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International Jurisdiction in National Legal Systems: The Case of Antitrust

*Diane P. Wood**

I. Introduction

It is no accident that many of the most provocative disputes about the allocation of jurisdiction among nations have arisen in antitrust cases.[1] Because antitrust regulates the competitive process, and because competition itself never remains neatly within the boundaries of individual countries, the inevitable result is that more than one nation can and does assert the right to prescribe mandatory rules of conduct. This in turn leads to a pressing need to develop rules for the resolution of those jurisdictional conflicts, a need made even more urgent by the absence of a choice of law solution to the problem in which the courts of state A would simply apply the competition law of state B in appropriate cases.

The export cartel problem described by Professor Rahl arises in

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* Professor of Law and Associate Dean, The University of Chicago Law School. I gratefully acknowledge the research support for this Article provided by the Bernard G. Sang Faculty Fund.

[1] *See, e.g.*, United States v. Watchmakers of Switz. Info. Center, Inc., 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. 1962); United States v. Imperial Chem. Indus., Ltd., 100 F. Supp. 504 (S.D.N.Y. 1951), *opinion on relief*, 105 F. Supp. 215 (S.D.N.Y. 1952); United States v. Standard Oil Co. (New Jersey), 1960 Trade Cas. (CCH) ¶ 69,849 (S.D.N.Y. 1960); United States v. Gulf Oil Corp., 1960 Trade Cas. (CCH) ¶ 69,851 (S.D.N.Y. 1960); Grand Jury Investigation of Shipping Industry, 1960 Trade Cas. (CCH) ¶ 69,746 (D.D.C. 1960); Westinghouse Elec. Corp. v. Rio Algom, Ltd., 448 F. Supp. 1284 (N.D. Ill. 1978)(one of many opinions in the uranium cartel cases). For an example of a case where cooperation succeeded, see the litigation on both sides of the Atlantic concerning the Quinine Cartel in United States v. N.V. Nederlandsche Combinatie Voor Chemische Industrie, 428 F. Supp. 114 (S.D.N.Y. 1977); ACF Chemiefarma N.V. v. EEC Comm'n, [1967-1970 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8083 (1970).

It would be a mistake, however, to assume that antitrust has a monopoly on extraterritorial disputes. For discussion of the general problem of extraterritoriality, see International Chamber of Commerce, Pub. No. 442, The Extraterritorial Application of National Laws (D. Lange & G. Born eds. 1987)[hereinafter International Chamber of Commerce]; *Symposium on Extraterritoriality of Economic Legislation*, 50 Law & Contemp. Probs. (1987).

large measure because the rules for allocating jurisdiction remain unclear and contentious.[2] Strict territoriality rules, under which nations may take actions only with respect to persons and conduct that are literally within their physical borders, make little sense for complex economic arrangements that are based in several countries and that have effects in many more. On the other hand, expansive recognition of so-called effects jurisdiction, under which a nation may regulate persons or conduct abroad having a sufficient effect within the nation, is difficult to justify without simultaneously undercutting the fundamental notion of sovereigns as territorially defined entities.

I suggest in this Article that part of the reason for the problem lies in the following dilemma for economic regulation: should the state regulate those whom it can reach legitimately under a regime of international jurisdiction that prefers territoriality as the foundation of authority, or should the state regulate those whose actions have the most profound effects within its territory, even when they are physically located within the borders of another state? Obviously, the state does not always face this choice. Just as obviously, it often does, and it does so most pointedly in the export cartel area. The nature of this problem also illustrates how difficult it is, with questions of international jurisdiction, to maintain a sharp distinction between the presumably preliminary jurisdictional inquiry and the substantive aspects of the case. In the final analysis, the only sure way out of this dilemma involves elements of multilateral agreement on the basic principles of economic policy and a greater willingness at the national level to apply the substantive laws of the country with the greatest regulatory interest consistent with those principles. Territorial distinctions between nation-states are not likely to fade in significance to anywhere near the degree with which they have faded within federations such as the United States, or even Canada, and thus the problems of both jurisdictional conflicts and substantive conflicts demand solutions that respect the existence of national sovereignty.

In exploring this issue, I begin in Part II with my own description of the export cartel problem for antitrust. Part III explores in detail the larger question of the principles that should govern allocations of jurisdiction in economic regulatory cases, in light of the dilemma I have noted. I conclude by suggesting some alternative ways for resolving these jurisdictional conflicts, each of which is designed to respect two limiting conditions. First, the nation should have a selfish interest in regulating the conduct, and second, the nation should be able to implement its choices without trampling significantly on the interests of other states.

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[2] *See* Professor Rahl's *An International Antitrust Challenge* which begins this Symposium.

II. The Law of Export Cartels

A. International Jurisdiction and the Regulation of Exports

A basic question relating to the current export cartel problem is, why should export cartels pose a particularly thorny problem for international antitrust enforcers in the United States?[3] Since the time the Sherman Act was passed, it specifically has covered restraints of trade "in foreign commerce." U.S. exporters engage in one branch of foreign commerce by sending goods and sometimes services to other countries. As a matter of first principle, these U.S. exporters are subject to regulation by the U.S. government with respect to their export activities, no less than with their employment practices, environmental practices, and occupational safety practices.

The first answer to the question lies in the fact that Congress chose not to exercise full powers over export activities almost from the start. Congress excluded exports from Section 3 of the Clayton Act,[4] which covers exclusive dealing and tying arrangements, and from Section 2(a) of the Robinson-Patman Act,[5] which deals with price discrimination. In addition, two statutes have been passed with the express goal of exempting certain export arrangements from the antitrust laws: the Webb-Pomerene Act of 1918, and Title III of the Export Trading Company Act of 1982.[6] Both statutes did so in response to the concern that U.S. firms were at a competitive disadvantage in export markets.[7] In order to

[3] Export cartels are obviously a problem for other countries and regions with competition laws as well, such as Canada, the Federal Republic of Germany, and the European Economic Community. *See* Competition Act, CAN. REV. STAT. ch. C-23 as amended, discussed in Goldman, *Bilateral Aspects of Canadian Competition Policy*, 57 ANTITRUST L.J. 401 (1988); the Gesetz Gegen Wettbewerbsbeschränkungen, BGB1.I 1081 (July 27, 1957), discussed in Gerber, *The Extraterritorial Application of the German Antitrust Laws*, 77 AM. J. INT'L L. 756 (1983); Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3 [hereinafter EEC Treaty or Treaty of Rome]. Articles 85 and 86 of the EEC Treaty are discussed, inter alia, in *North American and Common Market Antitrust and Trade Laws*, 1987 FORDHAM CORP. L. INST. (B. Hawk ed. 1988). Unless otherwise noted, however, I shall use the U.S. laws concerning export cartels as the paradigmatic example, and I shall assume that other countries are the ones that feel the effects of these cartels. The more general conclusions of the article are not, however, dependent on the direction of trade, nor on the specifics of any given country's law about export cartels.

[4] Clayton Act § 3, 15 U.S.C. § 14 (1982).

[5] Robinson-Patman Act § 2(a), 15 U.S.C. § 13(a) (1982). *See also*, I B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 165 (2d ed. 1986).

[6] The Webb-Pomerene Act is codified at 15 U.S.C. §§ 61-65 (1982). The Export Trading Company Act of 1982 is codified at 15 U.S.C. §§ 4001-4021 (1982)[hereinafter ETCA].

[7] *See, e.g.*, *Report of the 1979 National Commission for the Review of Antitrust Laws and Procedures*, 295 (1979)[hereinafter *1979 National Commission Report*], and supporting documentation for the Webb-Pomerene Act. For materials on the ETCA, see e.g., *New Opportunities Under the Export Trading Company Act of 1982*, 1983 L. BUS. 33, 87.

understand what these statutes reveal about jurisdictional conflicts, it is helpful to take a closer look at them.

The Webb-Pomerene Act begins by defining the words "export trade" to mean ". . . solely trade or commerce in goods, wares, or merchandise exported, or in the course of being exported from the United States or any Territory thereof to any foreign nation."[8] The definition goes on expressly to exclude production, manufacture, and sales of the same items for consumption or resale within the United States. Section 2 of the Act contains the key antitrust exemption: the Sherman Act does not make illegal ". . . an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association."[9]

The two provisos to this language, usually cited for the proposition that the antitrust exemption is quite narrow, also reveal on the positive side the type of commerce Congress thought it was regulating in the statute. The first proviso stipulates that the association or act must not be (1) in restraint of trade within the United States, or (2) in restraint of the export trade of any domestic competitor of the association. The second proviso stipulates that the association must not do anything that (1) artificially or intentionally enhances or depresses prices within the United States, or (2) otherwise substantially lessens competition or restrains trade within the United States.

Most commentators have emphasized either the limited role that the Webb-Pomerene Act has played in U.S. export trade, or the negative effects the Act may have on the domestic market. For example, the 1979 National Commission for the Review of Antitrust Laws and Procedures (the "Commission") noted that exports through Webb-Pomerene associations accounted for only 2.4% of total U.S. merchandise exports between 1958 and 1962.[10] By 1976, the latest year for which the Federal Trade Commission ("FTC") then had complete data, the total had shrunk to 1.5% of total U.S. exports.[11] Relying on FTC studies, the Commission found that the companies using Webb-Pomerene associations tended to be leaders in oligopolistic industries, producers of a homogenous product, and large in size.[12]

In this context, the conduct that has been held to be permissible for

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8 15 U.S.C. § 61.

9 *Id.* § 62.

10 *1979 National Commission Report*, *supra* note 7, at 298.

11 *Id.*

12 *Id.*

Webb-Pomerene associations does raise serious questions about the Act's consequences in the domestic market. The leading decision on this point, *United States v. Minnesota Mining and Manufacturing Co.*,[13] held that certain restrictions, which were imposed by a Webb-Pomerene association whose membership accounted for four-fifths of the U.S. export trade in the relevant industry, were permissible because they were inevitable consequences of any such association. Those permissible restrictions included: (1) the inclusion of nearly all members of the industry in the association, (2) the assignment of stock in the association according to quotas, (3) the agreement to use the association as the exclusive foreign outlet, (4) the refusal to handle exports of American competitors, (5) the determination of both production quotas and price levels for each member supplying products to the unit, (6) the fixing of foreign resale prices, (7) a reasonably limited agreement not to withdraw from the association at will, and (8) the charging of higher prices to U.S. exporters than to foreign distributors, insofar as the differentials are related to different service requirements.[14]

On the other hand, the Webb-Pomerene Act does not immunize agreements between associations and their foreign competitors.[15] Furthermore, it does not it help members of an association who wish jointly to establish manufacturing units abroad, even if the reason is to avoid foreign government restrictions that make export difficult or impossible.[16] Finally, there is an odd "government financing" exception to the Webb-Pomerene Act stating that the Act does not apply if the United States is purchasing or substantially funding an export sale.[17]

These exceptions are of more than passing interest for present purposes because they help shed light on the extent to which Congress implicitly asserts prescriptive jurisdiction over export commerce. The question can be put as follows: does the Webb-Pomerene Act simply identify conduct that the United States ought not to be regulating under any circumstances, given principles of international jurisdictional competence, or does it identify conduct that the United States could regulate, but is choosing not to, for reasons of domestic policy?

The answer to this question is quite clearly the second of these alter-

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13 United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950).

14 *Id.* at 965-66.

15 United States v. United States Alkali Export Ass'n, 86 F. Supp. 59 (S.D.N.Y. 1949).

16 Minnesota Mining, 92 F. Supp. at 947.

17 *See* United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199 (1968); Department of Justice, *Antitrust Enforcement Guidelines for International Operations*, § 4.1 [hereinafter *1988 International Guidelines*]; Case 5, *reprinted in* 55 Antitrust & Trade Reg. Rep. (BNA) No. 1391, Special Supplement (Nov. 17, 1988).

natives, for several reasons. First, from the point of view of international law, there is nothing objectionable about a country regulating the conduct of persons within its borders, even if some or all of the effects of that conduct will be felt overseas. Indeed, an argument for the contrary position would go beyond anything that even the most ardent proponents of objective territoriality have urged. It would mean that the sovereign in whose territory agreements were concluded or conduct took place was divested of jurisdiction in the international sense if the effects were felt in other countries. Certainly the leading international decision on this topic, the Permanent Court of International Justice's ruling in *The S.S. Lotus*, holds no such thing.[18] In that case, the Court decided that states were not obliged affirmatively to justify their exercises of jurisdiction under international law, and that there was no principle of international law that prohibited Turkey from prosecuting a French naval officer for committing an offense that had effects in Turkish territory.[19] No question about the jurisdiction of French courts arose; to the contrary, the French government argued in the alternative that the correct place for the suit was in France.

The proposition that the territorial state has jurisdiction to prescribe and enforce rules of law concerning acts and conduct within its territory is one of the strongest tenets of international law.[20] Along with that power, nations have an obligation to respect the rights of other states and their citizens. Thus, most nations would say that (1) they cannot expropriate the territory of aliens without providing an acceptable form of compensation, (2) they must respect the diplomatic agents of other states, and (3) some form of sovereign immunity must remain.[21] There is no need to belabor the point. If the United States wished to regulate the behavior of export cartels based in the United States, international law clearly would permit it to do so.

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[18] The S.S. Lotus, 1927 P.C.I.J. (ser. A) No. 10.

[19] *Id.* at pt. III, para. 6. With respect to the first proposition, the Court said the following:

> 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.

The Court rejected an alternative argument that the French had made, which was that exclusive jurisdiction should rest in the state whose flag is flown over the ship on which the challenged conduct (not effects) took place.

[20] *See, e.g.*, Island of Palmas Case, 2 R. Int'l Arb. Awards 829 (1928); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(a) (1987)[hereinafter RESTATEMENT (THIRD)]; RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 17(a) (1965).

[21] None of the examples I give is free from controversy. The fact that these and other practices break down from time to time does not mean, however, that states do not ordinarily observe them and acknowledge them to be part of customary international law.

The question with respect to the Webb-Pomerene Act is therefore the same as the question with respect to any other piece of legislation Congress has passed that arguably regulates foreign commerce: did Congress intend to reach the export-related activities of U.S. exporters in the Sherman Act, which in turn would imply that the Webb-Pomerene Act was necessary to relieve exporters of this burden?[22] This is a classic problem of statutory interpretation, not a jurisdictional problem. Whatever may be the difficulties with asserting jurisdiction over foreign-based conduct, export cartels do not present those issues.

From this standpoint, the Export Trading Company Act of 1982 (the "ETCA") is identical to the Webb-Pomerene Act. Once again, U.S. exporters complained to Congress that the antitrust laws had a chilling effect on the export trade of the United States; once again, Congress held hearings and deliberated, deciding that the fears were justified enough that a special antitrust exemption would be put in place. Although the mechanism of the ETCA is different in that (1) it requires prior application for a certificate of review, (2) certificates are granted upon a showing that special statutory antitrust standards are satisfied, and (3) various procedural consequences follow, the underlying premise is the same.[23] The fact that it is arguably necessary to exempt or lessen the force of the U.S. antitrust laws with respect to export trade means that Congress could, and perhaps did, assert its authority over that conduct in the general statutes.

B. Statutory Regulation of Export Arrangements

Given that many export arrangements do not fall within the Webb-Pomerene Act, and that many exporters have not bothered to obtain an Export Trade Certificate of Review, some export conduct remains potentially subject to the Sherman Act and the Federal Trade Commission Act.[24] The question that has perplexed U.S. commentators has been

[22] *Cf.* United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945), in which the court said, ". . . 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."

[23] *See* 15 U.S.C. §§ 4001-4021; Department of Commerce, International Trade Administration, *Guidelines for the Issuance of Export Trade Certificates of Review*, 50 Fed. Reg. 1786 (2d ed. Jan. 11, 1985); DEPARTMENT OF COMMERCE, INTERNATIONAL TRADE ADMINISTRATION, THE EXPORT TRADING COMPANY GUIDEBOOK (1984).

[24] The applicability of the Clayton Act to export conduct is more problematic, since most of its sections expressly call for an effect "in a section of the country." In any event, there is little that the Clayton Act would prohibit that cannot also be regulated by the Sherman Act. The discussion in the text will therefore use the Sherman Act as the principal U.S. antitrust law that is implicated.

The Federal Trade Commission Act is a different matter. Under § 5 of that Act, the FTC may reach everything that is prohibited by the other antitrust laws, as well as conduct that is contrary to

when and why one should construe the statutes to reach the export-oriented conduct, not whether there is power to do so. The difficulty of answering this question is a function of the complexity of purpose that one ascribes to the antitrust laws themselves. Viewed as the near-legendary "Chicago School" has seen them, and in the words of the 1988 Antitrust Enforcement Guidelines for International Operations promulgated by the Department of Justice ("1988 International Guidelines"), the antitrust laws are designed to "ensure[] the most efficient allocation of our resources and the maximization of consumer welfare."[25]

Others have stated the goal of the laws more broadly. Professor Rahl, for example, has argued that the laws are more generally designed to protect competition in the marketplace, regardless of who benefits from that competition.[26] Still others have challenged the allocative efficiency approach more directly, arguing that the antitrust laws serve political and social functions that help to shape the meaning of the "competition" that must be preserved.[27]

The appropriateness of U.S. antitrust coverage of export conduct is problematic only for those who consider the laws to be strictly concerned with the welfare of U.S. consumers. The need to regulate collusive or monopolistic behavior of exporters operating within the U.S. market is plain to one who is concerned with the integrity of the market itself, along lines similar to the SEC's efforts to protect the reputation and functioning of the securities markets. Political power is equally independent of the destination of the goods or services in question. It is quite difficult, however, to detect an effect on allocative efficiency within the United States, or more specifically a reduction in U.S. consumer welfare, when restraints of trade appear exclusively in export commerce.

If a consumer welfare oriented antitrust philosophy were of historical or aesthetic interest only, its problems with regulating export conduct would be unimportant here. The truth, however, is at the other extreme. Both from the standpoint of government enforcement policy over the last

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the spirit of those laws or otherwise is an unfair competitive practice. *See, e.g.*, Atlantic Refining Co. v. FTC, 381 U.S. 357 (1965); FTC v. Brown Shoe Co., 384 F.2d 3316 (1966); FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972).

25 *1988 International Guidelines, supra* note 17, § 1. *See also* R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978); Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

26 *See, e.g.*, Rahl, *Applicability of U.S. Antitrust Laws to Export Commerce*, 1986 FORDHAM CORP. L. INST. 131-135; Rahl, *International Application of American Antitrust Laws: Issues and Proposals*, 2 NW. J. INT'L L. & BUS. 336 (1980).

27 *See, e.g.*, Fox, *Consumer Beware Chicago*, 84 MICH. L. REV. 1714 (1987); Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1 (1982); Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979).

eight years, and from the standpoint of developments in antitrust caselaw, consumer welfare has gained a center-stage position, which, in the eyes of some observers, crowds all pretenders entirely out of the theater. It is therefore worth exploring when export activities will escape regulation under this theory, and when the economic effects in the United States continue to be of a quality and quantity to justify antitrust attention. I look first at instances where regulation is warranted under this interpretation of the laws, and then at examples where it is harder or impossible to defend.

The three principal examples of export-related conduct for which consumer welfare antitrust theory recognizes a legitimate U.S. interest and hence construes to be within the statutes are (1) anticompetitive activity with respect to exports that "spills over" into activities for the U.S. market, (2) anticompetitive activity with respect to exports that are actually intended to be reimported into the United States, and (3) anticompetitive arrangements designed to create an artificial short supply within the United States by exporting excess production.[28]

The spillover cases are nearly indifferent to the foreign consequences of the restraints in export trade. This theory, resting no doubt on human nature, holds that if exporters A, B, and C all manufacture two different products—item X which is exported, and item Y which is sold only in the United States—and if they fix prices and quantities for the export of product X, then they might be tempted to do the same thing for the domestic sales of product Y. This is a real danger in an industry with few producers and homogeneous products, which otherwise would be prone to collusion, and it is quite appropriate to treat it like other information exchange cases.[29] Note, however, that the foreign element is almost incidental.

The case of re-imports also requires little attention. An export fol-

[28] I do not include in this list a fourth category that some might note—exports significantly financed by the U.S. government. *See, e.g.*, United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199 (1968); *1988 International Guidelines, supra* note 17, § 4.1, Case 5 (joint bidding). It is missing from my list because it fits uncomfortably with the rigid consumer welfare focus of the Chicago approach to antitrust, except insofar as the government is a consumer. However, no complex theory of *jurisdiction* over exports is needed to protect the government in its consumer capacity. If the U.S. government suffers antitrust injury to its own property, it is entitled to sue for single damages. Clayton Act § 4A, 15 U.S.C. § 15a. Other conduct amounting to fraud in government transactions may be addressed under other statutes. In fact, the only theory justifying the Concentrated Phosphate rule is that in this one instance, U.S. taxpayers are entitled to the benefits of a functioning competitive marketplace. No one has explained satisfactorily why this entitlement is not enjoyed more broadly.

[29] For a general discussion of the information exchange cases, and the way in which the exchange of information can be a "facilitating practice" for industry cartelization, see P. AREEDA & L. KAPLOW, ANTITRUST ANALYSIS: PROBLEMS, TEXT AND CASES paras. 247-259 (4th ed. 1988).

lowed by a re-import looks nearly the same as a product that never left the United States in the first place. Naturally, anticompetitive practices with respect to these products are the rightful concern of U.S. antitrust authorities. Restraints in that kind of export trade are equivalent to restraints in trade within the United States. The only difficult question in this area, as in many others, is the correct characterization of the transaction. Many goods are in fact shipped offshore for further processing and are then re-imported perfectly legitimately into the United States. Complex customs rules dictate the attribution of a country of origin for those goods, usually based on the amount of value added or transformation that occurs in the intermediary country.

Contrived short supply comes closest to revealing a practice that might affect export commerce directly. The Department of Justice's 1988 International Guidelines mention this, along with conduct actually designed to affect U.S. price levels, as an example of a restraint in export conduct that might fall under the antitrust laws:

> [Export conduct] could have [a direct, substantial, and reasonably foreseeable effect on trade or commerce within the United States or on import trade or commerce] if supply in the relevant U.S. and foreign export markets were fixed or highly inelastic and U.S. firms accounting for a substantial share of the domestic market agreed on the level of their exports in order to reduce supply and raise prices in the United States.[30]

In other words, if the short- to medium-term supply of widgets is relatively fixed worldwide, and if the U.S. firms manufacturing widgets agreed to export enough widgets to create a domestic shortage, and those widgets or the widgets made by foreigners could not easily re-enter the United States due to spoilage, transportation costs, trade barriers, or other similar factors, then domestic allocative efficiency would be harmed by the export agreement.[31]

The reference in the 1988 International Guidelines to a "direct, substantial, and reasonably foreseeable effect" on domestic or import trade or commerce tracks the language of the 1982 Foreign Trade Antitrust Improvements Act (the "1982 Act"), a statute designed to clarify how

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[30] *1988 International Guidelines, supra* note 17, § 4.1.

[31] In these circumstances, it is possible that the foreigners would be complaining about the dumping of U.S.-made widgets in their markets. This would be true if the contrived shortage in the United States were matched by an artificial oversupply in the foreign markets. One would then see high U.S. prices and low foreign prices—the paradigmatic case of international dumping, within the meaning of Article VI of the General Agreement on Tariffs and Trade, 55 U.N.T.S. 194. Many countries and regions, including the economically powerful European Economic Community, have well-enforced laws that are designed to counteract this practice. *See generally* J. BARTON & B. FISHER, INTERNATIONAL TRADE AND INVESTMENT ch. 5 (1986).

far the U.S. antitrust laws reach internationally.[32] The statute also expressly makes the Sherman Act applicable to conduct that has a direct, substantial, and reasonably foreseeable effect "on export trade or export commerce" of a person in the United States engaged in export trade.[33] One might conclude that restraints whose effects fall solely on foreign consumers were obviously outside the statute, and that conclusion would find a great deal of support in the cases that have applied the 1982 Act.[34] That conclusion, however, begs part of the question, which is whether the effects of an export cartel can be so neatly confined to foreign markets.

In some cases, like *Pfizer, Inc. v. Government of India*,[35] the anticompetitive actions involving exports also affect U.S. consumers. In *Pfizer*, an alleged conspiracy to restrain trade in the manufacture, distribution, and sale of broad spectrum antibiotics had been formed by six pharmaceutical manufacturing companies. The cartel exported antibiotics to foreign buyers, including India, and it sold them in the United States. Although the opinion of the Court is not crystal clear, it certainly holds that foreigners may be plaintiffs in U.S. antitrust actions, and that a case involving harm to both foreigners and U.S. consumers may be brought by those plaintiffs, seeking damages for their own injuries. The legislative history of the 1982 Act indicates that Congress was not changing this result.[36]

Finally, in some cases, it is nearly impossible to find any effect on U.S. consumer welfare. A case in which a group of U.S. exporters refused to allow a competitor to join them in a joint venture designed to penetrate foreign markets may be one in point. The excluded exporter may be injured, particularly if the foreign market requires special connections, linguistic abilities, or licenses before it can be penetrated, but the firm's injury is not the same thing as injury to competition in general in the U.S. economy. Advocates of allocative efficiency would tell the firm to go sell elsewhere, unless its assets were so specialized to a particular foreign market that this option was unrealistic. Such cases are possible, but rare. Only a broader theory of antitrust would allow this

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32 The 1982 Foreign Trade Antitrust Improvements Act is codified at 15 U.S.C. § 6a (1982).

33 *Id.* § (1)(B).

34 *See, e.g.*, The 'In' Porters, S.A. v. Hanes Printables, Inc., 663 F. Supp. 494, 1988-1 Trade Cas. (CCH) ¶ 68,047 (D.N.C. 1987); Papst Motoren GmbH & Co. v. Kanematsu-Gosho (U.S.A.) Inc., 1986-1 Trade Cas. (CCH) ¶ 66,924 (S.D.N.Y. 1986); Liamuga Tours v. Travel Impressions, Ltd., 617 F. Supp. 920 (E.D.N.Y. 1985); Eurim-Pharm GmbH v. Pfizer Inc., 593 F. Supp. 1102 (S.D.N.Y. 1984).

35 434 U.S. 308 (1978).

36 *See, e.g.*, 128 CONG. REC. H1345 (daily ed. Aug. 3, 1982)(remarks of Rep. McClory).

excluded exporter to bring an action, in spite of the language of the 1982 Act that appears to contemplate these suits.

Under the allocative efficiency structure, a cartel or exporting monopolist that had absolutely no effects in U.S. markets or on competing U.S. exporters would escape regulation under the U.S. antitrust laws. If the cartel controlled a product for which there was little U.S. demand, for which most of the world's supply was located in the United States, and for which international arbitrage operations could not succeed, it would pose the most difficult question for international regulation: should the country where the cartel is operating undertake the task of supervision under its domestic laws, or should the country or countries where the economic effects are felt assume this responsibility? The substantive reach of the U.S. antitrust laws seems to preclude the first of those options, even though international jurisdiction based on the territoriality principle would exist. On the other hand, if the country where the effects were felt attempted to regulate, it could find itself embroiled in yet another dispute over the extent to which it could interfere with the economic policies of the territorial sovereign. With this apparent dilemma in mind, one must turn to the broader problems of allocating jurisdiction among states and resolving conflicts of law.

III. Conflicts of Jurisdiction and Laws

So many others have written at length about the problem of jurisdictional conflicts, not to mention other conflicts of law, that it may require excessive optimism to think that one can add to the debate in only a few pages. At this point, the debate over the limits of a country's territorially based prescriptive jurisdiction has focused on two primary options: the jurisdictional rule of reason, more or less as described by the American Law Institute in the *Third Restatement of Foreign Relations Law of the United States* (the "*Restatement*"), versus the objective effects rule.[37] After briefly describing those opposing positions, I will discuss some problems, both theoretical and practical, with this characterization of the

[37] Equally interesting debates have begun over the scope of nationality-based jurisdiction. For example, in the export controls area, the United States often asserts jurisdiction over "U.S. origin" goods, even if title has passed to a foreigner and the goods have come to rest in another country. Although a vague claim of effects on U.S. national security or foreign policy conceivably could be stretched into a territorial effects mold, the more likely jurisdictional basis in these cases is the nationality of the goods themselves. For a general discussion of this problem, see Abbott, *Collective Goods, Mobile Resources, and Extraterritorial Controls*, 50 Law & Contemp. Probs. 117 (1987).

Although bases for jurisdiction other than those in the territorial family certainly exist, the discussion in the text will concern itself only with variants of territorial jurisdiction. This choice is justified because other bases for jurisdiction play a minimal role in antitrust matters.

problem. I then will suggest several possible solutions, drawing both on international law and on the U.S. experience. It is clear enough that there is no way definitively to organize the chaos.[38] Nonetheless, like others before me, I am hopeful that clarification of the source of the problems may help to lead to partial or second-best solutions that are more within human grasp.

A. The Debate Over Reasonableness

The modern world, it appears, cannot live without some recognition that nations may prescribe binding rules of conduct for those whose actions have effects within the territory of the regulating nation, even if the actors are permanently, partially, or temporarily outside the physical boundaries of the prescribing nation. As noted above, almost no one would argue for a perfectly Balkanized set of territorially limited rules, under which a firm could conduct transborder arrangements with impunity, no matter how deliberately or substantially it affected the target country, as long as the host country was not offended or actually applauded the firm's actions. Effects jurisdiction, however, inevitably gives rise to competing claims of prescriptive competence, namely that of the nation where the effects are felt, and that of the nation where the actors are based.

As I have written elsewhere, it is my view that no conflict over prescriptive jurisdiction exists if both nations recognize and accept the legitimacy of the other's interest in the creation of rules in the particular case.[39] This is not to say that there is no conflict. Obviously there can be the problem of which law will take precedence if the two are inconsistent. It is only an effort to distinguish cases in which both nations recognize the other's interest from those in which even this preliminary point is disputed. Many international antitrust disputes that arise are of the second type. In these disputes, the country where the actors are located rejects the fundamental right of the country where the effects are felt to create enforceable rules, as the *Swiss Watchmakers* case exemplifies.[40] Other disputes, such as the litigation over the demise of Freddie Laker's Skytrain transatlantic air service, are of the first type, because both coun-

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[38] Efforts to clear away the chaos are, however, always valuable. *See* Ongman, *"Be No Longer a Chaos": Constructing a Normative Theory of the Sherman Act's Extraterritorial Jurisdiction*, 71 NW. U.L. REV. 733 (1977).

[39] Wood, *Conflicts of Jurisdiction in Antitrust Law: A Comment on Ordover and Atwood*, 50 LAW & CONTEMP. PROBS. 179-80 (1987).

[40] *See* United States v. Watchmakers of Switz. Info. Center, 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. 1962). *See also* the discussion of this dispute in COMMON MARKET AND AMERICAN ANTITRUST ch. 6 (J. Rahl ed. 1970).

tries recognize the validity of the U.S. interest.[41]

The way in which the conflict ought to be managed or resolved will be affected by whether the conflict is a conflict of laws, which is the first type identified above, or a conflict of jurisdiction, which is the second type above. Furthermore, a case in which the state's fundamental power to prescribe the rule for any circumstances is at issue is different from one in which the general legitimacy of the rule is acknowledged, but its application to a particular person is challenged. In the United States, cases of the latter type are typically addressed through the adjudicatory jurisdiction doctrines: may state X apply its contract law to a person who has a defined set of contacts with state X? The question, however, is somewhat broader than the usual adjudicatory or personal jurisdiction inquiry. Using antitrust as the example, one can acknowledge that the United States may prescribe rules for conduct that will have an anticompetitive effect within its territory, but one might also conclude that the application of that rule to a particular person's activity abroad would be excessive. Here, the question whether the presumably valid rule may be applied in judicial proceedings to this individual and the question whether the rule itself may extend to this set of circumstances become nearly identical.[42]

The *Restatement* does not draw any of the lines that have been suggested here very precisely, if at all. Its rule on jurisdiction to prescribe law is initially stated very simply in section 402:

> Subject to § 403, a state has jurisdiction to prescribe law with respect to:
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> (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;
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> (c) conduct outside its territory that has or is intended to have substantial effect within its territory; . . . .[43]

Without the qualifying reference to § 403, this rule would be relatively straightforward. Section 402(1) draws the line between permissible exercise of prescriptive power and excessive exercise of that power on the

41 *See* Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984); British Airways Bd. v. Laker Airways Ltd., 3 All E.R. 39 (H.L. 1984).

42 One important respect in which the questions may not be identical has to do with the possibility of waiver. If the state lacked prescriptive competence, the individual would not be able to waive her own state's objection to the exercise of jurisdiction. If, however, the matter were conceived of as "merely" an adjudicatory jurisdiction problem, U.S. doctrine allows an individual otherwise beyond the reach of a court to consent to the court's personal jurisdiction, or (which is the same thing) to waive the right to object. *See, e.g.*, RESTATEMENT (THIRD), *supra* note 20, § 421(3); Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982).

43 RESTATEMENT (THIRD), *supra* note 20, § 402(1).

basis of the substantiality of the conduct or effects within the territory of the regulating state. As noted above, this bears a strong resemblance to the minimum contacts tests designed to test adjudicatory jurisdiction, but perhaps calls for a stronger or more objective connection to the territory of the state than would be necessary for personal jurisdiction.

The trouble, or at least the controversy, arises over § 403. Section 403 limits the state's fundamental power to prescribe rules, declaring broadly that states may not create rules where to do so would be unreasonable, and setting forth eight illustrative factors to be taken into account.[44] Under this approach, states must somehow refrain from creating rules of law which would unreasonably infringe on the interests of other states, in order to comply with international law. There is nothing wrong with maintaining this limitation as a goal, but the case of antitrust demonstrates how difficult it is to enforce limitations of this type as rules of international law. The *Restatement*'s own § 415, which describes jurisdiction to regulate anticompetitive activity in more detail, demonstrates that the reasonableness approach requires detailed analysis of the facts of each case before the legitimacy of the rule can be established. Under this system, a national court that errs by upholding the applicability of its antitrust rule to conduct outside its borders would place its country in violation of international law.

There is a real risk in making violations of international law too easy to create. The entire notion of such a violation, treated with skepticism by many already, may become trivialized. This may be a more serious problem in the United States than in most other countries, given the heavy responsibility for the articulation of antitrust rules that the United States has given to its courts, and the ability of private plaintiffs to initiate and pursue cases in the U.S. courts. Ordinarily, before a country places itself in violation of international law, its executive and/or legislative authorities make a deliberate decision to do so, aware of the consequences that might ensue. It is simply unrealistic for the courts in the

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44 The eight factors are: (a) the link of the activity to the territory of the regulating state; (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; (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. *Id.* § 403(2). Subsection (3) adopts an interest analysis approach toward resolution of jurisdictional conflicts where more than one state can show valid interests, under which deference to the state with the greater interest is called for.

United States to assume the same task, yet that is what the *Restatement* asks of them.

The alternative to the *Restatement*'s approach is not wild-eyed and excessive assertions of antitrust jurisdiction by U.S. courts. Most of the benefits of § 403 and § 415 can be enjoyed without the overly dramatic consequences of error through a sensitive process of statutory construction. This process of statutory construction begins with an appreciation of the international law of jurisdiction and its force within U.S. courts, and then applies those principles to the antitrust laws.

At the international level, however, a number of propositions seem to be well established or on their way to general acceptance. The first such proposition supports the validity of some kind of effects jurisdiction in economic matters.[45] The United States urged this for years, and the Court of Justice of the European Communities recently endorsed a version of it.[46] In addition, effects jurisdiction is part of the German law.[47] This is not to say that some would not still prefer to return to a time of strict territoriality.[48] Nonetheless, most developed countries today endorse effects jurisdiction in concept. The second proposition is that international law does indeed place some outer limits on a state's power to prescribe rules of law for foreigners who are acting outside its territory. Judge Hand's statement about remoteness in the famous *Alcoa* case is typical of a broad international consensus:

> 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.[49]

The question is therefore not whether there is such a limit, but how to

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45 Effects jurisdiction in other areas, such as the classic case of the person standing near the border of one country who shoots a person standing across the border in another country, are less problematic. Both countries probably have a rule against murder. The country where the victim was standing therefore can reasonably assert that the crime took place there, even though the trigger may have been pulled elsewhere. Indeed, by playing semantic games, the country where the effect of the unlawful act was felt may also be called a place where one of the elements of the crime took place.

46 *See* A. Ahlström Osakeytiö v. Commission, 4 Common Mkt. Rep. (CCH) ¶ 14,491 (Sept. 27, 1988)[hereinafter Wood Pulp Case].

47 *See* Gerber, *supra* note 3.

48 Note, for example, the critical tone of the *Overview of Industry and Trade Experience*, in INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 1, at 3. The continuing British opposition to broad extraterritoriality is described in D. ROSENTHAL & W. KNIGHTON, NATIONAL LAWS AND INTERNATIONAL COMMERCE: THE PROBLEM OF EXTRATERRITORIALITY (1982).

49 148 F.2d at 443.

define it. The *Restatement*, as we have seen, defines the limit on a case-by-case basis, using reasonableness as the measuring rod. Others, who in my view have the better of the argument, define it in more objective terms, based on factors like actual contacts, substantiality of effects, and intent.[50]

With these principles of international law established, a second constraint on the courts appears through the general rules of statutory construction they must follow. One such rule provides that courts must not interpret statutes to have extraterritorial effect unless Congress has clearly indicated that this is to be the case.[51] With respect to the antitrust statutes, the "foreign commerce" clause satisfies the express authorization criterion, but Congress has modified the extent of extraterritorial coverage in the 1982 Act, as described above.

A second rule of construction provides that statutes passed by Congress should not be interpreted to violate international law in the absence of a direct expression to the contrary.[52] Far from any indication in the antitrust laws that Congress intended to contravene international norms, the passage of the 1982 Act indicates that Congress is trying affirmatively to confine the laws to reach only matters properly within the prescriptive power of the United States.

U.S. courts faced with a case presenting extraterritorial elements should therefore attempt to construe the statute with the limitations that Congress intended, just as Judge Hand said they should in *Alcoa*. If the court adopts an excessive construction, it has misinterpreted the statute and may be corrected by Congress or a higher court, but it has not violated international law itself. The factors that the court takes into account in construing the statute may resemble those of § 403, or they may be simply the "direct, substantial, and reasonably foreseeable" test of the 1982 Act, unmodified by further jurisdictional reasonableness.

B. Resolving the Effects Dilemma

The analysis of international law leaves us with an acknowledged power in a state to regulate conduct occurring elsewhere that has an effect within the territory, and with an understanding of the way that the limitations imposed by international law ought to be reflected within do-

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50 I prefer the more objective approach for two reasons: it asks the courts questions that they are realistically capable of answering, and it avoids transforming every case into a complex problem of international law.

51 *See, e.g.*, McCulloch v. Sociedad Nacional de Marineros, 372 U.S. 10, 21 (1963); Lauritzen v. Larsen, 345 U.S. 571, 576-79 (1953).

52 *See* Murray v. The Charming Betsey, 2 Cranch 64, 118 (1804)(Marshall, C.J.); Trans World Airlines v. Franklin Mint, 466 U.S. 261 (1984); Diggs v. Schultz, 470 F.2d 461, 466 (D.C. Cir. 1972).

mestic law. It indicates that the answer to the export cartel problem posed at the end of Part I of this Article is to allow the countries that feel the greatest economic effects from the cartel to regulate it, even if the host country has chosen not to do so or has "regulated" the cartel by giving its approval. Taken to the general level, this suggests an allocation of international jurisdiction that follows effects lines, rather than territorial lines, as the preferred solution.

Both practical and legal difficulties exist in this tentative answer to the problem. On a practical level, it is often difficult to compel foreigners to participate in judicial proceedings in a country where the effects of their actions are being felt. One of the most notorious examples of this has been the persistent failure of the U.S. authorities to prosecute successfully the De Beers group for its alleged restraints on diamond trade.[53] From a more legal standpoint, prosecution of another country's export cartel may cause conflicts of its own. An export cartel may be encouraged by the host country because the host desires foreigners to make overpayments to domestic firms. This possibility casts doubt on the wisdom of the suggestion that countries should simply respect one another's publicly announced export cartels, at least if competitive principles are to be preserved.[54]

Full recognition of the effects jurisdiction principle therefore can come only at the price of creating relatively more conflicts of substantive law. Country A, the host of an export cartel, specifically approves the cartel's activities and hopes to increase its national wealth; Country B, where most of the cartel's consumers live, deplores the cartel's actions because of the monopoly overcharges that its citizens are paying. If the cartel is sued in the courts of Country B, its real defense is not a lack of B's prescriptive jurisdiction. The defense instead should be either that the B courts ought to apply A law, or that the B courts ought to recognize a defense of foreign sovereign compulsion (which is functionally the same as the choice of law option here).

Substantive conflicts will not be resolved any more readily than jurisdictional conflicts, however, in the absence of international agreement on which state interests may validly be pursued. It is possible, of course, to avoid a conflict by construing the interest of one of the states in such a way that there is no real conflict. Thus, for export cartels, one could accept Professor Rahl's suggestion that the interest of the United States is in a competitively structured market, and thus that an export cartel

[53] DeBeers Consol. Mines, Ltd. v. United States, 325 U.S. 212 (1945).

[54] *See* Atwood, *Conflicts of Jurisdiction in the Antitrust Field: The Example of Export Cartels*, 50 LAW & CONTEMP. PROBS. 153 (1987).

that distorts the market should be prosecuted whether the victims are U.S. consumers or foreign consumers. If the U.S. antitrust laws must be construed as limited to the welfare of U.S. consumers, however, Rahl's solution is inadequate. Another possibility, at least in theory, would be to permit a judicial proceeding against the cartel in its home country (*e.g.*, the United States), and to require the court to apply the law of the place where the plaintiff's injury was felt (*e.g.*, France). Even if one overcame the traditional reluctance to apply the "public law" of other nations, however, direct conflicts would exist any time the host country affirmatively approved of the cartel's activities. In those cases, the courts would be likely to apply forum law, thereby again leaving the injured consumers without redress.

If the export cartel problem cannot be solved either with rules for the alloction of prescriptive jurisdiction or with a conflict of laws approach, what is left? The solution that until now has seemed out of reach is the one patterned on the U.S. approach to adjudicatory jurisdiction. In this field, the use of territory as a surrogate for the legitimacy of a state's exercise of power over the person has given way to the "minimum contacts" test. One looks to contacts with a state's territory to ascertain if the exercise of jurisdiction would be reasonable; the process does not go the other way around.

International law has not taken that step, and it seems quite unlikely that it will do so. The blurring of state boundaries within the United States, bound by a common constitution, is a far different matter than the analogous step for nation-states. Sovereignty itself continues to be defined in territorial terms.[55] Nonetheless, it should be possible on a subject-by-subject basis to approximate the inter-state consensus within the United States, through the conclusion of international agreements.

An international agreement on competition policy ideally would set forth the basic principles to which all signatories adhere, and according to which all national laws should be construed. One such principle should condemn cartelization, defined as collective acquisition and/or exercise of market power. Another such principle would condemn what the United States calls monopolization, or what the Europeans call the abuse of a dominant position within a relevant market. The list should probably be short and broad, so that it could be adapted most readily to the different particular regimes of each signatory. If such a treaty were in force, then the choice of law solution outlined above would become the most attractive one. The forum court could no longer choose an an-

[55] *See, e.g.*, RESTATEMENT (THIRD), *supra* note 20, § 201.

ticompetitive domestic law in violation of the treaty. Practical constraints on personal jurisdiction would not protect export cartels from accounting for their anticompetitive actions against foreign consumers. Finally, consumers in a particular country would receive a level of protection chosen by their own government, not a level of protection dependent upon the home of the export cartel.

No solution is likely to be perfect, at least as long as countries demand the right to regulate their own economies, to derogate from competition policy when they wish to do so, and to protect their local businesses. Trade imbalances also exacerbate the problem because there is often a hope that export cartels will help a country to reap economic rents from its foreign buyers, thereby improving its own trade terms and current account balances. If the political will were present to conclude an international agreement, however, jurisdictional disputes would diminish in importance.

IV. CONCLUSION

The problem of export cartels with which I began was that the country most easily able to enforce competition rules against the cartel is not going to be the country where the anticompetitive injury is suffered. This is so because of legislative choices in the home country and not because of any international jurisdictional problem. If there were sufficient consensus on competition policy to allow effective international judicial assistance, such as collection of documents abroad, service of process abroad, and enforcement of judgments in other countries, an intermediate solution would be to recognize effects jurisdiction and to allow those countries injured by the conduct the primary right to sue. One could also protect the interests of the injured state through a redefinition of the subjects covered by the laws themselves. As consensus has grown over the years on both the content of jurisdictional rules and that of substantive competition law, however, it is not unrealistic to hope for an international agreement along the lines described here some time in the foreseeable future.