical approach and stated that:

There is great confusion over whether the restraint must in some way *adversely* affect the commerce involved. The common, if not prevalent, impression is that it must—that the volume must be diminished, or the flow distorted. But this popular view, however widely held, does not, in my view, withstand analysis. It is obviously inapposite as to restraints occurring “in” commerce, where no effect at all need be shown . . . Even where effect is necessary to support subject-matter jurisdiction, the effect need not be adverse, although it usually is.

Rahl, *American Antitrust*, *supra* note 119, at 7 (emphasis in original).

121. Rahl, *Foreign Commerce*, *supra* note 119, at 524-25 (footnotes omitted).

122. John M. Raymond, *A New Look at the Jurisdiction in Alcoa*, 61 *AM. J. INT’L L.* 558 (1967).



Assuming there are no governing treaty commitments and no governmental agreements with private parties involved, could this country [the United States] pass today and legitimately enforce, on the basis of the "effects" doctrine, a law stating that it was a criminal offense for foreign coffee growers to ship less coffee to the United States this year than they shipped last year? Or could we legitimately make it an offense for any foreign customer abroad to buy less cotton from us in the coming year than he had bought last year? In such cases there would clearly be an effect on foreign commerce of the United States, should the coffee-growers reduce their shipments to the United States or the foreign importers reduce their purchases of cotton from us, and this effect would be a constituent part of the offense under the [Sherman Act] . . . .<sup>123</sup>

The above critique correctly notes that, under these circumstances, jurisdiction should not be founded on the effects doctrine. If merely effects, such as those illustrated in this example, invoked jurisdiction, an exercise of jurisdiction would be inconsistent with international law. Raymond assumes that Judge Hand's formulation of the effects doctrine would justify a jurisdictional exercise given this hypothetical situation. It clearly does not. The "substantive anticompetitive effects" approach would put any of these concerns regarding overreaching jurisdictional claims to rest. In this regard, another author has stated:

If a State can take jurisdiction over acts committed abroad by foreigners because they have "consequences" within its territory and it "reprehends" such acts, the door is open to an almost unlimited extension of extraterritorial jurisdiction. That foreign nationals are answerable for their acts within the territory of the United States is beyond question, but to prosecute them for what they do abroad can be justified only if an objective application to the territorial principle is permissible . . . . Unless "consequences" and "harmful effects" mean "constituent element of the crime," which might permit an objective application, [*Alcoa* and other cases] are contrary to international law.<sup>124</sup>

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123. *Id.* at 562-63.

124. Haight, *supra* note 38, at 643. Unfortunately, Haight's observations are only good up to this point. He goes on to argue that a Sherman Act offense is not one which the community of nations recognizes as justifying a modification of a strict territorial principle. He maintains that Sherman Act prosecutions cannot be justified because an objective application of the territorial principle is not permissible in such antitrust situations. This is simply not true if one follows Judge Hand's effects test which specifically incorporates the objective territorial principle. The position maintained in this discussion is that while

Another noted author has expressed his concern that the effects doctrine may lead to slippery slope jurisprudence and result in jurisdictional overreaching.<sup>125</sup>

These examples and comments reflect a legitimate concern that the effects doctrine under the *Alcoa* decision is inconsistent with the principles of international law. This concern may be well founded with respect to the mechanical approach, where the Sherman Act inappropriately becomes a form of a commercial tort law. For instance, under that approach, a specific injury to a particular individual firm may suffice to support jurisdiction rather than a showing of an anticompetitive effect on the United States market. Under the "substantive anticompetitive" test, however, the Sherman Act meets the requirements of international law under the objective territorial principle by requiring proof of an actual anticompetitive effect in the United States, caused by foreign actors abroad. Accordingly, a showing that a constituent element of the offense charged occurred in the United States gives rise to the proper exercise of prescriptive jurisdiction under the Sherman Act. Moreover, the mere fact that a restraint is "in commerce" will not, by itself, meet the international law standard. As suggested by Chief Justice Marshall,<sup>126</sup> statutes should never be construed as contravening international law if a consistent construction is at all possible. In the foreign commerce setting, the words "in commerce" must be subsumed within the "affects" commerce require-

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international law does not clearly define the limits of effects jurisdiction, it does seem to reject a strict territorial principle in circumstances including antitrust cases as evidenced by state practice.

125. Professor Jennings expressed this fear in stating:

[The objective territorial principle] is often said to apply where the offence "takes effect" or "produces its effects" in the territory. In relation to elementary cases of direct physical injury, such as homicide, this is unexceptionable, for here the "effect" which is meant is an essential ingredient of the crime. Once we move out of the sphere of direct physical consequences, however, to employ the formula of "effects" is to enter upon a very slippery slope; for here the effects within the territory may be no more than an element of alleged consequential damage which may be more or less remote. . . . [T]o extend the notion of effects, without qualification, from the simple cases of direct physical injury to cases such as defamation, sedition, and the like, is to introduce a dangerous ambiguity into the basis of the doctrine. If indeed it were permissible to found objective territorial jurisdiction upon the territoriality of more or less remote repercussions of an act wholly performed in another territory, then there were virtually no limit to a State's territorial jurisdiction.

Jennings, *supra* note 41, at 159.

126. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

ment.<sup>127</sup> Otherwise, as with the mechanical approach, the United States would enter upon the "slippery slope" of improper extensions of jurisdictional claims over foreign conduct, which Jennings was concerned about.<sup>128</sup> Even Judge Hand in *Alcoa* did not want to impute to Congress "an intent to punish all whom U.S. courts could catch, for conduct which has no consequences within the United States."<sup>129</sup>

In order to illustrate that the a "substantive anticompetitive effect" is required under Judge Hand's effects test, a closer look at the opinion is necessary.

As noted in the prior discussion of *Alcoa*, the foreign cartel, referred to as the Alliance, made sales of aluminum ingot which were imported into the United States market. Ingot sales had increased in absolute terms from about fifteen million pounds during the years of 1932 to 1935, to about thirty-three million pounds between 1936 and the first quarter of 1938.<sup>130</sup> The Alliance's sales to the United States had declined, however, as a percentage of the total U.S. market, from about 15.6 percent for the first period to about 12.6 percent for the second, due to increases in the domestic manufacture of ingot.<sup>131</sup>

127. See REP. ATT'Y GEN. NAT. COMMITTEE TO STUDY ANTITRUST LAWS 76 (1955). This report described the effect necessary for the appropriate exercise of jurisdiction under the Sherman Act. The following description is consistent with the substantive anticompetitive approach suggested above:

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

...  
We believe that conspiracies between foreign competitors alone should come within the Sherman Act only where they are intended to, and actually do, result in substantial anticompetitive effects on our foreign commerce. 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.

*Id.* at 76 (citing *United States v. Aluminum Co. of America*, 148 F.2d 416, 433 (2d Cir. 1945); *United States v. General Electric Co.*, 82 F. Supp. 753, 891 (D.N.J. 1949)). With regard to what the committee intended as the meaning of substantial anticompetitive effects, one committee member submitted his view as follows: "'Substantial anticompetitive effects'" referred to here and elsewhere in the Report mean of course 'anticompetitive effects' which are direct as well as substantial." *Id.* at 76, note 61.

128. See *supra* note 125 and accompanying text.

129. 148 F.2d 416, 443 (2d Cir. 1945).

130. *Id.* at 444.

131. *Id.* The manufacturing levels of domestic ingot grew from 96 million pounds to 262

According to Judge Hand, neither the gross increase in imports of ingot nor the decrease in the proportion of imports to the production of domestic ingot was sufficient to establish whether the cartel's activities produced the requisite "effect" on United States commerce to invoke jurisdiction. Thus, the proof that the cartel's imports constituted between twelve percent and fifteen percent of the U.S. market did not establish the "effect" required for jurisdiction under the Sherman Act.

Plainly, if proof of imports amounting to twelve to fifteen percent of the total United States market for aluminum ingot did not establish the "effect" required for Sherman Act jurisdiction, Judge Hand can be understood to require something more than a mere restraint "in commerce" or non-*de minimis* effect. Moreover, there must be more than Rahl's mechanical view<sup>132</sup> would require. What then, is required? Hand's opinion supplies the answer.

Judge Hand characterizes the Alliance as a "depressant upon production."<sup>133</sup> Prior to the formation of the Alliance, each of its members was a potential entrant into the market. As such, each member had the ability to affect the pricing behavior of *Alcoa* as a domestic monopolist in the United States. Judge Hand explicitly makes this point when addressing *Alcoa*'s domestic monopoly.<sup>134</sup> Having found that *Alcoa* at times had controlled up to ninety percent of the domestic ingot market with the remainder consisting of imports, Judge Hand concluded that such control is undoubtedly a monopoly.<sup>135</sup> The evidence involving the manufacturing capacity of the Alliance suggests that "there may well have been a practically unlimited supply of imports as the price of ingot rose."<sup>136</sup> The court stressed that the Alliance's possession of such a supply enabled it to be a potential entrant into the American market and served to put a ceiling on the prices that the domestic monopolist, *Alcoa*, could charge for ingot.<sup>137</sup>

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million pounds for the same time period.

132. See *supra* notes 118-21 and accompanying text.

133. 148 F.2d at 444.

134. *Id.* at 426.

135. *Id.* at 425.

136. *Id.* at 426.

137. Judge Hand made this point, likening the situation to that of a classic oligopoly: Assuming that there was no agreement between "Alcoa" and foreign producers not to import, [the foreign producers] sold what could bear the handicap of the tariff [imposed by the United States] and the cost of transportation. . . . While the record is silent, we may therefore assume . . . that, had "Alcoa" raised its prices, more ingot would have been imported. Thus, [for foreign producers,] . . .

In describing the Alliance as a "depressant upon production,"<sup>138</sup> Judge Hand meant that by increasing the level of concentration in the U.S. market, the cartel members enhanced the potential for that curtailment of production which is the hallmark of tacit oligopolistic collusion. The resulting "substantive anticompetitive economic effect" established a rebuttable presumption of jurisdiction, and is the "effect" Judge Hand was speaking of. Thus, the burden of proof had been shifted to the defendant to prove that the Alliance did not have this anticompetitive effect on curtailing imports.<sup>139</sup> If the defendants met this burden, jurisdiction would be defeated.

Judge Hand is even more explicit. The defendants, he explained, must prove that their anticompetitive motive in establishing a cartel was "over-balanced in all instances by motives which induced the shareholders to import . . ."<sup>140</sup> The cartel members needed to show that the U.S. market became "so attractive" that the economic incentives of competing on an individual basis would lead to the abandonment of their restrictive arrangement.<sup>141</sup> If cartel members operated per the agreement and received the royalties which the agreement awarded, then it would be less attractive for them to adhere to the agreement's restrictions than to compete in the American market on an individual basis. The court noted that the defendants must show that "the royalties [from the arrangement] did not count at all and their expectations were in fact defeated."<sup>142</sup> In other words, proof is required that the cartel miscalculated in deciding that it possessed sufficient market power for the successful imposition of a supra-competitive price, given the oligopolist structure of the market. Where there is no power to exact a supra-competitive price, there can be no "effect" on the United States market.

To illustrate further, suppose that instead of a cartel, the for-

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a rise in price will presumably induce [them] immediately to divert to the American market what they have been selling elsewhere. It is entirely consistent with the evidence that it was the threat of greater foreign imports which kept "Alcoa's" prices where they were, and prevented it from exploiting its advantage as sole domestic producer; indeed, it is hard to resist the conclusion that potential imports did put a "ceiling" upon those prices.

148 F.2d at 426.

138. See *supra* note 132 and accompanying text.

139. 148 F.2d at 444.

140. 148 F.2d at 444-45.

141. *Id.* at 445.

142. *Id.*

eign producers had merged their operations into a single holding company. Today, under these circumstances, the formation of the Alliance would be treated as a merger under the 1984 Merger Guidelines.<sup>143</sup> These Guidelines provide various thresholds of industry concentration that are thought to identify the potential existence of collusive pricing in concentrated oligopolistic markets. The Guidelines incorporate the Herfindahl-Hirschman Index (HHI) as an indicator to determine the existence of, and any significant increases in market concentration.<sup>144</sup> The HHI evaluates market concentration based on the relative size and distribution of the firms in a particular market. Using the HHI as a tool, the Alliance's potential "effect" on the competitiveness of the U.S. market can be evaluated.

Hypothetically, if *Alcoa* had enjoyed an eighty-five percent share of the United States market before the formation of the Alliance, and five individual foreign ingot producers had three percent each, the industry's concentration under the HHI would be 7,270. If the formation of the Alliance was treated as a merger of the foreign producers, however, the industry HHI would have risen to 7,450, an increase in concentration of 180 points. Under these circumstances, the Department of Justice would challenge this merger due to the extremely high post-merger concentration of the market. Moreover, the 180 point increase in concentration caused by the merger would signal an unacceptably dangerous potential for supra-competitive pricing.<sup>145</sup>

Compare another situation. Suppose, that instead of *Alcoa* holding eighty-five percent of the United States market, the U.S. industry consisted of six or seven independent and competitive U.S. firms of roughly the same size. Consider further that the five foreign firms in the Alliance each had a three percent market share. The HHI market concentration in this situation would be about 1,178 before the Alliance was established and would increase

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143. See *U.S. Department of Justice Merger Guidelines*, 4 Trade Reg. Rep. (CCH) ¶ 13,103, at 20,559-64 (June 14, 1984) [hereinafter *Merger Guidelines*].

144. For a more complete discussion of exactly what the HHI is and how the Department uses it in market concentration determinations, as well as other Department of Justice inquiries into mergers under these Merger Guidelines, see *infra* notes 161-65 and accompanying text.

145. See *Merger Guidelines*, *supra* note 143, at 20,560-61 indicating that the Department of Justice will tend to challenge mergers with a post-merger HHI above 1,800 and an increase in the HHI of more than 100 points. The Department has adopted this position because mergers in such range are regarded as extremely likely to lessen competition even if other economic factors considered by the Department may suggest otherwise.

only eighty points to 1,258 after the cartel's formation. The Department of Justice asserts in its Guidelines that it is unlikely to challenge mergers of firms in industries with this level of concentration when the post-merger increase in concentration is less than 100 points, because such mergers are not likely to substantially lessen competition.<sup>146</sup>

Under these hypothetical circumstances, Judge Hand would probably find no that jurisdiction exists using his "effects" test. This Alliance is a significantly weaker "depressant on production" and lacks sufficient power to threaten the U.S. market with a supra-competitive price. Accordingly, this arrangement would have no anticompetitive "effect."

Because the Alliance's royalty system was established to control supply and hence price, it is a classic example of a price-fixing device, which is proscribed as a *per se* offense under Section 1 of the Sherman Act.<sup>147</sup> In general, a *per se* analysis is used to determine the lawfulness of trade restraints that are viewed as inherently anticompetitive; thus, no inquiry is made into any procompetitive benefits that the restraints may yield.<sup>148</sup> With some variations, the *per se* rule essentially establishes one or more conclusive presumptions regarding the harm created by collusive pricing, where normally the harms require affirmative proof.<sup>149</sup>

The first conclusive presumption of the *per se* rule is that the parties have market power, the ability to affect market price. This presumption rests on the presuppositions that the purpose of an agreement is to raise prices to supra-competitive levels and that careful business persons will not engage in such a price-fixing arrangement, unless reasonably assured that they possess the market power necessary for success.

The second presumption is that the price charged is a supra-competitive price. If the conspirators had power over price, then no competitive price can be shown with which to establish a violation. Proving that a supra-competitive price was charged would be

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146. *Id.*; *Merger Guidelines*, see *infra* notes 176-78 and accompanying text.

147. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-25 (1940).

148. *Id.* at 218. As it was stated in the *Socony-Vacuum* case, the "[Supreme] Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense."

149. *Id.*

very difficult. Even if the price charged as a result of an agreement is competitive, the presumption of power over price remains. This is true because it is reasonable to presuppose that the restrictive agreement was not an idle exercise and that participants intended, sooner or later, to raise prices above a competitive level. Otherwise, the arrangement would require continuous policing which is practically beyond judicial and executive means.

Judge Hand's "effects" test modifies this *per se* rule by transforming the conclusive presumption of market power to only a rebuttable presumption. As a consequence, the defendant, now having the burden of proof, can show that the cartel arrangement did not in fact have the requisite market power to exact a supra-competitive price from the U.S. market; thus, meeting his burden of proof. It will not be conclusively presumed that foreign parties have market power in the relevant United States market.

Although Judge Hand's "substantive anticompetitive effects" jurisdictional test permits a defense based on the absence of power to fix prices, it does not require actual proof that the cartel charged a supra-competitive price. Such proof is unnecessary because the *per se* rule's presumption of power is distinguishable from the presumption regarding price. Thus, discussing *Socony-Vacuum*, Judge Hand observed that:

It will be remembered that, when the defendants in that case protested that the prosecution had not proved that the "distress" gasoline had affected prices, the court answered that that was not necessary, because an agreement to withdraw any substantial part of the supply from a market would, if carried out, have some effect on prices, and was as unlawful as an agreement expressly to fix prices. The underlying doctrine was that all factors which contribute to determine prices, must be kept free to operate unhampered by agreements. For these reasons we think that the agreement of 1936 violated § 1 of the Act.<sup>150</sup>

This modified *per se* rule regarding foreign price-fixing cartels is particularly appropriate when examined from a broader international policy perspective. Many governments favor policies which protect particular industries from unfair competition or volatile markets. Some governments may view closely regulated cartels as assisting new markets entrants or assisting established and infant industries to achieve economies of scale and other efficiencies. De-

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150. 148 F.2d 416, 445 (2d Cir. 1945).



veloping countries may permit the use of a cartel as a means of redistributing wealth or promoting other policies.

The United States has for a long time exempted particular industries from the discipline of a competitive market to promote similar governmental objectives. Since Congress has made such exemptions for certain portions of the economy, United States courts should be sensitive to the similar policy considerations that may underlie the existence of foreign cartels, for instance. These policy considerations need not be similar to U.S. policies. The United States should not attempt to export its peculiarly economic or political notions into other sovereign states which may have their own legitimate policy concerns.<sup>151</sup>

If adherence to these considerations and assumptions is appropriate in a domestic case, they should also be accorded equal weight when a case has international ramifications. Therefore, a flexible approach which requires the showing of actual proof of a foreign defendant's power to impose monopolistic evils upon the United States would seem to be essential and consistent with the objective territorial principle of international law, at least in terms of the larger foreign economic policy interests of the United States.

Inherent in the problem of determining whether the requisite "effects" exist to properly exercise jurisdiction in international antitrust cases is the procedural notion that the jurisdictional test wrongfully involves inquiries into the substantive merits of a case. Critics who would argue that Judge Hand's test inappropriately passes on the merits of the case fail to distinguish between prescriptive jurisdiction and subject matter jurisdiction.

The issue of whether subject matter jurisdiction exists goes simply to the constitutional or statutory competence of a particular court to hear a case. It does not reach the merits of a dispute, which involves one's substantive legal rights without regard to a court's competence to adjudicate the matter. Prescriptive jurisdiction, however, goes to the question of whether the sovereign,

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151. Haight, *supra*, note 38 at 650. Haight has articulated this point well in stating that:

In any country, trade regulation or lack of it is determined by the judgment of that country as to what is best in its own public interest. Nations necessarily differ according to race, geography, climate, raw materials, and social and economic development. In many instances a highly competitive economy is considered wholly unsuitable, and combinations are regarded as essential.

*Id.* (footnote omitted).

United States, has conferred a cause of action on the plaintiff. A motion challenging prescriptive jurisdiction asserts that the plaintiff has failed "to state a claim upon which relief can be granted."<sup>152</sup> Occasionally a challenge to the merits of the plaintiff's claim or a challenge to the court's authority depends on common questions of fact. The subject matter of the plaintiff's case may also bear upon the court's authority over that case. Such similarities, however, should not be allowed to conceal the fundamental distinction between prescriptive and subject matter jurisdiction.

The *American Banana*<sup>153</sup> and *Sisal Sales*<sup>154</sup> cases reached the Supreme Court after the lower court had dismissed the plaintiffs' complaints for failure to state a cause of action. In the *Alcoa* case, Judge Hand posed the jurisdictional question as whether the 1931 agreement or 1936 agreement violated Section 1 of the Sherman Act.<sup>155</sup> In framing the issue in this manner, Judge Hand necessarily focused specifically on whether Congress intended to impose liability upon the foreign actor's conduct. This is not the language regarding a "subject matter" jurisdiction inquiry. Instead, this is the language of a prescriptive jurisdiction inquiry and goes to the question of whether the plaintiff has a cause of action.

## VI. THE DEPARTMENT OF JUSTICE MERGER GUIDELINES

In summary, Judge Hand's "effects" test requires the showing of a "substantive anticompetitive effect" for the proper exercise of Sherman Act jurisdiction. This suggests the need for a more disciplined approach to determine if sufficient effects exist to exercise jurisdiction in a particular case. The United States Department of Justice Merger Guidelines<sup>156</sup> may provide the needed discipline. These Guidelines establish an economic inquiry to determine the extent of market concentration and post-merger increases in market concentration, in order to identify potentially anticompetitive mergers. In addition, the Guidelines specify various thresholds of concentration to be used as criteria for further inquiry into an industry's potential for supra-competitive pricing. The Guidelines also identify other economic factors which help assess when an ap-

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152. FED. R. CIV. P. 12(b)(6).

153. See *supra* notes 51-67 and accompanying text.

154. See *supra* notes 66-70 and accompanying text.

155. 148 F.2d 416, 443 (2d Cir. 1945).

156. *Merger Guidelines*, *supra* note 143.

parently collusive arrangement has a probability of success so that market power could be created, enhanced, or its exercise facilitated in violation of the Sherman Act.

The DOJ's Guidelines should be applied as a vehicle to indicate whether sufficient "substantive anticompetitive effects" on U.S. commerce exist to exercise prescriptive jurisdiction over foreigners' activities abroad that violate the Sherman Act. Obviously, a "substantive anticompetitive effects" test requires significant economic inquiry. The Guidelines provide a sound basis for that inquiry and may be utilized for purposes beyond mergers. Utilizing the Guidelines in making the "effects" determination for conduct allegedly occurring outside the territorial limits of the United States or involving foreign defendants (including foreign cartels), would be valuable to alert courts that a significant element of the requisite "substantial anticompetitive effects" test for jurisdiction has been established. If foreign actors abroad cross the Guideline's concentration thresholds and an examination of the other economic factors indicates possible anticompetitive pricing, then a "substantial anticompetitive effect" may exist in the United States, justifying the exercise of prescriptive jurisdiction. On the other hand, if the concentration threshold is not crossed, or an examination of the other economic factors suggests that there is no genuine risk of anticompetitive pricing, then it may be concluded that under a "substantive anticompetitive effects" approach, the restraint on U.S. commerce is insufficient to warrant an exercise of prescriptive jurisdiction.

It must be noted that the "international application" of these Guidelines is limited to the purpose stated: to serve merely one vehicle to determine whether jurisdiction exists, not as the exclusive determinant of such issue.

The Department of Justice issued its merger Guidelines in 1984 to outline its enforcement policy concerning acquisitions and mergers subject to Section 1 of the Sherman Act or Section 7 of the Clayton Act. The Guidelines describe general principles and specific standards which the DOJ uses in analyzing such mergers. The Department believes that it uses these standards in a reasonable and flexible fashion in determining whether it will challenge a given merger. The Guidelines do not indicate, however, the Department's litigation position with respect to mergers already being challenged.

The central theme of the Guidelines is that mergers should

not be permitted for the purpose of creating, enhancing, or facilitating the exercise of "market power."<sup>157</sup> The DOJ identifies two situations where market power may exist: Monopoly and oligopoly.<sup>158</sup> In the monopolistic environment, market power essentially exists when a monopolist, which is a sole seller of a product with no good substitutes, can maintain a selling price, that is above the level that would prevail if the given market were competitive. Alternatively, such power exists where a sole buyer of a product has the ability to depress the price paid to below the competitive price. In the oligopolistic environment, where only a few firms account for the sale or purchase of a given product. Market power may exist when these firms either implicitly or explicitly coordinate their activities to achieve the selling or buying advantages enjoyed by the single-firm monopolist. Accordingly, the DOJ broadly defines the term "market power" as the "ability of one or more firms profitably to maintain prices above competitive levels for a significant period of time," to encompass and regulate both market conditions.<sup>159</sup> Although mergers may harm competition, they also have an important role in a free enterprise economy.<sup>160</sup>

The Department's Guidelines provide a flexible six-step approach to determine whether the DOJ will challenge a horizontal merger of firms. Horizontal firms are in the same product and geographic markets.<sup>161</sup> In applying the six-step approach the Department will examine the following: First, under section 3.11 of the Guidelines, the post-merger concentration of the relevant market (including both product and geographic markets) as characterized

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157. *Merger Guidelines*, *supra* note 143, at 20,555-56.

158. *Id.* at 20,555.

159. *Id.* at 20,555-56.

160. *Id.* Indeed, the DOJ notes that mergers:

... can penalize ineffective management and facilitate the efficient flow of investment capital and the redeployment of existing productive assets. While challenging competitively harmful mergers, the Department seeks to avoid unnecessary interference with that larger universe of mergers that are either competitively beneficial or neutral.

*Id.* at 20,556.

161. *Merger Guidelines*, *supra* note 143, at 20,559-60. It should be noted that the Department also analyzes non-horizontal mergers under section 4 of the Guidelines. *Id.* at 20,559-60. The DOJ states that non-horizontal mergers involve firms that do not operate in the same market and that "[i]t necessarily follows that such mergers produce no immediate change in the level of concentration in any relevant market as defined in Section 2 of these Guidelines. Although non-horizontal mergers are less likely than horizontal mergers to create competitive problems, they are not invariably innocuous." *Id.* at 20,564.

by the HHI;<sup>162</sup> second, also under section 3.11, the increase in market concentration due to the merger as measured by HHI;<sup>163</sup> third, under section 3.2, a variety of factors affecting the significance of market shares and concentrations;<sup>164</sup> fourth, under section 3.3, the ease of entry into the relevant market;<sup>165</sup> fifth, under section 3.4, a variety of other factors that affect the likelihood that a merger will create, enhance, or facilitate supra-competitive pricing;<sup>166</sup> and sixth, under section 3.5, any potential procompetitive efficiencies that the merger is likely to create.<sup>167</sup>

In a merger involving horizontal firms, the DOJ focuses on the first two steps mentioned above; namely, the pre-merger concentration of the market and the increase in concentration caused by the merger. If a merger results in low market concentration or a relatively slight increase in concentration, the DOJ will determine that the merger poses no significant threat to competition without further consideration of the last four steps. If the concentration is not low, or more than a slight increase in concentration is evident, however, the DOJ will proceed to examine the variety of other relevant economic factors.<sup>168</sup>

The Department describes "market concentration" as follows:

Market concentration is a function of the number of firms in a market and their respective market shares. Other things being equal, concentration affects the likelihood that one firm, or small group of firms, could successfully exercise market power. The smaller the percentage of total supply that a firm controls, the more severely it must restrict its own output in order to produce a given price increase, and the less likely it is that an output restriction will be profitable. If collective action is necessary, an additional constraint applies. As the number of firms necessary to control a given percentage of total supply increases, the difficulties and costs of reaching and enforcing consensus with respect to the control of that supply also increase.<sup>169</sup>

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162. *Id.* at 20,560.

163. *Id.*

164. *Id.* at 20,561.

165. *Id.* at 20,562.

166. *Merger Guidelines, supra* note 143, at 20,562.

167. *Id.* at 20,564.

168. *Id.* at 20,559-60.

169. *Id.* at 20,560. The Department notes that there is a spectrum of different types of markets ranging from "atomistic, where a very large number of firms that are small relative to the overall size of the market compete with one another, to monopolistic, where one firm controls the entire market." *Id.* at 20,560 n. 13. The greatest analytical difficulty is posed in

In the first step of its economic inquiry, the Department determines market concentration and evaluates the merged firm's pre-merger market power. This is accomplished by assigning it to one of three regions of concentration which serve as the thresholds for the determination of whether the merged firm possesses the requisite market power to act anticompetitively. Step two of the inquiry involves the evaluation of the increase in market concentration resulting from the merger. The DOJ uses the HHI of market concentration as an aid to interpret market data.<sup>170</sup> The HHI is calculated by summing the squares of the individual market shares of all firms included in the market as defined in section 2.<sup>171</sup> To illustrate, the Guidelines cite the following example:

[A] market consisting of four firms with market shares of 30 percent, 30 percent, 20 percent and 20 percent has an HHI of 2600 ( $30^2 + 30^2 + 20^2 + 20^2 = 2600$ ). The HHI ranges from 10,000 (in the case of a pure monopoly) to a number approaching zero (in the case of an atomistic market). Although it is desirable to include all firms in the calculation, lack of information about small fringe firms is not critical because such firms do not affect the HHI significantly.<sup>172</sup>

Once market concentration is determined, the DOJ divides the concentration spectrum into three regions. The first is regarded as unconcentrated with an HHI below 1,000, the second is characterized as moderately concentrated with an HHI between 1,000 and 1,800, and the third is highly concentrated with an HHI exceeding

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the middle range, the most common type of market, where a small number of firms account for the majority of the sales in a given market. *Id.*

170. *Merger Guidelines*, *supra* note 143, at 20,552.

171. *Id.* at 20,559. Market shares are calculated and assigned in section 2.4 of the guidelines which provides in relevant part that:

The Department normally will include in the market the total sales or capacity of all domestic firms (or plants) that are identified as being in the market under Sections 2.2 and 2.3. Market shares can be expressed either in dollar terms through measurement of sales, shipments, or production, or in physical terms through measurement of sales, shipments, production, capacity, or reserves.

. . . .

In some cases, however, total sales or capacity may overstate the competitive significance of a firm. The Department will include only those sales likely to be made or capacity to be used in the market in response to a "small but significant and non-transitory" increase in price . . . .

*Id.* at 20,559.

172. *Id.* at 20,560 n.14.

1,800.<sup>173</sup> A DOJ study concerning size dispersion of firms within markets found that the HHI thresholds of 1,000 and 1,800 correspond roughly to four-firm concentration ratios of fifty percent and seventy percent, respectively.<sup>174</sup>

With regard to the "unconcentrated" region, the DOJ will not, in the absence of extraordinary circumstances, challenge the merger because: (1) implicit coordination among the firms in the industry is likely to be difficult, and (2) the prohibitions of section 1 of the Sherman Act are considered an adequate response to any explicit collusion that might occur.<sup>175</sup>

On the other hand, "moderately concentrated" mergers with HHI concentrations between 1,000 and 1,800 are likely to be challenged if the post-merger increase in concentration exceeds 100 points.<sup>176</sup> The DOJ, however, is unlikely to challenge a merger if it concludes that the merger is not likely to substantially lessen competition after examining the post-merger HHI, the increase in HHI, and the presence or absence of the economic factors constituting the final four steps (sections 3.2-3.5) of the Department's merger analysis.<sup>177</sup> Mergers causing HHI increases of less than 100 will ordinarily not be challenged unless circumstances require a further inquiry.<sup>178</sup>

In the "highly concentrated" region with post-merger HHI above 1,800, mergers will be challenged if an HHI increase of more than fifty points occurs, unless the Department concludes, on the basis of the same six steps mentioned in the second region, that the merger is not likely to substantially lessen competition.<sup>179</sup> Mergers causing an HHI increase of less than 50 points are unlikely to be challenged.<sup>180</sup> In this region, however, if the increase in HHI exceeds 100 and the post-merger HHI substantially exceeds 1,800, then only in extraordinary cases will the presence or absence of the economic factors discussed in the final four steps of the analysis establish that the merger is not likely to substantially lessen competition.<sup>181</sup>

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173. *Merger Guidelines*, *supra* note 143, at 20,560.

174. *Id.*

175. *Id.* at 20,560-61.

176. *Id.*

177. *Id.*

178. *Merger Guidelines*, *supra* note 143, at 20,560.

179. *Id.* at 20,561.

180. *Id.*

181. *Id.* at 20,560. The guidelines provide that increases in concentration are relevant

The third step of the Merger Guidelines' inquiry involves examination of factors affecting the significance of market shares and concentration. In many situations, market share and concentration information from an HHI analysis "may either understate or overstate the likely future competitive significance of a firm or firms in the market."<sup>182</sup>

The fourth step of the Guidelines, under section 3.3, concerns the "ease of entry" into a market.<sup>183</sup> If a firm may enter the market so easily that existing competitors could not succeed in charging an anticompetitive price for any significant period of time, then the DOJ would probably not challenge mergers in that market. Nonetheless, the Department would "consider the likelihood and probable magnitude of entry in response to a 'small but significant and nontransitory' increase in price."<sup>184</sup> The greater the difficulty of entry into the relevant market is, the more likely the Department is to challenge the merger.<sup>185</sup>

The fifth step of the DOJ's merger analysis involves the evaluation of a variety of factors under section 3.4 which affect the likelihood that a merger will create, enhance, or facilitate the exercise of market power.<sup>186</sup> These factors will be considered in relation to the ease and profitability of collusion.<sup>187</sup> If these factors are relevant to the issue of collusion, then they will be especially germane when the DOJ's decision to challenge a merger is otherwise close.

Factors considered by the Department at this stage of its merger analysis include: The nature of the product and terms of

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to several key issues involving competitiveness:

Although mergers among small firms increase concentration, they are less likely to have anticompetitive consequences. Moreover, even in concentrated markets, it is desirable to allow firms some scope for merger activity in order to achieve economies of scale and to permit exit from the market. However, market share and concentration data provide only the starting point for analyzing the competitive impact of merger. Before determining whether to challenge a merger, the Department will consider all other relevant factors that pertain to its competitive impact.

*Id.*

182. *Id.* at 20,561.

183. *Merger Guidelines*, *supra* note 143, at 20,562.

184. *Id.* at 20,562 (footnote omitted). In "ease of entry" inquiries under section 3.3 of the guidelines, the "nontransitory" increase in price period is two years rather than the one year period used in the product market definition of section 2.1. *Id.*

185. *Id.*

186. *Id.* at 20,562.

187. *Id.*



sale,<sup>188</sup> information about specific transactions and buyer characteristics,<sup>189</sup> the ability of small or fringe sellers to increase sales,<sup>190</sup> the conduct of firms in the market,<sup>191</sup> and the performance of firms.<sup>192</sup>

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188. *Merger Guidelines*, *supra* note 143, at 20,562-63. The Department notes that this factor involves an inquiry into the homogeneity and heterogeneity of the relevant product. *Id.* In a market with a homogeneous and undifferentiated product, a cartel generally must only establish a single price. *Id.* In this situation, consensus among colluding firms is more evident as is the detection of deviations from the explicit or tacit agreement. As the products constituting the relevant product market become more numerous, heterogeneous, or differentiated, it becomes increasingly difficult for a cartel to enforce a complex scheme, involving more than the mere imposition of a single price. *Id.* Thus, the DOJ is more likely to challenge a merger when the relevant product market is completely homogeneous and undifferentiated. Conversely, the Department will not challenge a merger involving heterogeneous products. *Id.* The Department also considers the degree of difference between the products and locations in the market and the next-best substitutes. *Id.* The concern here is, first, whether the next-best substitute product is only slightly or significantly inferior to the last product included in the relevant product market; or, second, whether the next-most-distant seller is only slightly or significantly farther away than the last seller included in the geographic market. *Id.* at 20,563. The larger the "gap" at the edge of the product and geographic market, the more likely the DOJ will challenge the merger. *Id.* Additionally, the Department may look at the similarity and difference in the products and locations of the merging firms. *Id.* Under this inquiry, the DOJ is likely to challenge mergers where the products or plants of the merging firms are particularly good substitutes for one another. *Id.*

189. *Id.* at 20,563. With regard to information about specific transactions, the Department notes that collusive agreements are more likely to persist if the participating firms can easily detect and retaliate against deviations from the terms of the agreement. *Id.* When detailed information about specific transactions or individual price or output levels is available to competitors (with sources including exchanges among sellers, public disclosure by buyers, reports by the press or a government agency), deviations are easier to detect and less likely to occur. *Id.* Thus, the Department is more likely to challenge mergers when such information is available and suggests collusion. *Id.*

190. *Id.* at 20,563. With regard to a small firm's ability to increase sales, the DOJ asserts that:

Collusion is less likely to occur if small or fringe sellers in the market are able profitably to increase output substantially in response to a "small but significant and nontransitory" increase in price and thus to undermine a cartel. The Department is less likely to challenge a merger if small or fringe firms currently are able to expand significantly their sales at incremental costs that are approximately equal to their incremental costs experienced at current levels of output.

*Id.*

191. *Id.* The Department states that it would probably challenge a merger involving firms with any of one of the following characteristics: (1) a history of previous engagement in collusive practices; (2) a number of specific (enumerated) practices which suggest that an agreement exists in certain circumstances; (3) the acquired firm was an unusually disruptive and competitive influence in the market. *Id.*

192. *Merger Guidelines*, *supra* note 14, at 20,563-64. The Department notes that a merger made in a noncompetitive market environment will more likely be challenged. In this regard, the guidelines state: "Noncompetitive performance suggests that the firms in the market already have succeeded in overcoming, at least to some extent, the obstacles to effective collusion. Increased concentration of such a market through merger could further facilitate the collusion that already exists." *Id.* In its evaluation of the performance of a

The last step of the DOJ's merger analysis involves the consideration of any pro-competitive efficiencies that the merger may create.<sup>193</sup> With respect to efficiencies, the Merger Guidelines state that:

The primary benefit of mergers to the economy is their efficiency-enhancing potential, which can increase the competitiveness of firms and result in lower prices to consumers. Because the antitrust laws, and thus the standards of the Guidelines, are designed to proscribe only mergers that present a significant danger to competition, they do not present an obstacle to most mergers. As a consequence, in the majority of cases, the Guidelines will allow firms to achieve available efficiencies through mergers without interference from the Department.

Some mergers that the Department otherwise might challenge may be reasonably necessary to achieve significant net efficiencies. If the parties to the merger establish by clear and convincing evidence that a merger will achieve such efficiencies, the Department will consider those efficiencies in deciding whether to challenge the merger.<sup>194</sup>

If United States courts choose to employ the Merger Guidelines' standards in prescriptive jurisdictional inquiries concerning the issue of whether sufficient "effects" exist to apply the Sherman Act to foreign conduct, they will conform to the requirements of the *Alcoa* test and international law. In view of the rapidly changing world and its accompanying complex commercial international relationships, the adoption of the Guidelines is necessary.

## VII. POST-ALCOA DEVELOPMENTS IN THE UNITED STATES COURTS

It is important to reiterate that, except in the rare case where nationality or protective principles might be applicable, the use of the Sherman Act to cover foreign conduct is permissible under in-

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market, the DOJ will give particular weight to the following evidence of possible noncompetitive performance when the factors are found together: "(a) Stable relative market shares of the leading firms in recent years; (b) Declining combined market share of the leading firms in recent years; and (c) profitability of the leading firms over substantial periods of time that significantly exceeds that of firms in industries comparable in capital intensity and risk." *Id.*

193. *Id.* at 20,564. The Guidelines identify the following as some of the cognizable efficiencies that may be enhanced as a result of a merger: "Achieving economies of scale, better integration of production facilities, plant specialization, lower transportation costs, and similar efficiencies . . ." *Id.*

194. *Id.* at 20,564.

ternational law only if the exercise of jurisdiction is consistent with the objective territorial principle. This study has demonstrated that Judge Hand's "effects" test is a valid basis for the exercise of prescriptive jurisdiction when the *Alcoa* opinion is read to require a "substantive anticompetitive effect." While proliferating a variety of semantical deviations from the *Alcoa* test,<sup>195</sup> United States courts have failed to adhere to this requirement, in turn, causing the Sherman Act to take on the overbroad character of extended commercial tort law.

Many foreign governments and commentators have severely criticized the *Alcoa* decision as being violative of international law, in large part, due to an improper reading of a mechanical effects test into the decision.<sup>196</sup> Furthermore, many courts simply have not applied or interpreted the effects test in a manner which is consistent with international law's principle of objective territoriality. One notable exception is the *National Bank of Canada v. Interbank Card Ass'n*<sup>197</sup> decision. Here, the United States Court of Appeals for the Second Circuit correctly decided that there must be a showing of evidence that the challenged foreign conduct has an anticompetitive effect on United States commerce before an American court may exercise jurisdiction.

In the *Interbank* case, the National Bank of Canada sought to enjoin the Interbank Card Association, an American firm, and the Bank of Montreal from carrying out a decision to terminate National Bank's "Master Charge" credit card business. The National Bank argued that the revocation of its right to use the Master Charge trademark would exclude it from competition for Canadian credit cardholders and merchant accounts in violation of Section 1 of the Sherman Act.<sup>198</sup>

The issue to be decided was whether the termination of National Bank as a Master Charge bank in Canada could have any anticompetitive effects on United States commerce. The court held that National Bank failed to establish the linkage between the behavior objected to and any anticompetitive consequences to United States commerce.<sup>199</sup> In making this determination, the court

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195. See *supra* notes 72-76 and accompanying text.

196. See, e.g., THE AMERICAN BAR ASSOCIATION, PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS (J. Griffin ed. 1979).

197. 666 F.2d 6 (2d Cir. 1981).

198. *Id.* at 8-9.

199. *Id.* at 8.

stated:

Building upon the fundamental "effects" test outlined by Judge Learned Hand in [*Alcoa*], we think the inquiry should be directed primarily toward whether the challenged restraint has, or is intended to have, any anticompetitive effect upon United States commerce, either commerce within the United States or export commerce from the United States . . . . To us the critical factor in deciding this case is that appellants have not shown that enforcement of the exclusivity provision of the license agreement is at all likely to have an anticompetitive effect upon American commerce, either foreign or interstate.<sup>200</sup>

The court recognizes an essential matter worthy of note. In an interdependent world economy, any act necessarily has some effect virtually anywhere, yet the Sherman Act cannot be said to govern all conduct having some mere consequence on United States commerce. In this regard, the *Interbank* court stated:

Our jurisdiction is not supported by every conceivable repercussion of the action objected to on United States commerce. Only those injuries to United States commerce which reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation constitute effects sufficient to confer jurisdiction . . . . While the anticompetitive effects must be shown to outweigh any procompetitive effects in order to establish liability, there must be at least *some* anticompetitive effects to meet the threshold requirement of jurisdiction.<sup>201</sup>

The court concluded that the possible consequences resulting from the elimination of National Bank of Canada's credit card business due to defendant's actions failed to amount to the requisite anticompetitive effect on U.S. commerce to invoke the court's jurisdiction. The court also noted that the potential consequences of the cancellation of the plaintiff's license, such as decreased profits for Canadian merchants required to pay higher fees on their accounts due to the increase in the Canadian credit card market concentration, and/or fewer Canadian credit cardholders, would not suffice to show an anticompetitive effect on the United States.<sup>202</sup> The court concluded that there was no showing that any

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200. *Id.*

201. *Interbank*, 666 F.2d at 8.

202. *Id.*

significant number of United States firms doing business in Canada clear their credit card sales paper through Canadian banks, or that even if they did so, they would be unable to use United States banks for that service.<sup>203</sup>

There was also nothing to show that a decline in Canadian credit cardholders, who may purchase goods and services in the United States, would have an anticompetitive effect on U.S. commerce. The court pointed out that the plaintiff failed to claim that, as a result of increased concentration, Canadian purchases in the United States "would not be made on cash terms, or on other credit terms, if, due to the enforcement of [National Bank's] license agreement, credit cards were unavailable to some of these purchasers."<sup>204</sup>

In stating its anticompetitive effects test, the Second Circuit specifically rejected the Ninth Circuit's test for jurisdiction as enunciated by Judge Choy in *Timberlane*.<sup>205</sup> *Timberlane* adopted a "jurisdictional rule of reason." The *Timberlane* test has received attention for specifically introducing the notion of comity into a jurisdiction analysis. Judge Choy's three-part test is as follows:

[1] Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States? [2] Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act? [3] As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?<sup>206</sup>

*Timberlane* involved an American lumber company

203. *Id.*

204. *Id.*

205. *Timberlane Lumber Co. v. Bank of America N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976).

206. *Id.* at 615. In discussing the issue of international fairness and comity, the third prong of the test, the court listed seven elements to consider when determining if an assertion of jurisdiction is proper. They include:

The degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

*Id.* at 614 (citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40).

(Timberlane) which unsuccessfully attempted to establish a base of operations in Honduras for the purpose of milling lumber and exporting it to the United States. Timberlane claimed to establish the base due to an alleged conspiracy between the Bank of America and other parties designed to prevent Timberlane from operating in Honduras.<sup>207</sup> The plaintiff appealed to the Ninth Circuit after the district court dismissed the complaint in part for a lack of subject-matter jurisdiction. Judge Choy concluded that the district court erred because it only considered whether the restraint involved had "a direct and substantial effect on American foreign commerce."<sup>208</sup> Thus, the Judge presented his tripartite test.<sup>209</sup>

The serious problem with *Timberlane* is that Judge Choy should have dismissed the case for lack of jurisdiction under the second prong of his test. Proper analysis would have indicated that any effect on United States commerce was not "of such a type and

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207. *Id.* at 604-05. Some of the specific allegations regarding the conspiracy are that: (1) Timberlane purchased a substantial interest in an existing lumber mill owned by the Lima family, one of three principal competitors in the Honduran lumber business; (2) a subsidiary of the Bank of America had significant financial interests in both of Lima's rivals, and (3) the struggling Lima enterprise was heavily indebted to this bank which the plaintiff alleges had been conspiring with the two competitors by eliminating Lima and Timberlane from milling and exporting lumber. This last element was allegedly done by refusing to refinance Lima's debt, refusing to sell the bank's interests in the mill to Timberlane, conveying the bank's claims to Lima's rivals for questionable consideration, and using Honduran courts and other means by the conspirators to force Timberlane to cease operations. *Id.* at 603-05.

208. *Id.* at 615.

209. Judge Choy's contribution to jurisdictional tests influenced the American Law Institute in its definition regarding jurisdiction and antitrust law. Section 415 of the THIRD RESTATEMENT, entitled "Jurisdiction to Regulate Anti-Competitive Activities" provides as follows:

(1) Any agreement in restraint of United States trade that is made in the United States, and any conduct or agreement in restraint of such trade that is carried out in significant measure in the United States, are subject to the jurisdiction to prescribe of the United States, regardless of the nationality or place of business of the parties of the agreement or of the participants in the conduct.

(2) Any agreement in restraint of United States trade that is made outside of the United States, and any conduct or agreement in restraint of such trade that is carried out predominantly outside of the United States, are subject to the jurisdiction to prescribe of the United States, if a principal purpose of the conduct or agreement is to interfere with the commerce of the United States, and the agreement or conduct has some effect on that commerce.

(3) Other agreements or conduct in restraint of United States trade are subject to the jurisdiction to prescribe of the United States if such agreements or conduct have substantial effect on the commerce of the United States and the exercise of jurisdiction is not unreasonable.

THIRD RESTATEMENT, *supra* note 19, § 415.

magnitude so as to be cognizable as a violation of the Sherman Act." Thus, the court should have restrained itself from considering the third question involving comity.

On remand, the lower court in *Timberlane II*<sup>210</sup> correctly dismissed the plaintiff's action for lack of jurisdiction. The district court employed the language of *Interbank* to support the notion that jurisdiction is not supported by every conceivable repercussion on U.S. commerce, "even if occasioned by the most reprehensible business torts,"<sup>211</sup> because only anticompetitive effects suffice to confer jurisdiction.<sup>212</sup>

Interestingly, the court in *Timberlane II* did not directly address Judge Choy's jurisdictional factors. Nonetheless, the court did undertake a comparative interest analysis of relevant factors in the "extraterritorial" application of antitrust laws. This analysis seems to fall under prong three of Judge Choy's test. The language used, however, and the findings of the court, suggests that the analysis would be proper as a straightforward "substantive anticompetitive effects" inquiry under Judge Hand's test in *Alcoa*. Under this type of inquiry, dismissal of the complaint for a lack of prescriptive jurisdiction would be appropriate due to the absence of the requisite effect in the United States. To illustrate, the district court stated:

In this case, the tortious conduct of which the plaintiffs complain occurred in Honduras. Were this simply a straight-forward tort complaint, the only legitimate choice of law would be Honduran . . . . [T]he directly anticompetitive effect of the Bank's decision to liquidate Lima's indebtedness was felt in the marketplace in which the Lima assets supplied lumber: Honduras and, to a far less degree, the Caribbean . . . . [A]ny effect that Lima's demise had upon competitive conditions in the U.S. foreign [sic] was *de minimis*.

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210. *Timberlane Lumber Co. v. Bank of America National Trust & Savings Ass'n*, 574 F. Supp. 1453 (N.D. Cal. 1983).

211. *Id.* at 1463.

212. *Id.* With regard to this point, the court stated:

It appears to this Court, upon reviewing all the evidence in this matter, that this lawsuit—essentially a group of separate tort actions which were deemed unsuccessful in Honduran courts—has been repackaged as an antitrust case in an attempt to subvert prudent and traditional limits upon applications of our laws to foreign conduct and actors. We commend plaintiffs for their perseverance and indefatigable enthusiasm, as well as their building the quintessential Trojan horse from the ashes of their aborted investment in Honduras.

Unlike the first prong of the *Timberlane* test, in this inquiry the weight, as opposed to the mere existence, of the commerce is significant. The minimal commercial opportunity for Honduran lumber in the U.S. is important to our assessment of whether the Bank's actions could have been intentionally directed at, or their effect predictable upon, U.S. commerce in lumber.<sup>213</sup>

Of equal importance, the ninth circuit examined significant economic factors in *Timberlane III*<sup>214</sup> and found the actual effect of Timberlane's potential operations on the United States foreign commerce to be insubstantial. The analysis was, however, misplaced into the third prong of Judge Choy's test. The court found that "[t]he insignificance of the effect on the foreign commerce of the United States when compared to the substantial effect in Honduras suggests federal jurisdiction should not be exercised."<sup>215</sup> More appropriately, the court should have stated that due to the insignificant effect in the United States, federal jurisdiction *cannot* be exercised. To hold otherwise would be inconsistent with the objective territorial principle of international law.

In its analysis of the relevant economic factors which warranted the dismissal of the complaint, the ninth circuit compared Honduran lumber imports to both United States imports and total United States lumber consumption. Expressed as a percentage of total U.S. lumber imports, Honduran lumber imports constituted .07 percent, .02 percent, and .04 percent in volume for the years 1970-1972, respectively.<sup>216</sup> During the same years, such imports formed an even smaller percentage of total U.S. lumber consumption. The percentage of volume was .011 percent, .004 percent, and .008 percent, respectively.<sup>217</sup>

Given the small market share enjoyed by the Honduran lumber industry in the U.S. market, any restraints imposed in the *Timberlane* case could not produce the supra-competitive pricing benefits to the conspirators and the anticompetitive effect on U.S. foreign commerce required for the proper exercise of jurisdiction.

Another example of a wrongful exercise of jurisdiction on the

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213. *Id.* at 1470.

214. *Timberlane Lumber Co. v. Bank of America National Trust & Savings Ass'n*, 749 F.2d 1378 (9th Cir. 1984).

215. *Id.* at 1384.

216. *Id.* at 1385.

217. *Id.*



ground that the restraints involved did not have the requisite "substantive anticompetitive effect" is the case of *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*<sup>218</sup> This case involved a dispute between two U.S. companies. Occidental Petroleum Corporation (Occidental) complained of the defendant's (Buttes) instigation of an international dispute over the sovereign rights to a portion of the Persian Gulf. Occidental alleged that this portion of ocean area covered the richest area of a concession it obtained from Umm Al Quaywayn, one of the Trucial States, to explore, develop, and exploit the petroleum reserves. The defendants' actions allegedly prevented the plaintiffs from "enjoying the fruits of their concession."<sup>219</sup>

In defense of its behavior, Buttes, relies on language from the 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws to assert that the court lacks jurisdiction over the case.<sup>220</sup> The standard for jurisdiction as set forth in that study provides that activity *unreasonably in restraint of trade* has a "substantive anticompetitive effect" on U.S. commerce.<sup>221</sup> To justify its contention that Occidental failed to demonstrate such an effect, Buttes emphasized the following economic factors: Its smallness in relation to the plaintiff (Occidental), the confined geographical area and speculative value of Occidental's concessions, and the presence in the area of numerous other companies also extracting oil for importation into the United States.<sup>222</sup>

The district court, however, reasoned that to establish jurisdiction a plaintiff need only assert that the defendant's activity has an effect on U.S. foreign commerce; the scope and degree of that effect, which Buttes attempted to diminish by emphasizing economic factors, is valuable only where the plaintiff seeks to establish a Sherman Act violation.<sup>223</sup> Through its application of a mechanical jurisdictional test, the court improperly exercised jurisdiction, in contravention of the standards set forth in *Alcoa* and international law.<sup>224</sup>

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218. *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied* 409 U.S. 950 (1972).

219. 331 F. Supp. at 95.

220. *Id.* at 102.

221. *Id.*

222. *Id.* at 103.

223. *Id.*

224. There may be a justification for the use of U.S. antitrust law to apply to the blatantly predatory activity, for example, of American firms where there is not an arguable

Like the court in *Occidental*, the court in *Fleischmann Distilling Corp. v. Distillers Co.*,<sup>225</sup> misconstrues *Alcoa's* effects test. In *Fleischmann*, two U.S. distributors of imported Black & White brand Scotch whiskey claimed that defendant British Distillers (Distillers) terminated plaintiff's long-standing distributorships as part of a conspiracy between Distillers and its subsidiaries in violation of Section 1 of the Sherman Act.<sup>226</sup> The court denied the defendants' motion to dismiss and also denied a motion for summary judgment based on the same claims.<sup>227</sup>

The court denied the motion to dismiss on the ground that under the circumstances, the plaintiff was relieved of the necessity for explicit allegations.<sup>228</sup> When a change in a distributorship, such as that which occurred here, furthers a horizontal conspiracy to boycott, a conspiracy to fix prices, or a conspiracy to establish market dominance or monopoly, such practices are *per se* illegal and eliminate the requirement of explicit allegations.<sup>229</sup> Thus, although *Fleischmann* failed to allege that the termination of the distributorship agreements restrained scotch whiskey competition in the United States, the complaint withstood the motion to dismiss.

The *Fleischmann* court's application of the *per se* rule is inconsistent with the *Alcoa* decision. Judge Hand tailored the *per se* rule for circumstances where foreign defendants abroad allegedly violated the Sherman Act by affecting U.S. foreign commerce.<sup>230</sup> In this situation, Judge Hand's test transforms the conclusive presumption of market power to a rebuttable presumption, allowing the defendant the opportunity to prove that he lacks such power.<sup>231</sup> Rather than allow Distillers the opportunity to prove that it lacked power over price, the court ascribed such power to the defendant.<sup>232</sup> Furthermore, for the policy reasons discussed

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foreign policy interest in the matter. In this narrow hypothetical context, the Sherman Act could serve as an extended body of commercial tort law since its enforcement would not offend any foreign government's or party's interest. Jurisdiction in this instance would be based on the widely recognized international law principle of nationality.

225. 395 F. Supp. 221 (S.D.N.Y. 1975).

226. *Id.* at 226.

227. *Id.* at 221.

228. *Id.* at 226.

229. *Id.*

230. See *supra* text accompanying notes 101-04, 146-47.

231. See *supra* notes 105-06 and accompanying text.

232. *Fleischmann*, 395 F. Supp. at 224. The court noted that Black & White Scotch was the leading seller in the United States from 1939 to 1953. Between 1959 and 1972, however, shipments fell by over 54% while total imports into the United States rose by over 185%.

above regarding the application of the *per se* rule to cases involving international matters,<sup>233</sup> courts should not so easily dispense with the *Alcoa* requirement that a defendant be afforded the opportunity to prove that it does not have the power to impose the costs of monopoly upon the United States.

Thus, given the defendant's lack of market control in the United States, the *Fleischmann* case represents another instance where jurisdiction was exercised contrary to the principles of international law and the requirements of Judge Hand's "effects" test.

Of the many Fifth Circuit appeals decisions the case of *Industrial Investment Dev. Corp. v. Mitsui & Co.*,<sup>234</sup> presents, yet another stark example, of an improper exercise of jurisdiction. This case primarily involved a claim by a U.S. plaintiff, Industrial Investment Development Corporation (IID) against a Japanese defendant, Mitsui & Co., Ltd. (Mitsui), and its American subsidiary. The plaintiff alleged that the defendants conspired to keep IID out of the business of harvesting trees in Indonesia and exporting lumber to the United States in violation of Sections 1 and 2 of the Sherman Act.<sup>235</sup>

IID had entered into a joint venture agreement with an Indonesian firm (Telaga Mas) in order to exploit a timber concession granted to Telaga Mas by the Indonesian government.<sup>236</sup> Telaga Mas and IID negotiated a forestry agreement with the government which provided that the lumbering concession would be terminated for the failure of the joint venture to cooperate or carry out its duties prior to the issuance of a "cutting" license.<sup>237</sup> Before the license was issued, Mitsui allegedly usurped control of Telaga Mas for the self-serving purpose of destroying IID's interest in the concession.<sup>238</sup> IID characterizes the conspiracy as having been inspired by an increase in the world price of lumber.<sup>239</sup> When the new Mitsui-influenced management refused to cooperate with IID, the government cancelled the forestry agreement and terminated the concession.<sup>240</sup>

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*Id.*

233. See *supra* notes 151-56 and accompanying text.

234. 855 F.2d 222 (5th Cir. 1988).

235. 594 F.2d 48, 49 (5th Cir. 1979).

236. *Id.* at 50.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Industrial*, 594 F.2d at 50.

In support of its antitrust claim, IID argued that the defendants' allegedly wrongful acts impaired its ability to enter and compete in the market, and deprived it both of its contract and concession rights and the profits it would have derived from such operations.<sup>241</sup> Aside from the view that "substantive anticompetitive effects" are required for jurisdiction in cases such as these, the weakness in IID's position is that it fails to allege that the defendant's actions resulted in any impact on United States commerce. Matters such as market power and effects were not addressed. In effect, IID raised the Sherman Act to protect itself from a Japanese firm's allegedly unfair business practices rather than showing that the conduct harmed the competitive structure of the United States lumber market. This case arguably fails to meet even Dean Rahl's mechanical jurisdiction test,<sup>242</sup> yet the court denied the defendant's motion to dismiss.<sup>243</sup>

Despite a jury finding that Mitsui was guilty of attempted and actual monopolization and restraint of trade, it found, and the Fifth Circuit affirmed, that Mitsui's activities lacked a direct and substantial effect on United States import commerce.<sup>244</sup>

It is noteworthy that Mitsui offered testimony which would be quite relevant under the fifth step of the jurisdictional analysis proposed in the Merger Guidelines<sup>245</sup> where once market concentration has been determined as significant, an inquiry into other economic factors regarding monopolistic tendencies is made. An analysis of economic factors such as the degree of difference between the product in question and the next-best substitute and the homogeneity or heterogeneity of the relevant product, for example, could help determine whether an imposed restraint might affect the exercise of market power and the exaction of a supra-competitive price.<sup>246</sup> Under such analysis, the following Mitsui testimony demonstrates that its activity in Indonesia did not have a "substantive anticompetitive effect" on United States foreign commerce despite the plaintiff's claim that it intended to specifically import "agathis" logs into the United States:  
"[A]gathis is highly substitutable with numerous hard woods and

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241. *Id.* at 54.

242. *See supra* notes 119-121 and accompanying text.

243. 594 F.2d at 56.

244. *Mitsui*, 855 F.2d 222 (5th Cir. 1988).

245. *See supra* note 181-87 and accompanying text.

246. *See Merger Guidelines, supra* note 180-92, at 20,562.

soft woods that are grown in, and exported from the United States . . . . Agathis neither is nor would be imported into the United States, and even if agathis were imported into the United States, it would constitute an insignificant percentage of the market."<sup>247</sup>

A survey of recent cases indicates that an increase in its attention to economic factors has led United States courts to hold that in certain foreign or partly foreign trade situations, the courts do not have jurisdiction due to the lack of an anticompetitive effect on United States commerce.

The plaintiff in *Bulk Oil (Zug) A.G. v. Sun Co.*,<sup>248</sup> claimed that the defendant's refusal to deliver a quantity of North Sea crude oil as contracted allegedly due to an Arab oil boycott, was a violation of Section 1 of the Sherman Act.<sup>249</sup> The court found that the plaintiff's following allegations did not sufficiently show, without the support of relevant and reliable economic information, that there was an anticompetitive effect on United States commerce as required by the *Interbank*<sup>250</sup> case:

- (a) the flow of crude oil in the foreign trade and commerce of the United States has been burdened by the Defendants' compliance with Arab Boycott;
- (b) the availability of crude oil in the United States has been affected by defendant's compliance with the Arab Boycott;
- (c) plaintiff has been deprived of the benefits of free and open competition; and
- (d) plaintiff has been injured in its business by defendants' compliance with the Arab Boycott.<sup>251</sup>

Thus, the court recognized the legal notion that conclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim.

In *Eurim-Pharm v. Pfizer Inc.*,<sup>252</sup> the court held that it lacked jurisdiction because the plaintiff failed to establish that the defendants' alleged foreign price-fixing and market allocation scheme resulted in an anticompetitive effect on United States domestic or import commerce in violation of the Sherman Act.<sup>253</sup> The plaintiff

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247. 855 F.2d at 227.

248. 583 F. Supp. 1134 (S.D.N.Y. 1983).

249. *Id.* at 1136.

250. *See supra* note 200 and accompanying text.

251. 583 F. Supp. at 1137.

252. 593 F. Supp. 1102 (S.D.N.Y. 1984).

253. *Id.* at 1107.

alleged, and the court assumed to be true for purposes of the motion to dismiss, that Pfizer granted exclusive licenses to foreign manufacturers for the antibiotic Vibramycin in major foreign markets. Under these licenses, the foreign manufacturers agreed with Pfizer to restrict their sales of Vibramycin to distributors, wholesalers, and jobbers.<sup>254</sup> The latter three groups would confine their sales to specific geographical areas assigned by Pfizer, who would also assign the prices.<sup>255</sup> The plaintiff argued that as a result of this scheme, Pfizer was able to maintain its substantial share of the world market and charge an artificially high price for Vibramycin,<sup>256</sup> the results of which had a spillover effect on either United States import or export commerce.<sup>257</sup> In granting the defendants' motion, the court stated that the "plaintiff has made no allegations whatsoever regarding the manufacture, sale or marketing of Vibramycin in the United States other than its allegation that the United States price has increased. Thus the link between defendants' conduct abroad and the price of Vibramycin in the United States is far from apparent."<sup>258</sup>

The case of *Papst Motoren GmbH & Co. KG v. Kanematsu-Goshu (U.S.A.) Inc.*,<sup>259</sup> involved a claim where a Japanese firm was accused of infringing on patents by selling computer motors to another firm in Japan, who sold the motors to its American subsidiary, which resold the products in the United States.<sup>260</sup> The court asserted that the fact that a foreign firm has never sold products in the United States, nor ever had any specific plans to sell in the United States is irrelevant as long as the alleged injurious conduct has an anticompetitive effect on United States commerce.<sup>261</sup> The court denied jurisdiction over this claim, however, on the basis that "[a]ny effect in the United States of Papst's alleged conduct . . . would be, at most, de minimis," when the allegations lacked information about, for example, the size of the relevant market and the availability of substitute products.<sup>262</sup>

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254. *Id.* at 1104.

255. *Id.*

256. *Id.* at 1104. According to the plaintiff, the price of 500 capsules of 100 milligrams of Vibramycin rose from \$343.95 in 1981 to \$550.64 in 1983, which represents more than a 38% increase when drug prices in general rose only 15% during the same period. *Id.* at 1106.

257. *Eurim-Pharm*, 593 F. Supp. at 1106.

258. *Id.* at 1107.

259. 629 F. Supp. 864 (S.D.N.Y. 1986).

260. *Id.*

261. *Id.* at 868.

262. *Id.* at 869.

Finally, in *McGlinchy v. Shell Chemical Co.*,<sup>263</sup> the court held that it lacked jurisdiction based on a finding that the plaintiff failed to allege a sufficient effect on domestic commerce or import trade.<sup>264</sup> This case involved an allegation of a Section 1 Sherman Act violation. The plaintiff claimed to have been injured by the defendants' termination of a contract which allowed the plaintiff to promote the sale in Southeast Asia of "PB pipe grade resin" which is used to manufacture piping designed to carry water.<sup>265</sup> The court found that the most significant omission in the plaintiff's complaint to have been its failure to allege injury to the PB and PB-related product market or to competition in general.<sup>266</sup> Without such an allegation, the court is powerless to find the requisite "substantive anticompetitive effect" for the proper exercise of jurisdiction under Judge Learned Hand's standard.

### VIII. CONCLUSION

Judge Learned Hand's opinion in the *Alcoa* case and its "effects" test is consistent with the objective territorial principle of international law. This is apparent when the opinion is read to require a "substantive anticompetitive effect" on U.S. foreign commerce. Actual proof of such an effect caused by foreigners abroad must be shown in order for a court to properly exercise prescriptive jurisdiction under the Sherman Act. Thus, a constituent element of the alleged antitrust offense charged must occur in the United States as it did in the *Alcoa* case; otherwise, the Sherman Act takes on the character of an overextended body of commercial tort law.

The United States courts should adopt the 1984 Department of Justice Merger Guidelines' standards in prescriptive jurisdictional inquiries in order to determine the issue of whether sufficient "effects" exist to apply the Sherman Act to foreign conduct. Proper application of such Guidelines would ensure that jurisdictional exercises in antitrust cases involving transnational activity conform to the requirements of the *Alcoa* test and international law.

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263. 845 F.2d 802 (9th Cir. 1988).

264. *Id.* at 812.

265. *Id.* at 805.

266. *Id.* at 812.