1963

Jurisdiction in International Application of United States Antitrust Laws

Hiroshi Fukuda

Recommended Citation

Hiroshi Fukuda, Jurisdiction in International Application of United States Antitrust Laws, 12 Clev.-Marshall L. Rev. 125 (1963)

Jurisdiction in International Application of United States Antitrust Laws

*Hiroshi Fukuda**

IN TODAY'S WORLD COMMUNITY, the United States, with its common law tradition, has an unusually strong system of antitrust laws with thoroughgoing enforcement machinery. Although the antitrust laws of this country form a complex of executive, legislative and judicial actions, the central figure is the Sherman Act of 1890.[1] Section I of the Act declares it illegal to contract, combine or conspire in restraint of trade or commerce among the several States, or with foreign nations. The basis of this antitrust policy is to prevent the tendency of monopolistic activities to missallocate resources, raise prices, and reduce innovation, productivity, employment and consumption.

> It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions.[2]

With respect to international trade agreements, American policy has constantly been opposed to restrictive business practices. As early as 1910 in *United States v. American Tobacco Co.*,[3] the Supreme Court struck down an agreement between the defendant and an English corporation whereby they agreed to end a trade war in which they were engaged by limiting their business to their respective territories and surrounding areas.

The attempts by the Government authorities to break down those international restrictive agreements and combines were greatly intensified after the Second World War. The main reasons for this offensive were international conspiracies in various vital

---

* LL.B., Univ. of Tokyo, LL.M., Yale Univ., Attache, Embassy of Japan, Washington, D. C. [This article expresses the personal opinion of the author and not that of the Embassy of Japan.]

1 Act of July 2, 1890, c. 647, 26 Stat. 209; U. S. C. A. §§ 1-7, 15. For discussion of U. S. Anti-Trust Laws, see, 4 Oleck, Modern Corporation Law, c. 74 (1960).

2 Northern Pacific Railroad Co. v. U. S., 356 U. S. 1, 4 (1958).

3 221 U. S. 106 (1910).

industries which endangered the security of this country at that time. The Report from The Subcommittee on War Mobilization of the Committee on Military Affairs, United States Senate stated in 1944 that:

> Standing athwart the achievement of international goals of world prosperity and enduring peace is the international cartel system. . . . The extensive testimony . . . has established beyond question that the international cartel or monopoly system has been subversive of political security, full production and employment and the expansion of world trade. These effects have not been incidental . . . but have arisen out of their essential character. Private restrictive economic agreements and monopolistic profits inevitably minimize political security, jobs and world trade.[4]

This zeal has appeared, since then, as a movement for more extensive application of the antitrust laws of the United States. This trend was prompted by the fact that the economy of this country was more and more closely related to that of other countries and consequently many industries have been involved in international business.

However, this trend has given rise to another important question, namely the jurisdictional problem of antitrust laws. Many people, both in this country and abroad, criticized this trend as an abuse of power and invasion of foreign sovereignty. The objective of this paper is, therefore, to analyze the underlying theories of jurisdiction with respect to antitrust laws and to discover the existing jurisdictional limitations imposed by the courts on themselves.

Theories of Jurisdiction and Courts' Practice

An analysis of codes and practices of modern nations is said to reveal five general principles by which more or less extensive jurisdiction is claimed at the present time. These five principles[5] are:

> (1) *The Territoriality Principle,* determining jurisdiction by reference to the place where the offence is committed (regarded by nearly every nation as of primary importance);
>
> (2) *The Nationality Principle,* determining jurisdiction by reference to the nationality or national character of the

---

[4] Report from the Subcommittee on War Mobilization of the Committee on Military Affairs, U. S. Senate, "Cartels and National Security" pt. I, "Findings and Recommendations," (Nov. 13, 1944) p. 10.

[5] Briggs, Law of Nations, (2d ed., 1952) at 575-577.

person committing the offence (universally accepted, though variously applied);

(3) *The Protective Principle,* determining jurisdiction by reference to the national interest injured by the offence (claimed by most states but not often followed in the United States);

(4) *The Universality Principle,* determining jurisdiction by reference to the custody of the person (widely but not universally accepted); and

(5) *The Passive Personality Principle,* determining jurisdiction by reference to the nationality or national character of the person injured by the act (not very widely accepted).

Of these five principles the most important for regulation of restraint of trade are the nationality principle and territoriality principle.

The Nationality Principle

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

> It is generally agreed that a State may punish its own nationals for disobeying its commands while in a foreign country, notwithstanding the legal quality which the territorial sovereign may have annexed to the acts of disobedience . . .[6]

This principle is generally recognized on the theory of a continuing allegiance of the national to his nation-state regardless of his travel across national boundaries. This principle has been well recognized by American courts in many cases. For instance, in *Blackmer v. U. S.*[7] the Supreme Court declared that an American residing abroad could be subpoenaed for testimony in this country, and in his failure to appear the United States could fine him and collect the amount from his property in the United States.

This jurisdiction will not be weakened even if an American corporation has an agreement with a foreign corporation, and this was made clear in the *National Lead* case.[8] Judge Rifkind in the District Court stated:

---

[6] Hyde, International Law Chiefly as Interpreted and Applied by the United States (2d. Rev. ed. 1945) I, 802-803.

[7] 284 U. S. 421 (1932).

[8] U. S. v. National Lead Co., 332 U. S. 319 (1947).

> The argument has been advanced that this court cannot invalidate contracts with parties who are not within the court's jurisdiction and amenable to its order. The absence of National Lead's foreign associates will, of course, place a practical limitation upon the scope of the court's decree: it does not prevent the court from finding a violation as the facts warrant and from restraining those within the reach of its mandate from continuing a conspiracy in defiance of the Sherman Act.[9]

In *Timken Roller Bearing Co. v. U. S.*,[10] where American Timken owned 30% of British Timken and 50% of French Timken, and, with the interest held by a third party, controlled both, the Supreme Court held that ". . . the fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws." [11]

Thus, it seems rather clear by now that all American corporations will fall under the jurisdiction of American courts for violations of the antitrust laws even though the acts are done in a foreign country.

However, the nationality principle is clearly not enough to cover the whole area of restrictive business practice. A company may easily incorporate itself in a foreign country and have a home office there, and yet can effectively restrain the trade of this country through various activities. In fact, the idea of "nationality" or "citizenship" is not adequate for the overall control of corporations. Thus, another principle of jurisdiction, i.e. the territoriality principle, has attracted the attention of many experts and scholars interested in the control of restrictive business practice, and has been applied concurrently by courts in some cases.

Territoriality Principle

This principle, in its strict sense, is based on the complete sovereignty or competence of the nation-state over all acts taking place within its territory whether the party is foreign or national, and this has been fairly well accepted by various nations, including the United States, although there are striking differences in the extent to which it is used in the different national systems.

---

9 U. S. v. National Lead Co., 63 F. Supp. 513 (S. D. N. Y. 1945); Aff. 332 U. S. 319 (1947).

10 341 U. S. 593 (1951).

11 *id.* at 598.

In the sphere of antitrust law jurisdiction, there has been no doubt as to the jurisdiction of American courts over foreign corporations doing business in the United States. Professor Neale states:

> Such companies must obviously conform to the law of the sovereign who gives hospitality to their commerce. A foreign company which imports and distributes large quantities of goods in the United States is no more entitled than an American company to make price-fixing agreements in the American markets.[12]

In *American Banana Co. v. United Fruit Co.,*[13] a treble damage action in which the plaintiff complained of the rough methods used by the defendant to maintain its dominant position in the ownership and control of fruit plantations in Panama, the defendant was an American company, but since the acts complained of took place in Central America, the Supreme Court held that no cause of action had been stated and Mr. Justice Holmes dealt with the jurisdictional point as follows:

> . . . The 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, which the other state concerned justly might resent. . . .
>
> The foregoing consideration would lead in case of doubt to a construction of any statute as confined in its operations and effect to the territorial limits over which the lawmaker has general and legitimate power. . . . *All litigation is prima facie territorial* . . .[14]

Three cases decided after the *Banana* case,[15] namely *U. S. v. Pacific & Artic Ry. & Nav. Co.,*[16] *Thomsen v. Cayser,*[17] and *U. S. v. Sisal Sales Corp.*[18] are said to be reconciled with concepts of strict territoriality because acts constituting violations oc-

---

12 Neale, The Antitrust Laws of the U. S. A. (1960) 321-322.

13 213 U. S. 347 (1909).

14 *id.* at 357.

15 *Supra* n. 13.

16 228 U. S. 87 (1913).

17 243 U. S. 66 (1917).

18 274 U. S. 268 (1927).

curred within American territory, although these cases did involve extraterritorial activities necessary to the success of the defendants' ventures.

However, the strict territorial view, based in part on the theory that a single act has significance primarily where performed, became inadequate for the analysis of later cases involving facts so complex that an individual act had meaning only in relation to an entire international agreement. For instance, United States courts will be effectively enjoined from enforcing their antitrust laws in such cases as conspiracies between foreign companies not to supply the United States. Also, it is rather difficult, under this theory, to exploit for enforcement purposes evidence obtainable from foreign companies. Similarly, effective enforcement without the power to regulate activities abroad becomes almost impossible. Consequently, there has always been pressure on courts from the enforcement agencies to take up a wider interpretation with respect to the scope of antitrust law jurisdiction, and some recent courts decisions followed these suggestions. The new principle is known as the *Impact Territoriality Principle,* which would extend courts' competence to acts taking place abroad but which have effect (or impact) within the territory. This was explicitly stated by the American court for the first time in 1945 by the famous *Alcoa* case.[19] There Judge Learned Hand held that certain restrictive agreements between foreign companies violated Section I of the Sherman Act, though they were made outside the United States and no American company was shown to be a party to them. In this case, there was no express reference in the agreements to imports into the United States, but Judge Hand felt able to say that "they were intended to affect imports and did affect them." He based his condemnation of the agreements on the proposition that "Any state may impose liabilities even upon persons not within its allegiance for conduct outside its borders that has consequences within the borders which the State reprehends." [20]

The seemingly conflicting opinions of the *Banana* case[21] and the *Alcoa* case,[22] were reconciled on the ground that the "effect"

[19] U. S. v. Alcoa, 148 F. 2d. 416 (2d Cir. 1946).

[20] *id.* at 443.

[21] American Banana Co. v. United Fruit Co. *Supra* n. 13.

[22] U. S. v. Alcoa, *supra* n. 19.

took place in the United States. Consequently the *Alcoa* case is not inconsistent with the territorial principle of the *Banana* case.

In *Steele v. Bulova Watch Co.*[23] a trade-mark case, the Supreme Court held that

> . . . Viewed in its context, the holding in that case (Banana) was not meant to confer blanket immunity on trade practices which radiate unlawful consequences here, merely because they were initiated or consummated outside the territorial limits of the United States. *Unlawful effects* in this country, absent in the posture of the Banana case before us, are often decisive . . .[24] (Emphasis added.)

The effect test, however, is a "potentially limitless charter of jurisdiction" [25] for in the present interdependent world community any commercial transactions will be said to have some effect on the United States economy. Mr. Haight states:

> 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.[26]

If widely applied, this principle may lead to the prosecution of foreign nationals who lack the knowledge of U. S. antitrust laws some day in the future when they happen to come to this country or obtain property here. Also, the frustration of foreign countries' policies as to the regulation of restrictive business practices, which are usually quite different from those of the United States might lead to diplomatic difficulties between this country and others.

Therefore, various factors have been introduced to limit the wide interpretation of territoriality principle with respect to antitrust jurisdiction of United States courts, and some of them are now observed by the enforcement agencies and courts. The next section will be devoted then to the exploration of these several limitations on the impact territoriality principle of jurisdiction.

---

23 344 U. S. 280 (1952).

24 *Id.* at 288.

25 Note, Extraterritorial Application of the Antitrust Laws; A Conflict of Laws Approach, 70 Yale L. J. 259, 261. (1960)

26 Haight, International Law and Extraterritorial Application of the Antitrust Laws, 63 Yale L. J. 639, 643. (1955).

Impact of Territoriality Principle and Its Limitations

Arguments that Extraterritorial Application of U. S. Antitrust Laws Are Against International Law Because They Are Penal

United States antitrust laws (Sherman Act, Clayton Act, Federal Trade Commission Act, etc.) prescribe both so-called criminal and civil sanctions. The former may result in a fine or imprisonment; the latter may comprise treble damages and injunctive relief compelling the disposition of property or perhaps reconstruction of an industry, etc. While criminal proceedings carry the stigma of indictment, finger-printing and conviction, civil proceedings may result in forbidding a company to do many things. Orders may be issued requiring the company to divest itself of valuable property which it holds abroad, to alter contracts, to license patents, and to grant patent immunities.[27]

These rather severe sanctions in civil proceedings in antitrust laws has led to the criticism by many scholars and businessmen that the distinctions which prevail in the United States between criminal and civil proceedings under the Sherman Act are not relevant in determining whether the proceedings are penal in the international sense. They argue, then, that, as it is an established principle of international law that penal laws should not be applied extraterritorially, "extraterritorial application of American antitrust laws conflicts with public international law." [28]

Some of the proponents of this argument concede that

> It is true that there are certain contexts in which a State is regarded as competent to punish a foreigner for acts committed abroad which are directly connected with a crime within its territory (*e.g.*, shooting a person across the border) . . . but economic crimes cannot be regarded as the same. . . .[29]

The leading case in international law where such an "objective" application of extraterritorial penal law has been involved is the famous *Lotus*[30] case of 1927. There the Permanent Court of In-

[27] *Id.* at 640.

[28] *Id.* at 641.

[29] Neale, *op. cit. supra* n. 26, at 324.

[30] The Lotus Case, Permanent Court of International Justice P. C. I. J., Series A, No. 10 (1927).

ternational Justice decided a case involving a collision, outside territorial waters, between a French and a Turkish vessel, causing the loss of the latter and the death of eight Turkish nationals, in favor of Turkey on the ground that the crime had been committed in Turkish territory (*i.e.*, the Turkish vessel) notwithstanding the fact that the French officer had at all times remained on board the French vessel. The case is authority for the proposition that a State has competence to punish a foreigner for his acts abroad if such acts form a constituent element of a crime consummated within the territory of the State.

However, they argue that "an objective application" of the territoriality principle in penal law is only permissible when "not only is the consummation or 'effect' inseparable from the act committed abroad but the offense is one which the community of civilized nations has come to regard as justifying a modification of the strict territorial principle. . . ." [31]

Features which distinguish antitrust violations from those regarded as crimes by the community of civilized nations are said to be as follows:

> i) Violation of United States antitrust laws (especially Section I, II of the Sherman Act) do not fall within any category of crimes which are common to such community.
>
> ii) While in usual crimes the proximity of cause and effect is direct and readily ascertainable, the Sherman Act offense is complex, and it is usually difficult to establish the relationship of cause and effect.
>
> iii) The prohibitions of antitrust acts are vague and uncertain in nature.
>
> iv) If international law were to permit the extensive application of antitrust laws, it would open the door to interference with freedoms and liberties guaranteed by other nations.

Thus, it may be concluded that foreign nationals are answerable for their criminal conduct only within the territory of the United States. Even if prosecution for what is done abroad can be justified in some criminal cases, the consequences and harmful effects of international restrictive business practice is too vague to be a "constituent element of a crime," which might permit an objective application of penal laws.

On the other hand, it is suggested that antitrust laws are

---

[31] Haight *op. cit. supra* n. 26 at 644; Neale *op. cit. supra* n. 12 at 324.

entirely applicable extraterritorially because they are of regulatory nature and cannot be categorized as either penal or civil. One of the arguments runs as follows:

> Such a distinction (between penal and remedial legislation depending upon whether the statute in question punished an offense against public justice or provided a remedy for injury to private interests) may have been meaningful in terms of the laissez-faire philosophy of an age which could still clearly distinguish a limited area of public activity from the private sector. But with the continued growth of an industrial society came an expansion of regulatory legislation and an increasing number of new types of statutes . . . Such statutes represent declarations of the public interest in private transactions. . . . The antitrust laws are typical. . . . the majority of antitrust proceedings are civil in nature. . . . The impossibility of categorizing regulatory legislation as either penal or remedial renders the penal-remedial distinction useless as a standard for determining whether or not a given regulatory law should be applied extraterritorially.[32]

Although it is true that "the increasingly industrialized economy to which regulatory legislation is a response, leads to a large number of transactions affecting interests located in more than one jurisdiction, and consequently it becomes increasingly difficult to define rigid rules which will unerringly identify the one proper law applicable to transaction. . . ."[33], the writer does not believe in giving up the distinction between penal and civil laws. It is absolutely clear that, even in today's developed world community, nation-states have exclusive authority and competence over their respective territories and prohibition against extraterritorial application of penal laws, based upon an identification of jurisdiction with sovereignty, cannot be easily discarded as outdated. The principle still serves both independence and friendly relations of nation-states.[34]

At the same time, however, categorization of all U. S. antitrust laws as penal cannot be adequate. This theory lacks recognition of today's complicated economic systems which require some degree of government regulation.

---

[32] Note, Extraterritorial Application of the Antitrust Laws. Notes and Comments, 70 Yale L. J. 259, 267 (1960).

[33] *Id.* at 268.

[34] *Id.* at 269.

The proper conclusion will be therefore, that some distinction between penal and civil proceedings in the field of antitrust laws is still very useful, and generally only civil proceedings should be used against restrictive business practice by foreign nationals abroad. In other words, the impact territoriality principle should not be applied for criminal proceedings except in a case where "effect" is clearly a "constituent part" of a crime.

In the *Oil Cartel* case of 1952,[35] a suit in criminal proceeding was brought against five American oil companies along with Royal-Dutch Shell, Anglo-Iranian, and a French company for violation of the Sherman Act in the production and marketing of Arabian oil. (Anglo-Iranian had previously been given sovereign immunity from subpoenas.) The Dutch, French and other concerned governments protested against the suit on the ground that it is violating sovereign rights of foreign nations. Aiding their argument was the announcement by the Department of Defense to the effect that the suit was a threat to our military security. The Truman administration, then, dismissed the action. Although the case was opened again in 1953, it was a civil action and against the five American defendants only.[36]

Thus, by permitting only civil proceedings against foreign restrictive business practice, the United States is able to not only enforce its regulatory legislation effectively, but also preserve friendly relations with foreign countries by avoiding or at least decreasing the possibility of "sovereignty" questions.

Sovereign Immunity—the Act of State Doctrine

An act of state is an act done by the sovereign power of a country, or by its delegate, within the limits of authority vested in him. An act of state cannot be questioned or made the subject of legal proceedings in a court of law. While it is said sometimes that these acts are based upon international comity or courtesy, and while they doubtlessly find their origin therein, they may now be said to be based upon generally accepted usage, *i.e.*, international law.[37] This has been accepted in American

35 The Oil Cartel case, In re Investigation of World Arrangement with Relation to the Production, Transportation, Refining and Distribution of Petroleum, 13 F. R. D. 280 (D. D. C. 1952).

36 U. S. v. Standard Oil of New Jersey, et al., No. 1779-53 (S. D. N. Y. 1953).

37 Hackworth, Digest of International Law (1940-1944) 2:393.

courts for a long time. As early as 1812, Chief Justice Marshall said in *The Schooner Exchange v. McFaddon*[38] that:

> This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.[39]

Therefore, it is natural that the United States will not apply its antitrust laws for foreign restrictive business practice if it find them acts of foreign states.

In *American Banana Co. v. United Fruit Co.,*[40] although it was declared that the acts complained of took place in a foreign country and consequently the plaintiff did not have any cause of action, it should be noted that the acts complained of were official acts of the sovereign Government of Costa Rica and would have been immune from the United States jurisdiction anyway even if they were allegedly influenced by the defendant.

Those who favor strict limitation on extraterritorial application of the United States antitrust laws argue for more liberal use of this doctrine, *i.e.,* courts should dismiss suits whenever they could find foreign government involvement in the restrictive business practice.

In *U. S. v. Sisal Sales Corp.,*[41] the court did not go so far as to proclaim that a monopoly based upon discriminatory legislation enacted by a foreign government could be regarded as exempt from United States jurisdiction. Also, a defense based upon the doctrine of sovereign immunity was rejected in *U. S. v. Deutsches Kalisyndikat Gesellschaft,*[42] although the French Government owned a majority of the defendant corporation's shares.

---

[38] U. S. Sup. Ct., 7 Cranch 116 (1812).

[39] *Id.* at 136.

[40] American Banana Co. v. United Fruit Co. *supra* n. 13.

[41] *Supra* n. 18.

[42] 31 F. 2d 199 (S. D. N. Y. 1929).

Some critics suggest that these two decisions indicate that the United States has not been observing the act of state doctrine in anti-trust cases and thus has been violating international law.[43]

However, in the *Sisal* case,[44] the court can be said to have made a right decision, considering the fact that every government in the present world community is more or less involved in some kind of regulatory legislation of their national economies, and that it is to invalidate antitrust laws of this country to interpret that foreign legislation would render a monopoly an act of state and immune from United States courts' jurisdiction. Also, in relation to the case of *Kalisyndikat*,[45] it will be interesting to note that, in the *Anglo-Iranian Oil Co.* case,[46] the International Court of Justice held that a mere majority holding of a company shares by a government will not make the company activities acts of state. In that case, the court declared that majority stock holding by the British Government of the A. I. O. C. did not make the concession agreement between the company and the Government of Iran a treaty.

As a matter of fact, United States courts have been taking into consideration the act of state doctrine in a proper manner. One example is the *Oil Cartel* case of 1952.[47]

In that case American and British controlled oil companies were summoned before a Grand Jury on charges of the alleged domination of world oil production and prices through an international cartel system. The counsel representing the Anglo-Iranian Oil Company contended that many of the documents subpoenaed by the Department of Justice were not in its possession and, indeed, not in the United States at all. He read to the court a letter sent to his company by the British Minister of Fuel and Power which stated that such a subpoena was "contrary to international comity" and that the disclosure of some of its documents concerned might well "prejudice or endanger the economic, strategic or political interests of Her Majesty's Government and required the company not to produce any documents which were not in the United States and which did not

---

43 *Supra* n. 25 at 267.

44 U. S. v. Sisal Sales Corp. *Supra* n. 18.

45 U. S. v. Deutsches Kalisyndikat Gesellschaft *supra* n. 42.

46 United Kingdom v. Iran, Judgment of July 22, 1952 (1952) I. C. J. Rep. 93, 112, A. J. I. L. 737, 748 (1952).

47 *Supra* n. 35.

relate to business in the United States without approval of the British government. Judge Kirkland thereupon ruled that the A. I. O. C. was "indistinguishable from the Government of Great Britain," and for that reason it could rightly claim "sovereign immunity." He stated:

> The consequences of a successful prosecution of the A. I. O. C. here, would, in reality, be to charge and find the British Government guilty of violating a law of the United States, which imposes criminal penalties.[48]

Accordingly, he quashed the subpoena on the Anglo-Iranian Oil Company. However, it should be noted that the court did not find the A. I. O. C. immune on the ground that the British Government owned a majority of its stock, but rather on the ground that the activities of the company were indistinguishable from those of the Government because too much national security was involved in the activities (keeping British maritime fleet supplied with oil).

Since 1952, the Department of Justice adopted the governmental-commercial distinction as the basis of a policy limiting the doctrine of sovereign immunity.[49]

Although this distinction is very vague and its validity is rather doubtful in borderline cases,[50] it will be helpful to apply the act of state doctrine in particular cases to avoid any unnecessary friction between foreign countries and the United States. Also, it should be remembered that this doctrine will apply not only to the extraterritorial acts but also acts performed by foreign governments in this country, and consequently it is not confined to the limitations of the impact territoriality principle.

Diplomatic Considerations—Comity

Even though it is found that the Sherman Act is applicable, that the foreign corporation is subject to it, and that personal jurisdiction is obtainable over the foreign company, the difficult problem of comity with friendly nations remains.

Advocates of a strict territorial concept of international law contend that the antitrust laws of the United States should be

---

[48] *Supra* n. 35 at 291.

[49] Letter from the State Department to the Attorney General, May 19, 1952, 26 Department of State Bulletin 984 (1952).

[50] *Supra* n. 25 at 272.

construed as applicable only to those violations occurring within the United States, because, if extended, strained international relations might result. They also contend that in these cases, enforceability of those judgments would be highly doubtful and courts should avoid giving ineffectual verdicts.

It is admittedly true that the United States has much stricter policies as to restrictive business practices than do any other countries. In some countries, cartels are even encouraged. Accordingly, the view above stated apparently looks upon the importance of avoiding the contingency of strained relations between nations as outweighing the value of flexible judicial control of supernational cartels.

The impact of the conflict of antitrust policies between the United States and other countries was fully felt in the case of *U. S. v. Imperial Chemical Industry Ltd.*[51] The decree in that case required I. C. I., a British Corporation, to divest itself of certain patents which it had obtained from DuPont, an American concern. I. C. I., however, together with another British company had already created a company called British Nylon Spinners, Ltd., to which it had granted an exclusive license under the patent in question.[52] After the *I. C. I.* case in the United States, British Nylon Spinners applied to the British courts for an injunction restraining I. C. I. from complying with the United States decree and ordering it to execute the license. The decree was granted.[53] Although Judge Ryan, in the *I. C. I.* case, observed that the patent licensing in question was a conspiracy to divide territories which affected American commerce and thus violated the Sherman Act,[54] the Court of Appeals in England rejected the order because it constituted an attempt to "assert an extraterritorial jurisdiction which the court of this country cannot recognize. . . ."[55]

Referring to the statement in Judge Ryan's opinion that "it is not an intrusion on the authority of a foreign sovereign for this court to direct that steps be taken to remove the harmful effects on the trade of the United States," the Master of Rolls said:

---

[51] 105 F. Supp. 215, 229-31 (S. D. N. Y. 1952).

[52] Extraterritorial Application of the Antitrust Laws. Supra n. 25 at 276.

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

[54] U. S. v. Imperial Chemical Industries, Ltd. *Supra* n. 51 at 504, 592.

[55] British Nylon Spinners v. I. C. I. *Supra* n. 53 at 24.

> If by that passage the learned Judge intended to say (as it seems to me that he did) that it was not an intrusion on the authority of a foreign sovereign to make directions addressed to that foreign sovereign or to its courts or to nationals of that foreign power effective to remove (as he did) "harmful effects on the trade of the United States," I am bound to say that, as at present advised, I find myself unable to agree with it.[56]

In the *Oil Cartel* case,[57] the *Shipping Industry* case,[58] and some other cases, various foreign governments protested vigorously to the production of documents located overseas and yet subpoenaed. In the extreme case, a foreign local government made it a crime to ship out any documents existing in that country to a foreign government for investigation.[59] Thus, it is clear that some kind of considerations are necessary to be given for the application of antitrust laws in order to avoid resultant friction between nations.

Some critics use the public policy doctrine to meet this need.[60] Public policy has been used in private international law to justify application of a domestic rule of law in cases where the forum's choice-of-law would otherwise have dictated the application of foreign law. They now wish to interpret the public policy doctrine to include "the consideration of foreign interests," so that this would serve as a new doctrine of comity replacing the territoriality principle.[61]

However, even though it is clear that some political considerations are necessary, the newly interpreted public policy doctrine is not a theory of jurisdiction, as is the territoriality principle. The new theory of public policy doctrine may be used in the interpretation of the substance of antitrust law, or as a basis for purely political consideration by courts and enforcement officers, but cannot replace the territoriality principle.[62]

---

[56] *Ibid.*

[57] In re Investigation of World Arrangement with relation to the Production, Transportation, Refining and Distribution of Petroleum. *Supra* n. 35.

[58] In the Matter of Grand Jury Investigation of the Shipping Industries, 1960 Trade Case No. 69746 (D. D. C. 1960).

[59] Business Records Protection Act, 1 Ontario Rev. Stat. ch. 44 (1950), Canada.

[60] *Supra* n. 25 at 277.

[61] *Ibid.*

[62] See, Cheatham, Conflict of Laws, (4th ed., 1957), p. 105 note.

This does not mean that any consideration of political circumstances by the courts and the enforcement agencies is unnecessary for the extraterritorial application of antitrust laws. On the contrary, it is of absolute necessity and is rather well recognized in practice.

For instance, in these days as a practical matter, the Department of State and the Department of Justice which is the main enforcement agency of the antitrust laws, work closely together to develop solutions in antitrust cases which have foreign policy implications. Recent examples include the *Swiss Watch* case,[63] the *Oil Cartel* case,[64] and the *Shipping Industries* case.[65] The Straus Report of 1959 states:

> The Department of Justice in recent years has not taken any action involving foreign relations without prior consultation with the Department of State. . . .[66]

Regular consultation by the Department of Justice with other agencies, including the State Department, before commencing a broad investigation or bringing any antitrust proceeding in international field, would undoubtedly result in a more accurate assessment of possible damage to America's international position.[67]

Also, the courts from time to time have used savings clauses in their holdings to avoid any impasse. For instance, in *U. S. v. General Electric Co.,*[68] the court included the following paragraph in its final order:

> Philips (the foreign corporate defendant) shall not be in contempt of this Judgment for doing anything outside the United States which is required or for not doing anything outside of the United States which is unlawful under the laws of the government . . . in which Philips or any other subsidiaries may be incorporated . . . or . . . may be doing business.[69]

---

63 Hearings pursuant to S. Res. 61 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 84th Cong., 1st sess., pt. 4, at 1846, 1848.

64 *Ibid.*

65 *Ibid.*

66 Straus, Expanding Private Investment for Free World Economic Growth, Department of State 30 (1959).

67 Brewster, Antitrust and American Business Abroad, note 49 at 418-440, 444-445 (1958).

68 115 F. Supp. 835 (D. N. J. 1953).

69 *Id.* at 878.

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. So long as nations are independent, each one must determine for itself what is in the interest of its own public. Therefore, a skillful drafting of a decree, and use of savings clauses may not only avert a political conflict of obligations but may also ensure that foreign laws will not thwart the purpose of the court's order. However, this consideration should be clearly separated from the question of the jurisdiction of courts, for the misunderstanding may lead to thwarting the purposes of the U. S. antitrust laws by limiting courts' jurisdiction to an extreme extent.

Jurisdictional Difficulties Confronting the Extraterritorial Application of U. S. Antitrust Laws

This brief study of the jurisdiction of courts with respect to the application of the U. S. antitrust laws suggests many difficulties which will confront the United States courts in the extraterritorial application of antitrust laws. In addition to the limitations on jurisdiction and deliberate discretion by courts and the Department of Justice, extraterritorial application of the United States antitrust laws will still have to face the following difficulties.

The Question of Personal Jurisdiction Over Foreign Defendants

The *Scophony*[70] and *U. S. Alkali*[71] cases have given liberal interpretations to the venue and personal service provisions of the Sherman Act so that any corporation which is transacting business of a substantial character within a federal judicial district may now be sued under the Act. Nevertheless, many corporations which restrain American foreign commerce do not satisfy this test, and consequently cannot be reached under the Sherman Act. When the courts decide that they have no jurisdiction because of the lack of personal service over foreign antitrust defendants, the Government must dismiss its complaint. The *DeBeers* case[72] of 1948, a suit against several South African

70 U. S. v. Scophony, 333 U. S. 795 (1947).

71 U. S. v. U. S. Alkali Export Association, 86 F. Supp. 59 (S. D. N. Y. 1949).

72 DeBeers Consol. Mines v. U. S., 325 U. S. 212 (1948).

diamond mining companies, illustrates one such frustrating situation. Even where the Department of Justice succeeds in establishing jurisdiction by personally serving the parties, as it did in the *Alcoa* case,[73] this frequently takes place only after expensive and delaying jurisdictional objections by defendants.

The difficulty of obtaining personal service explains why so many international cartel cases involve foreign co-conspirators who are not joined as co-defendants. For example, in the *General Electric* case,[74] all of the G. E.'s German, English and other foreign cartel associates, except a Dutch firm which happened to have had a factory in the United States, were immune from the suit. The present situation that a selective enforcement of the American antitrust laws have been made against foreign businesses that "happen to get caught within the jurisdiction" pleases neither defendants nor enforcement authorities.

Difficulty in Obtaining Evidence

It is difficult and often impossible to obtain, by the use of American judicial process, business records located overseas which are of vital importance for investigation and proceedings. National sentiments are sometimes mixed with this process, and this makes things more difficult. It is well known that sometimes foreign governments prohibit the production of any record for investigation by foreign governments.[75] More often, the registration of governmental protests in many cases also hamper the obtainment of documents.[76]

Also, the lack of comprehensiveness of business records and statistics in foreign countries, transportation costs and other factors will impede the securing of relevant information.

Involvement of a Foreign Government

Another impediment to antitrust enforcement is the extent to which foreign governments may be involved in a cartel situation.

---

[73] *Supra* n. 19.

[74] U. S. v. General Electric Co., *supra* n. 68.

[75] E.g., In re Canadian International Paper Co., 72 F. Supp. 100 (S. D. N. Y. 1947), Business Records Protection Act of Ontario. *Supra* n. 59.

[76] E.g., the Oil Cartel case, In re Investigation of World Arrangement with Relation to the Production, Transportation, Refining and Distribution of Petroleum. *Supra* n. 35.

Although it is now clear that when cartels are in the nature of acts of state, the antitrust laws of the United States cannot be applied to regulate them, difficult questions may arise when foreign governments unofficially exert pressures which tend to restrain U. S. foreign commerce.

Unavailability of Extraterritorial Remedies

Assuming an airtight antitrust case, in which all the parties involved are properly served as defendants, production of documents being made, there would still remain a final obstacle to success in enforcement, i.e., securing of satisfactory relief. Failure to achieve adequate relief makes any antitrust proceedings, however conclusive it may be, a waste of time and money.

On top of the courts' reluctance in some cases to issue injunctions against foreign corporations abroad, the problem remains that court orders having extraterritorial effect can only be effectively enforced abroad through foreign courts. These courts are not obliged to give effect to a U. S. court judgment but do so only through comity or respect for the laws of a foreign nation. As the *Nylon Spinners* case[77] indicates, foreign courts may not be willing to give effect to an American antitrust judgment, because usually it reflects a public policy different from that of their own countries and involves rather unfamiliar judicial remedies.

Such unwillingness will be particularly evident where foreign vested interests may be impaired by the enforcements of the American judgments. Accordingly, in international cases the antitrust judge is deprived of the wide range of alternatives which enables him to give reasonably adequate relief in domestic cases.

Because control of restrictive business practice can be made effective only through rather extensive application of antitrusts laws and considering the jurisdictional problem, it is concluded that cartels and international trade restraints are an international problem and must be dealt with on that basis. Solutions must be sought through some kind of international organizations, treaties and so forth. Despite numerous attempts,[78] international cooperation has not yet been successful in this field. However,

---

[77] *Supra* n. 53.

[78] E.g., See U. N. Doc. No. E/2612 (1951). E/2380, E/AC, 37/3 (1953).

this does not mean that the final solution of effective antitrust enforcement will be made without any international cooperation, and until some solutions are reached on that level, the United States must rely, for the time being, on the treaty making power in order to mitigate the effect of international monopoly.[79]

[79] Presently, the Restrictive Business Practice Clause was incorporated in eight of the Treaties of Friendship, Commerce, and Navigation between the United States and foreign countries. See, Haight, The Restrictive Business Practice Clause in United States Treaties, 70 Yale L. J. 240, 242-243 (1960).