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Extraterritoriality in U.S. Antitrust: An International "Hot Potato"

Introduction

The Bechtel Case

In January of 1976, the United States Department of Justice filed a civil anti-trust complaint¹ under Section 1 of the Sherman Act² against the Bechtel group of companies alleging a conspiracy to cooperate in the so-called Arab Boycott. An injunction was sought to restrain Bechtel from having anything further to do with the boycott. This complaint is useful to illustrate a number of fundamental issues in the field of extraterritorial application of the antitrust laws.

Based in San Francisco, the Bechtel Group is one of the largest construction prime contractors in the world. It designs and builds large plants and refineries, often on a "turnkey" basis. Bechtel usually takes overall responsibility for completion of these projects and subcontracts out various component parts of a job. The group has been extremely active in the Middle East.

The complaint discloses that the Arab Boycott consists of a series of rules and regulations adopted by the Arab countries, prohibiting Arab League citizens from dealing with firms which trade in any way with Israel. It is administered by a central office in Damascus. Since the boycott first began in 1951, the Arab League has compiled a roster of blacklisted persons who trade with Israel or have Israeli connections. As mentioned, Arab citizens are generally prohibited from having any dealings with Western companies that are on the blacklist or that deal with blacklisted persons.

According to the complaint, the Bechtel companies have operated the conspiracy in three ways:

1. By refusing to let blacklisted persons participate as subcontractors in major construction projects in the Arab countries (this is known as a "primary boycott");

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¹United States v. Bechtel Corp., Civil No. C 76-99 (N.D. Cal. 1976).

²15 U.S.C. Sec. 1 (1970).

2. By requiring the subcontractors which the Bechtel Group uses to refuse to deal with other blacklisted persons on these projects (this is called a "secondary boycott"); and
3. By obtaining, apparently from the Arabs, the actual blacklist and using it to facilitate the first two violations.

The Department of Justice contended that these activities have reduced competition both within the United States and in United States export trade by effectively denying to blacklisted persons the chance to participate in these Bechtel projects. The Department considered the case of such importance that it decided to give it, and others like it, highest priority on the antitrust agenda.³

Some Basic Issues Raised by the Bechtel Complaint

1. UNITED STATES POLITICS

As was true in many of the "big cases" over the eighty years of antitrust, the complaint had a political angle. The Arab Boycott is unpopular in the United States. The attack on the boycott through Bechtel's alleged involvement in it was probably seen as a way to attract votes.

2. UNITED STATES FOREIGN POLICY

The Arab Boycott has been officially pronounced contrary to American foreign policy. By maneuvering against it through antitrust, the government doubtless viewed itself as bringing pressure on the Arabs to cancel the most offensive parts of the boycott.

3. CONSISTENCY WITH POLICY TOWARD OTHER BOYCOTTS; FAIRNESS

The entanglement of the case with foreign policy is all the more apparent from the fact that it is this particular boycott which is attacked. The United States, itself, officially has boycotts against Rhodesia and Cuba. No cases have been brought against companies which abide by these boycotts. The question immediately arises, therefore, whether it is fair to compel private parties like Bechtel to suffer the anguish and expense of such a lawsuit for the sake of advancing United States political and foreign policy objectives, or whether legislation would not be a better means of achieving the policy aims. Indeed, a collateral attack on this problem was engrafted onto the Tax Reform Act of 1976, with a provision denying tax credit benefits to firms which participate

³Washington Post, Jan. 26, 1976, Sec. A, at 14, col. 1; Velvel, *Antitrust and the Arab Boycott*, Wall Street Journal, Jan. 27, 1976.

in the Arab Boycott—in the present writer's view a far more effective means to the desired end than is an attack via an isolated antitrust case.

4. INTERFERENCE WITH POLICIES OF OTHER SOVEREIGN NATIONS

The Arab Boycott is officially sponsored by the sovereign Arab countries; it is not only lawful in the Arab countries, but insisted upon as a matter of the strongest public policy. Now, if it is reasonable for the United States to place conditions on how business is to be done within its borders (as it does in many ways), is it not also reasonable for the Arab countries to impose conditions on how business is done there?

5. CONFLICTS OF LAW & POLICY

How and by whom is the conflict between Arab and United States policies to be resolved? Is a trial court in San Francisco competent to rule on how the Arab states should conduct themselves? Could a court avoid that question simply by deciding that it is wrong for United States citizens to have anything to do with such a boycott, even though it is legal in the Arab countries? From a technical conflict of laws standpoint, the contracts which Bechtel signs are made in the Middle East and must be performed there. Under most conflicts of law rules, it is the law of the place of making and performance which governs—hence the laws of the Arab countries surely should have more force in respect of such contracts than United States law. We are thrown back then on the query: Is it wrong for Bechtel to obey the Arabs' law?[†]

6. INHIBITIONS ON UNITED STATES BUSINESS ABROAD

If the government were to succeed, and the Arabs persist in imposing their boycott, American business might well be forced out of the vitally important Arab Middle East entirely. From the standpoint of United States commercial policy does it make sense that American business abroad should be hamstrung

[†]*Editor's Note:* The *Bechtel* case did not come to trial. After this paper was written Plaintiff and defendants stipulated on January 10, 1977 for the entry of final judgment (not yet entered as of press date) in which the Court: (1) determined that it would be "inappropriate" to apply United States law in conflict with that of a foreign sovereign, to alleged illegal conduct within that sovereign's territory; (2) concluded that the defendants not only had agreed to implement the Arab boycott as to several major construction projects in Arab League countries but had implemented it within the sovereign jurisdiction of the United States by various actions aimed at blacklisted persons; and (3) enjoins a number of practices within the jurisdiction of the United States, such as refusing to deal with blacklisted persons as subcontractors, requiring subcontractors to refuse to deal with blacklisted persons on any project on which defendants were prime contractors, and the like. For the text of the stipulated judgment, see *INTERNATIONAL LEGAL MATERIALS*, Vol. XVI, January, 1977, pp. 97 et seq.

by antitrust problems of this sort when its Japanese and other vigorous competitors do not have this handicap?⁴

7. JURISDICTIONAL PROBLEMS UNDER UNITED STATES LAW

It is a jurisdictional prerequisite to the application of the antitrust laws that there be an impact on the interstate or foreign commerce of the United States. Although Bechtel could be presumed to be engaged in United States foreign commerce, it remained for the Justice Department to prove that Bechtel's actions vis-a-vis the boycott actually affected United States commerce. On its face, this might not seem easy. Moreover, Sherman Act section 1 under which the complaint is brought requires a plurality of actors to make the requisite "conspiracy." The only defendants in this action are various companies in the Bechtel Group. Can constituent parts of a wholly-owned group perpetuate a Sherman Act conspiracy?

8. TREBLE DAMAGES

If, however, Bechtel were to lose the case, what about treble damage suits? May all of the companies on the blacklist which, at least theoretically, might have participated in these Bechtel deals as subcontractors sue Bechtel for damages?

9. ENFORCEMENT PROBLEMS

What if one of the unnamed defendants in the Bechtel case turned out to be a French company which was a subcontractor of Bechtel? Assume that company had no office in the United States but still participated in the alleged conspiracy by refusing to take supplies for its part of the project from an American company based in New York. Is the French company subject to the United States antitrust laws and can it be condemned? How can United States court orders be enforced in France?

10. DISCOVERY PROBLEMS

If the United States government wished to investigate our hypothetical French firm, could it serve subpoenas on them in Paris to compel cooperation? Suppose the French firm had a subsidiary in Chicago, could service on the French parent be effected by service upon the United States subsidiary?

⁴This has been a frequent theme of the position papers of The National Association of Manufacturers and others. See draft *Antitrust Study*, April 25th, 1974, National Association of Manufacturers, 1776 F. St. N.W., Washington, D.C. 20006; see also the study entitled *The Federal Antitrust Laws*, 1974, American Enterprise Institute for Public Policy Research, 1150 Seventeenth St. N.W., Washington, D.C. 20036.

Where To Find Answers

The terms of the antitrust statutes, themselves, are of virtually no help on any of these issues. Enacted at the turn of the century, the statutes are marvels of brevity, little more specific than the Ten Commandments. More than in almost any other field of American law, antitrust depends for its substantive content upon case law/common law. If there are any answers to the questions which have been raised about *Bechtel*, they will be found in the cases.

This paper seeks to treat the main lines of cases, and to deal with the questions raised by *Bechtel*; but before reaching those issues it may be useful to consider the legitimacy of the extraterritorial jurisdiction asserted in United States antitrust proceedings against the background of legal history and public international law. In this context, one is mindful not only of the cries of dismay which extraterritorial antitrust enforcement so often provokes, but also of larger questions of international criminal jurisdiction, e.g., the puzzlement recently expressed in the public press over which country properly should bring to trial the European mercenary soldiers accused of committing criminal atrocities in Angola.

The Perspective of Legal History and Public International Law

The available sources seem to suggest that for the first 6,000 years or so of recorded history territoriality had nothing to do with law at all. Law in primitive society was entirely a personal concept, depending on tribe, family and religion. A man was subject only to the law of his own tribe and could not legally be judged by any other. If he murdered someone from another tribe, the latter tribe could put him to death, but he could not be tried in its courts since he was an outlaw.

In classical Greece, the law that a man was born into governed everything he did, even if he moved to another state. An Athenian living in Sparta held his property according to Athenian law. Disputes between people of different tribes or states were resolved by intermediaries specially appointed and later by treaties between states.

The same was true in the Roman Empire. Only Roman citizens were entitled to the protection of Roman law. For example, Christ was condemned under Jewish law as a Jew although put to death by the Romans. Paul was given a full Roman trial and properly beheaded because he was a Roman citizen. Peter was summarily tried and crucified because he was a foreigner. Each was accorded different treatment, depending on the personal law applicable to him, even though all three had presumably offended against the same supposed principles of public order.

It was not until the Renaissance that it came to be accepted that law governed

a territory and all those within it. This coincided with the rise of nation states and territorial sovereignty as we know them. The territorial concept of law co-existed along with the old personal concept; e.g., while exercising full power over all matters transpiring in the country, French law also was asserted to apply to Frenchmen wherever they were in the world.

In the nineteenth century, territoriality, for the most part, was strictly construed by the Anglo-Saxon countries. Apart from a few cases involving crimes on the high seas, it was accepted that a country did not have authority to enforce its law outside its borders. A challenge to this principle arose in 1886 in an incident involving an American publisher by the name of Cutting who lived on the American side of the Mexican border in El Paso, Texas.⁵ Cutting printed an article in his local newspaper which was defamatory of one Medina, a citizen and resident of Mexico.

When Cutting later crossed over the border into Mexico on an afternoon stroll, he was arrested, thrown in jail, and charged with violating Mexican law which made it a crime for a foreigner to publish a libelous statement against a Mexican citizen outside of Mexico.

This case, which promptly became a *cause célèbre*, raised a storm. The United States officially took the position against Mexico (ironic in terms of its later attitude), that it was not legal for a country to punish aliens for crimes committed outside its territory, and that the attempt to punish such acts was an invasion of the American government's independence.

Such was also the view subscribed to by the United States Supreme Court in one of the early antitrust cases, the oft-cited *American Banana v. United Fruit*, in 1909.⁶ This case involved the machinations of two American companies in the so-called "banana republics." Very briefly, the United Fruit Company instigated a revolt in Costa Rica and then persuaded the new government there to confiscate the plantations of American Banana and close the access railway. American Banana sued United Fruit for antitrust treble damages.

The Supreme Court threw the case out on the ground that the antitrust laws should not be read to make criminal acts done in Panama or Costa Rica which on their face were legal in those countries. Speaking for the Court, Justice Holmes said, "The character of an act as legal or illegal must be determined wholly by the law of the country where the act is done."⁷

⁵For a full discussion of this case, see Rolin, *L'Affaire Cutting: Conflit entre les Etats-Unis de l'Amérique du Nord et le Mexique en 1886*, 20 *Revue de Droit International et Legislation Comparee* 559 (1888); Gamboa, *L'Affaire Cutting*, 22 *Revue de Droit International et Legislation Comparee* 234 (1890). And for an excellent summary see BISHOP, *INTERNATIONAL LAW, CASES AND MATERIALS*, 2d ed. (1962) pp. 459-60.

⁶213 U.S. 347 (1909).

⁷*Id.* at 356.

The *Cutting* and *Banana* cases are completely at the opposite pole from *Bechtel* and the other modern cases. Perhaps their only relevance is to show that the United States government and its courts can change their minds.

In 1927 arose the famous case of the *Steamship Lotus* which was submitted to the Permanent Court of International Justice at The Hague.⁸ The *Lotus* case involved a collision of a French vessel with a Turkish ship on the high seas, the sinking of the latter and the death of a number of Turkish citizens.

When the French ship managed to reach Constantinople, the French officer in charge was arrested, prosecuted and found guilty under Turkish law under a statute which made it a crime to inflict wrongful injury upon Turkey or Turkish subjects abroad.

France objected to Turkey's assumption of criminal jurisdiction and instituted proceedings before the International Court. The Court, after an extensive exploration of the problem, concluded, in effect, that international law poses few, if any, limits on the jurisdiction of a state. Even if international law did pose some limits as to how far a state might go, the International Court in *Lotus* held it was not impermissible for a state to punish acts committed outside its boundaries which produce one of the constituent elements of the offence against its law within its territory.⁹ In the words of the American Law Institute, "the Court makes it clear after its analysis of the practice of States that the effect in the territory of conduct occurring outside it provides a State with a valid basis of jurisdiction under international law. That part of the opinion is still valid, even though the part . . . holding that a Turkish vessel could be treated as Turkish territory for the purpose of jurisdiction based on effects in the territory, is not generally regarded as stating a rule of international law."¹⁰ To simplify the *Lotus* holding as much as possible, if a French citizen standing in France shoots a gun across the border and kills someone in Belgium, Belgium has the clear right under international law to prosecute the Frenchman for murder. This seems to be about as far as our civilization has carried these questions.

It is, however, possible to draw two conclusions:

- (i) As regards United States citizens acting abroad, such as for example the Bechtel Corporation, the United States is on solid ground in regulating their conduct simply for the reason that the Bechtel company is a United

⁸P.C.I.J., Serv. A, No. 10 (1927). For a superb exposition of this case and the entire field, see Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145 (1972-73).

⁹Experts in this field have considered that France may have lost the case by the manner in which it phrased the question put to the Court, i.e., "Does international law prohibit" such exercise of jurisdiction, rather than the inverse form, "Does international law *permit* the exercise of such jurisdiction?"

¹⁰Restatement of the Law, Second FOREIGN RELATIONS LAW OF THE UNITED STATES, p. 53. It was superseded by Article 11 of the Convention on the High Seas of April 29, 1958.

States "citizen." Under international law as it has existed almost from the days of Hammurabi, a country can prescribe rules for conduct of its citizens anywhere. This is true regardless of whether the conduct prescribed produces an effect within the territorial confines of the law-making country.

- (ii) As regards acts committed abroad by foreigners not present in the United States, the United States is also on solid ground in enforcing its law against them within its own borders so long as the acts concerned produce *one of the elements of the crime* within the borders of the United States. If there is no element of the crime produced within the U.S.A., then in terms of international law as it has evolved to date the United States would seem to be overreaching.

Viewed in the context of antitrust, the latter rule of international law would require that some element of an offence committed by non-United States citizens, be it restraint of trade or monopoly, occur in the United States. Upon our reading, nearly all of the extraterritorial assertions of United States antitrust have met this test fairly well.

U.S. Antitrust and Extraterritoriality

Reviewing now the standard bases for jurisdiction, it is hardly necessary to recall that for United States courts to be competent to accept cases, there must be both "personal" and "subject matter" jurisdiction.

Personal Jurisdiction

The United States rules of personal jurisdiction require a state or federal court to have judicial power over the parties and ability to bind them to its decrees. Well into the first half of this century, these rules were generally construed to require that a defendant had to reside or be present within the jurisdiction of the court which was trying his case, but in a series of cases since 1945 that construction no longer retains its validity. The only constraint at present is that there be a minimum contact with the jurisdiction and that exercise of the court's power not violate "fair play."¹¹

Again by way of reminder, there are two additional procedural requirements which are related to personal jurisdiction. The first is "service of process" which refers to the court's ability to serve its papers on the parties and give them fair notice of the proceeding. The second is "venue" which limits a complaining party's choice of forum to places which are not unfairly inconvenient to the defendant.

¹¹Hanson v. Denckla, 357 U.S. 235 (1968); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

With that preliminary review, we should observe that the rules of personal jurisdiction in antitrust cases are very broad. A company can be sued in any judicial district where it may be found or transacts business.¹² This means foreign companies are wide open to suit. The leading case on an antitrust personal jurisdiction in the international context is *Scophony*,¹³ which involved the British company that pioneered the development of modern television. It was enough for personal jurisdiction over the British company on the part of a court in New York that one of the British *Scophony* directors was living in New York and acting as president of a United States subsidiary. In *Watchmakers of Switzerland*,¹⁴ one reason for upholding personal jurisdiction of a New York federal court over a Swiss watch trade association was that the association did substantial advertising business through Foote, Cone & Belding, an advertising agency in New York. Thus it was viewed as having "agents" within the court's jurisdiction.

There have also been several cases holding that the existence of a United States subsidiary within the court's jurisdiction is enough to establish jurisdiction over the foreign parent.¹⁵ This was true in the action filed to break up the Imperial Chemical Industries-du Pont cartel in explosives.¹⁶ I.C.I. had a subsidiary in New York, many of the officers of which were also officers of the I.C.I. group in Britain. The subsidiary handled most of the British I.C.I.'s business in the States, and there was lacking in practise a rigid separation of the affairs of the two firms. This was deemed sufficient cause for the United States court to assert personal jurisdiction over the whole of British I.C.I.

The opposite side of the jurisdiction issue posed in the *I.C.I.* case is the question of whether United States courts can exercise personal jurisdiction over foreign subsidiaries of United States parent companies. Almost invariably presence of the parent in the United States is deemed enough for personal jurisdiction over the foreign subsidiary on the ground the parent controls the subsidiary.¹⁷

Service of process in these cases is accomplished in a variety of ways, including personal delivery abroad, registered mail, or publication in the local newspaper. All are permissible. For example, in a case against Alfa-Romeo, both service by mail and personal service of papers on the managing director in Italy

¹²Clayton Act Sec. 12, 15 U.S.C. § 22 (1970).

¹³United States v. *Scophony Corp.*, 333 U.S. 795 (1948).

¹⁴United States v. *Watchmakers of Switzerland Information Center*, 133 F. Supp. 40 (S.D. N.Y. 1955).

¹⁵In re *Siemens and Halske A.G.*, 155 F. Supp. 897 (S.D. N.Y. 1957) (subpoena duces tecum).

¹⁶United States v. *Imperial Chem. Indus.*, 100 F. Supp. 504 (S.D. N.Y. 1951).

¹⁷United States v. *Watchmakers of Switzerland Information Center*, 134 F. Supp. 710 (S.D. N.Y. 1955).

were deemed adequate.¹⁸

As regards venue, aliens have no rights at all. Normally, the rules of venue prescribe that American defendants can only be sued in courts which are convenient to where they reside, e.g., a Texan could not normally be made to travel to Alaska to defend himself. But alien defendants who do not "reside" in America in the legal sense can be sued anywhere in the United States.¹⁹ Presumably the theory is that all locations are equally inconvenient for non-resident aliens.

One may only conclude from what has preceded that it is extremely difficult to avoid United States personal jurisdiction. If this is an objective, the advice to a foreign company must be to do no business at all in this country, to have no agents (even advertising agents), to maintain no United States bank or brokerage accounts, and the like—in short, to have nothing whatsoever to do with the United States.

If a foreign company concerned about United States antitrust must have a subsidiary here, it should treat the subsidiary at arm's length. There should not be common officers or directors. The agent should not let the subsidiary undertake any activities as agent for the parent, and should keep the subsidiary's business separate. Even then, it cannot be said that the very existence of the subsidiary will not expose the parent to antitrust personal jurisdiction.

Subject Matter Jurisdiction

If there is little hope for foreign defendants in the rules of personal jurisdiction, the requirement that United States courts also have jurisdiction over the subject matter of an antitrust case offers more scope.

The first point is that the antitrust laws require an impact on the domestic or foreign commerce of the United States before they apply. In a sense almost everything affects United States commerce in some way or other. If for example the French farmers in the Perigord decided to slaughter their pigs, the foreign trade in truffles between France and America would cease and the price of truffles in America likely would skyrocket. The rise in American prices, however, would only be a side effect. The case law establishes that the effect on United States commerce must be direct, not just a collateral or aftereffect. It must be substantial. It must be reasonably foreseeable. There must be a close connection between the activity which is a violation of antitrust rules and its effect on United States commerce.²⁰

¹⁸Hoffman Motor Corp. v. Alfa Romeo S.p.A., 244 F. Supp. 70 (S.D. N.Y. 1965).

¹⁹28 U.S.C. Sec. 1391(d); see, Brunette Machine Works Ltd. v. Kockum Industries, Inc., 406 U.S. 706 (1972).

²⁰Rahl, *Foreign Commerce Jurisdiction of the American Antitrust Laws*, 43 ANTITRUST L.J. 521 (1975).

This case law gloss on the Sherman Act seems likely to have important ramifications for the *Bechtel* case. If the Bechtel company could prove, for example, that participation in the boycott did not affect United States commerce because there were no subcontractors or suppliers dealing in United States commerce who could have been hurt by the boycott, probably they would be in the clear. There would be no effect upon United States trade. On the other hand, if Bechtel imposed on one of its French subcontractors the requirement that the subcontractor not take supplies from any of several New York merchants, and there is a realistic possibility that the New York merchants could have supplied, then Bechtel probably would be in trouble.

The fact that agreements are physically negotiated or made outside the United States does not really matter if they directly affect United States trade. On the other hand, if an agreement is made in the United States it is all the easier to prove the impact on United States commerce. The difficult cases for establishing subject matter jurisdiction involve agreements made abroad between completely foreign companies. The watershed decision in this area is, of course, the *Alcoa* case (1945), a proceeding against the Aluminum Company of America (Alcoa) and involved the participation by the Aluminium Company of Canada (Alcan) in a Swiss-based aluminium cartel.²¹ The Alcan company was formed by spin-off of Canadian and foreign aluminium interests for Alcoa. Originally, the shareholders of Alcan were the same as those of Alcoa, but the two companies grew apart and were separately managed.

The Swiss aluminium cartel, known as the "Alliance," fixed world-wide quotas for the production of aluminium which were intended to affect its import into the United States. Alcoa was not a party to this, but benefitted from it. Although Alcan was not doing business in the United States and had no office there, its participation in the Swiss cartel (all of which occurred outside the United States) coupled with the intent to affect United States commerce was enough to establish a violation and an injunction was issued against any further participation in the cartel.

Since then there have been a number of cases involving foreign cartels. These include the *Swiss Watch*²² case and the *Pharmaceuticals*²³ and *Oil Cartel*²⁴ cases. Some of the cases involved straightforward cartel agreements between competitors. Others were concerned with market carve-ups through patent and trademark exchanges. The later cases have made it crystal clear that in terms

²¹United States v. Aluminum Company of America, 148 F.2d 416 (2d Cir. 1945).

²²United States v. Watchmakers of Switzerland Information Center, 133 F. Supp. 40 (S.D. N.Y. 1955).

²³United States v. Bayer Company, 135 F. Supp. 65 (S.D. N.Y. 1955).

²⁴In re Investigation of World Arrangements with Relation to Prod., Transp., Ref. and Distrib. of Petroleum, 13 F.R.D. 280 (D.D.C. 1952).

of United States law it is not a defence that the conduct in question was legal in the state where it occurred (cf. *Bechtel*). The only proper questions are whether activities are unlawful under the United States statutes and whether they affect United States trade as a result of some intent or deliberation.

Special Defences in Foreign Commerce Cases

1. SOVEREIGN IMMUNITY:

The question frequently arises in foreign commerce cases as to whether nationalized industries owned by foreign governments can claim sovereign immunity. The general rule is that the sovereign immunity defence is limited to cases where the sovereign acts *qua* sovereign.²⁵ It does not apply where the sovereign is engaged in commercial business.²⁶ Thus, for example, sovereign immunity probably prevents antitrust suits against the blatantly offensive price-fixing carried on by the national governments belonging to the OPEC oil cartel; but it has been held that it would not bar suit against a nationalized shipping line such as the Philippine National Lines.²⁷

2. ACT OF STATE:

The cases get harder when, as in *Bechtel*, there is a mixture of involvement between a foreign government acting as such and private concerns. Foreign governments cannot be sued directly because of sovereign immunity. However, private defendants can still be attacked, for it has been held that it can be illegal to conspire with entities which may themselves be immune from suit.²⁸

An interesting recent example is *Occidental Petroleum Corp. v. Buttes Gas & Oil*.²⁹ In 1969, Occidental won an offshore oil concession from the ruler of one of the Trucial States. Buttes had competed for the concession but lost. Buttes subsequently obtained a concession for the offshore oil of a neighbouring state, and then persuaded the Sheik in the latter state to assert expansion of his territorial sea from 3 miles to 12 miles. This led to an overlap of the two concessions and a dispute as to sovereignty over the crucial seabed. After the Royal Navy intervened to keep Occidental from drilling until the issue was resolved, Occidental sued Buttes for its conspiracy with its Sheik.

The case clearly had an effect on United States commerce, but in order to decide it, the court would have needed to adjudicate the legality of the acts of

²⁵*L'Invincible*, 14 U.S. (1 Wheat.) 238 (1816); *The Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812).

²⁶*See, e.g.*, *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199 (S.D. N.Y. 1929).

²⁷*In re Grand Jury Investigation of the Shipping Industry*, 186 F. Supp. 298 (D.D.C. 1960).

²⁸*Farnsworth v. Zerbst*, 98 F.2d 541 (5th Cir. 1938).

²⁹331 F. Supp. 92 (C.D. Cal. 1971), *aff'd per curiam* 461 F.2d 1216 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972).

a sovereign Sheikdom. This the court felt it was not competent to do. It threw the case out on the ground that it was confronted by an "act of state." According to this doctrine, when wrongs complained of result from acts of another sovereign, it is not appropriate for United States courts to sit in judgment upon them.³⁰ Even though Buttes' friendly Sheik was not a party to the case, the court felt that if it decided the case it would have to rule on whether the Buttes company had encouraged his claim to a 12-mile limit. This might in some way cast doubt on his dignity or otherwise interfere with United States foreign policy.

3. FOREIGN GOVERNMENT COMPULSION:

It can also be a defence that an anti-competitive act abroad is compelled by a foreign government.³¹ This is illustrated by a case against Texaco involving its business in Venezuela.³²

The Betancourt government which came to power in Venezuela in 1959 had among its target dislikes a certain company known as Interamerican Refining. This company was owned by some old political rivals of Senor Betancourt and was making a nuisance of itself by undercutting posted prices. The Venezuelan government ordered oil companies with concessions on Lake Maracaibo to cease supplying any oil to Interamerican. The major oil companies began boycotting the company and Interamerican sued them.

The United States District Court threw the case out on the ground that the boycott was imposed by the Venezuelan government. It was a condition of doing business in Venezuela. The court noted that if it did not allow "foreign sovereign compulsion" as a defense, American firms could not do business in countries like Venezuela at all. It was not the intent of the Sherman Act to go this far.

At first blush, there would appear to be very little difference between the "foreign sovereign compulsion" which existed in the Venezuelan case and the situation in *Bechtel*. If the *Bechtel* case ever went to trial, the Bechtel Group would surely argue foreign government compulsion as a defence. A hint as to how the Department of Justice would try to meet this argument came in a speech by Mr. Joel Davidow, then Chief of the Foreign Commerce Section of the Antitrust Division.³³ Mr. Davidow remarked that the doctrine of foreign

³⁰Cf., e.g., *Underhill v. Hernandez*, 168 U.S. 250 (1897); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

³¹See Graziano, *Foreign Government Compulsion as a Defence in United States Antitrust Law*, 7 V.A. J. INT'L L. 100 (1967).

³²*Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970).

³³Joel Davidow, *Extraterritorial Application of U.S. Antitrust Law in a Changing World*, Department of Justice Release (June 15, 1976). For a full discussion of the issues raised upon Mr.

sovereign compulsion is limited to the territorial confines of the foreign state, and the foreign state may not, therefore, lawfully command the carrying out of anti-competitive conduct which produces an effect in the United States.

One is tempted to answer Mr. Davidow's view with the remark, "what is sauce for the goose is sauce for the gander." The United States should not be issuing its commands with extraterritorial effect if it is not willing that other sovereigns should do the same. Although the logic of this retort seems ineluctable, one must admit it is perhaps a bit too facile for such a politically "loaded" issue as the sovereign compulsion doctrine raises.

Exemptions

There are two special exemptions from the antitrust rules in the foreign commerce field.

- (i) Carrying out an order or directive from the United States government that competition in United States commerce should be restricted is normally exempt. An example is the recent foreign steel import programme, in which foreign producers were asked voluntarily to reduce the volume of their steel imports into the United States.³⁴
- (ii) There is a special statute relating to agreements regarding United States exports, known as the Webb-Pomerene Act.³⁵ Under this statute, companies can form associations for export purposes and register them with the Federal Trade Commission. If the formalities are followed there is blanket immunity from the antitrust laws but it is limited only to export activities.

Webb-Pomerene allows competing exporters to fix prices and divide territories outside the United States almost at will. The voluntary restraint programmes are also very anti-competitive and protectionist. One wonders why the E.E.C. does not awake to this and find some of these activities illegal under Article 85 of the Treaty of Rome.³⁶ Perhaps the E.E.C. is afraid of the equally valid charges the Americans could make about European export subsidies.

Davidow's contention see Joelson and Griffin, *The Legal Status of Nation-State Cartels Under United States Antitrust and Public International Law*, 9 INT'L L. 617 (1975); see also, Note, *Extraterritoriality—Antitrust Law—Development of the Defense of Sovereign Compulsion*, 69 MICH. L. REV. 888 (1971).

³⁴Consumers Union of U.S., Inc. v. Rogers, 352 F. Supp. 1319 (D.D.C. 1973).

³⁵15 U.S.C. §§ 61-65 (1970).

³⁶Treaty Establishing The European Economic Community, art. 85 (1957); a recent indication that the E.E.C. may in fact be taking a closer look at U.S. export associations came in an announcement in Brussels on the Second of August this year that the E.E.C. Commission is investigating an allegation that American companies are using their privileged access to phosphates to charge prices well below those offered by Community concerns and that they are enlarging their market share at the expense of Common Market industry.

Problems of Subpoena and Discovery

At the heart of any antitrust case is the discovery of business documents. In foreign commerce cases, this frequently leads to touchy issues of conflict of laws.³⁷ In a case involving a grand jury investigation of several customers of First National City Bank,³⁸ it was held that the bank was required to produce bank records pertaining to people who were customers of its German branch. It was no defence that the German laws of banking secrecy might subject the bank to *civil* liability for the disclosure.

In this area the Supreme Court essentially has directed the United States courts to balance the interests in these cases, and to try to find ways of obtaining necessary information without head-on collisions.³⁹ Where production of documents would violate foreign criminal laws, as the Swiss bank secrecy laws, United States courts can still order disclosure, but here they must temper their orders with mercy, and the sanctions for non-compliance may not be too harsh (i.e., should not include contempt citations, or dismissal of the case). If there is no other way to obtain justice, however, United States courts may proceed to order foreign production.

Enforcement Problems

The classic case in the area of enforcement is the United States antitrust suit against the British company I.C.I. and the American du Pont company.⁴⁰ The two chemical groups had divided world markets between them since 1897. When their first blatant cartel was held illegal in 1907, they turned to the device of market carve-up by patent exchange and licences.

Du Pont invented nylon in the 1930s and licensed and later sold to I.C.I. the British patents for it. I.C.I. in turn sublicensed it to a company known as British Nylon Spinners, a 50-50 joint venture of I.C.I. and Courtaulds.

The United States court found the du Pont-I.C.I. arrangements illegal. In a wide-ranging decree⁴¹ the court insisted that the sale of the British patents for nylon be undone, and that I.C.I. take no more than a non-exclusive licence. The purpose of making I.C.I.'s right to nylon non-exclusive was to enable du Pont to compete by selling or making nylon in Britain. But the hard problem was that the other company, British Nylon Spinners, now held the United Kingdom

³⁷For a general discussion of this area, see Smith, *Discovery of Documents Abroad in U.S. Antitrust Litigation*, 14 VA. J. INT'L L., 747 (1974).

³⁸United States v. First National City Bank, 396 F.2d 897 (2d Cir. 1968).

³⁹Societe International Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958).

⁴⁰United States v. Imperial Chem. Indus., 100 F. Supp. 504 (S.D. N.Y. 1951) (judgment).

⁴¹United States v. Imperial Chem. Indus., 105 F. Supp. 215 (S.D. N.Y. 1952) (supplemental opinion on remedies).

nylon patents. B.N.S. was not a party to the action. Fearing that B.N.S. would sue on its rights to those patents if du Pont imported, the court ordered that du Pont should have immunity under the British patents. Recognising that this might not be upheld in Britain, the court felt it was worth trying, anyway.

As expected, B.N.S. eventually did bring the issue before the British courts by suing I.C.I. to enjoin compliance by I.C.I. in the United Kingdom with the United States decree.⁴² The British court ruled that the United States decree went too far in its attempt to invalidate the patent rights held by B.N.S. since the United States court lacked jurisdiction over B.N.S. It is interesting, however, that the British court did accept the terms of the United States decree which ordered I.C.I. to perform certain acts in Britain. The key distinction in the mind of the British court was that I.C.I. was properly before the American court, whereas B.N.S. was not.

The British court had the last word, for the United States authorities did not pursue the matter. This shows that although our government is not bashful about asserting extraterritorial jurisdiction, it is mindful of the need to avoid open clashes with other legal systems. At least some attention is paid to so-called principles of "international comity."⁴³

Particular Applications of Substantive Law in Foreign Commerce Cases

Generally speaking, the transactions of foreign companies taking place within the United States are judged by the same standards as domestic cases. It is transactions carried out abroad by either foreign or United States companies that are subject to the special rules on extraterritoriality.

1. DISTRIBUTION:

It is permissible to appoint an exclusive distributor in a foreign country.⁴⁴ One must be careful, however, about the restraints placed on him, such as making sales outside his territory, resale price maintenance, exclusive purchase requirements and tying clauses.

The rules against these restrictions do not have the same force when applied to foreign rather than domestic distributors. But such restraints can be violations if United States commerce is intended to be affected, or is likely to be affected in practise. An express contractual restraint on foreign distributors

⁴²*Nylon Spinners, Ltd. v. Imperial Chem. Indus.*, (1952) 2 All E.R. 780 (C.A.).

⁴³See, e.g., *United States v. Holophone Co.*, 119 F. Supp. 114 (S.D. Ohio 1954) (findings and conclusions), 1954 Trade Cas. Para. 67, 679 (S.D. Ohio 1954) (judgment), *aff'd per curiam*, 352 U.S. 903 (1956); *United States v. Watchmakers of Switzerland Information Center*, 1965 Trade Cas. Para. 71, 353 (S.D. N.Y. 1965).

⁴⁴*United States v. Imperial Chem. Indus.*, 105 F. Supp. 215, 244 (S.D. N.Y. 1952).

not to sell in the United States, for example, is clearly a deliberate restraint on United States commerce and is very likely invalid.

Suppose, however, the distribution contract merely says the distributor will not sell outside his assigned territory without specifically referring to the United States. In this case the test would be whether the restraint operated or could operate in any practical way to inhibit United States trade.

Likewise, price-fixing between competitors abroad, sharing of local foreign markets, and appointment by competitors of joint foreign distributors can escape United States antitrust if they are not intended to and can have no impact on United States trade, including United States export trade. Otherwise a problem is likely to arise.

2. LICENSING:

Similar considerations apply to licensing with the added complication that, know-how licenses apart, one is dealing with legalized forms of monopoly. The antitrust rules will always make certain the legal monopolies are not unduly extended or protected—as by grant-back clauses, non-attack clauses, or other provisions tending to stretch the effect of the monopoly of, e.g., a patent, beyond its intended scope and term.⁴⁵

The United States authorities generally allow exclusivity. They also allow a licensor to license his patent for one country and retain it for another. But when one reaches the domain of cross-licenses or market carve-ups through licenses, he is on dangerous ground. Carve-ups of this type were very much the fashion in the 1920s and '30s. Many such arrangements were struck down in the cartel cases of the 1940s and early '50s.⁴⁶

In one of those cases, *National Lead*,⁴⁷ the trial judge very graphically and succinctly illustrated the problem. The case involved a worldwide tie-up of the market for titanium pigments by cross-license and patent pool. As Judge Rifkind put it, the licenses:

[A]ppplied to commerce beyond the scope of any patents. . . . extended to a time beyond the duration of any then-existing patent . . . embraced acknowledgement of patent validity with respect to patents not yet issued, nor applied for, and concerning inventions not yet conceived . . . extended to countries, such as China, where no system of patent monopolies exists . . . (and) regulated the disposition of the products after sale by the licensees.⁴⁸

⁴⁵See, e.g. *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917); *International Salt Co. v. United States*, 332 U.S. 392 (1947); *Brulotte v. Thys Co.*, 379 U.S. 29 (1964).

⁴⁶See, e.g. *United States v. Minnesota Mining and Mfg. Co.*, 92 F. Supp. 949 (D. Mass. 1950); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *United States v. Holophone Co.*, 119 F. Supp. 114 (S.D. Ohio 1954).

⁴⁷*United States v. National Lead Co.*, 63 F. Supp. 513 (S.D. N.Y. 1945), *aff'd*, 332 U.S. 319 (1947).

⁴⁸*Id.* at 524.

Although modern licensing arrangements are usually less all-embracing than in the old cartel cases, the principles remain the same.

3. ACQUISITIONS AND MERGERS:

Since 1964 there have been a number of antitrust cases against foreign companies acquiring United States companies. This reached such a degree that a number of foreign commentators accused the United States of using antitrust as a weapon to keep out foreign investment.

Under the Clayton Act, acquisitions can be attacked if they tend to lessen actual or potential competitions in any line of commerce. In one case this was read to preclude acquisition of a United States aluminium manufacturing company by a large foreign integrated aluminium company.⁴⁹ The theory was that if the takeover were allowed, the United States company thereafter would be likely to take its supplies of aluminium from the foreign parent, rather than allowing its several former United States suppliers to bid and compete.

Likewise, it was held wrong for I.C.I. to acquire Atlas, a United States explosives company with 15 percent of the United States market for certain explosives, on the ground that prior to the acquisition I.C.I. was a potential entrant into the market on its own.⁵⁰ By the acquisition, the possibility of I.C.I. entering the market by itself was foreclosed. In other words not only did I.C.I.'s takeover increase the barriers to market entry on the part of other potential competitors, the very fact that I.C.I. was no longer hovering in the wings as a potential competitor was felt to have an adverse effect on the competitive status of the industry.

The latter theory, known as the "potential competition doctrine" is frequently used. The one exception to it is the so-called "toe-hold theory," which allows potential competitors to buy small companies in order to get a foothold in the market. The toe-hold theory is particularly important for foreign firms, because doing business in the United States often proves altogether different from doing business in, say, Europe. It is often useful for a foreign company to buy a small United States company with indigenous personnel in order to learn how things are done in America for a quick move into the market.

Acquisitions of foreign companies by American companies can also constitute violations of the antitrust laws.⁵¹ An example is the recent takeover of Braun, one of Germany's largest electric razor concerns, by the United States Gillette

⁴⁹United States v. Aluminium Ltd., (1961-1970 Transfer Binder) Trade Reg. Rep. Para. 45,064 (case 1841) (complaint); 1966 Trade Cas. Para. 71,895 (D. N.J. 1966) (consent decree).

⁵⁰Imperial Chemical Industries, (1970-1973 Transfer Binder) Trade Reg. Rep. Para. 19,914 (FTC 1972) (consent decree).

⁵¹United States v. Jos. Schlitz Brewing Co., 253 F. Supp. 129 (N.D. Cal. 1966); *aff'd per curiam*, 385 U.S. 37 (1966).

razor company.⁵² Although Braun did not compete in the United States razor market because of a license it had with Ronson running until January 1 of 1976, the complaint alleges Braun was a potential competitor and the acquisition would eliminate the "threat" Braun posed. The case has since been settled by consent decree requiring Gillette to spin off Braun's electric shaver business into a new company which will compete with Gillette. Gillette will be required in various ways to help that company to become a viable force in the market. Moreover, Gillette had to agree not to try to acquire any other razor companies doing business in the U.S.A. for a period of ten years.

Despite these cases, it is easier from an antitrust standpoint to make mergers abroad than in the United States. Thus, most of the recent acquisitions of I.T.T. and other "conglomerators" have been made abroad.

United States antitrust laws can even reach mergers of two foreign companies. Consider the merger of the two Swiss companies, CIBA and Geigy.⁵³ Each of these competing drug companies had United States subsidiaries, with aggregate United States sales of \$423 million. The government was reluctant to try to block the foreign merger, but it was very much concerned to avoid the lessening of competition in this country which the merger would cause. The eventual result of the suit which the government brought was a consent decree requiring that any overlapping businesses of the two groups in the United States be spun-off into a new company. As in Gillette/Braun, CIBA and Geigy were ordered to take steps to ensure that the new company could be a viable competitor.

4. JOINT VENTURES:

One of the most difficult antitrust areas to advise upon is that of joint ventures because of the scarcity of cases. Yet joint ventures of various kinds seem currently to be among the most popular forms of investment, especially as regards foreign investment. Indeed, some foreign countries require joint ventures with local enterprises as a ticket of admission.

The very coming together of two competitors to form a joint venture is obviously fraught with anti-competition problems. Nonetheless, there is a tendency on the part of the authorities to allow these combinations, especially when without the joint venture it is unlikely the particular project could be carried out at all. In fact, no joint venture among Americans to sell abroad to foreigners has been challenged under the authorities laws in the last twenty-five years.⁵⁴

⁵²United States v. Gillette Co., Civ. No. 68-141 (D. Mass. 1968), (1961-1970 Transfer Binder) Trade Reg. Rep. Para. 45,068 (case 1988) (complaint).

⁵³United States v. CIBA Corp., (1961-1970 Transfer Binder) Trade Reg. Rep. Para. 45,070 (case 2118) (complaint); 1970 Trade Cas. Para. 73,269 (S.D. N.Y. 1970) (consent decree).

⁵⁴See, *Antitrust and Foreign Commerce*, 5 Trade Reg. Rep. Para. 50,129 (1972).

One point to be cautious on is that the joint venture should not arbitrarily freeze out other companies which might have been able to participate. This is particularly true when participation in the joint venture is a prerequisite to getting into the market. Such an issue came up in *I.C.I./du Pont*,⁵⁵ in which the two companies had set up joint subsidiaries in third countries as part of their cartel. The scale of operations required in the industry meant that no competitors in those countries had any chance against the combined weight of these giants operating in joint venture.

Another point of concern is to ensure that the restraints placed on the parties to the joint venture do not exceed what is absolutely necessary to achievement of the venture's purpose. Quite often joint ventures are used as part of larger plans to restrict competition, and this will not be allowed. For example, the joint venture in airline service in South America between Pan American and W.R. Grace was upheld, but Pan Am's later attempt to confine Panagra to South America and deny it landing rights within the United States was struck down.⁵⁶ The distinction drawn by the court was between the agreements between the parties which are essential to accomplish the joint venture, and ancillary restraints going beyond the lawful main purpose of the venture.

Conclusion

Antitrust procedures are very much on the upswing throughout the world, not only in the United States and the European Economic Community, but also in Australia, Germany, Canada and elsewhere. As business has become increasingly multinational, it has become obvious to the authorities in all of these jurisdictions that strict territoriality is a luxury which can no longer be afforded.

Even Great Britain, traditionally the staunchest advocate of strict territoriality, has realized the practical shortcomings of its position. The report of the British Monopolies Commission in the *Roche* case on Valium and Librium pointedly criticized the Swiss defendants for failure to provide necessary information. It was implied that since Roche did not cooperate, the Commission had little choice but to order price reduction.⁵⁷

With the tough and expansionist line the E.E.C. and other countries are taking on antitrust, the United States position on extraterritorial jurisdiction is beginning to seem less extreme. It is regrettable, however, that little attention seems to have been paid by any of the antitrust authorities to means of harmonizing the overlaps and conflicts of jurisdiction and policy which arise in the

⁵⁵*United States v. Imperial Chem. Indus.*, 100 F. Supp. 504 (S.D. N.Y. 1951).

⁵⁶*United States v. Pan American World Airways, Inc.*, 193 F. Supp. 18 (S.D. N.Y. 1961), *rev'd on other grounds*, 371 U.S. 296 (1963).

⁵⁷Rhineland, *The Roche Case: One Giant Step for British Antitrust*, 15 VA. J. INT'L L. 1 (1974).

international context. Witness Bechtel and others who are literally "damned if they do, damned if they don't."

Very probably a treaty on antitrust jurisdiction amongst the developed countries is what is needed before the issues in this field will ever be very clearly resolved.⁵⁸

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⁵⁸There have been, in fact, recent efforts in this direction. See, e.g., address by Secretary of State Kissinger, Seventh Special Assembly of the United Nations, 1975; UNCTAD, *Report of the Second Ad Hoc Group of Experts on Restrictive Business Practices*, United Nations Conference on Trade and Development, Geneva (March 8, 1976).

