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# THE DOCTRINE OF "EFFECTS" AND THE EXTRATERRITORIAL APPLICATION OF ANTITRUST LAWS

NAJEEB SAMIE\*

## I. THE TRADITIONAL ANALYSIS OF THE "EFFECTS" DOCTRINE IN ANTITRUST LAW

The "effects" doctrine is a basis of jurisdiction which was developed in order to reach aliens abroad whose conduct occurs beyond the borders of the enforcing State, but has an effect within that State.<sup>1</sup> Its origin lies in the "objective" application of the territorial principle.<sup>2</sup> The doctrine asserts that activities abroad, even those of foreign citizens, may be regulated because of their impact on interests within the territorial State's domain.<sup>3</sup> It seeks to satisfy the concept of territoriality by treating the impact of the prohibited conduct as much a part of the crime as the conduct itself.

In this respect, two important issues arise. First, what is meant by the "effect" of the conduct as opposed to the actual conduct. Second, how substantial an "effect" is necessary to support jurisdiction.<sup>4</sup>

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1. W. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* 37 (2d ed. 1973); see Kintner and Hallgasten, *Application of United States Antitrust Laws to Foreign Trade and Commerce - Variations on "American Banana" Since 1909*, 15 B. C. INDUS. & COM. L. REV. 343 (1973); Simson, *The Return of "American Banana": A Contemporary Perspective on American Antitrust Abroad*, 9 J. INT'L L. & ECON. 233 (1974).

2. B. HAWK, *UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE* 32 (1979).

3. INT'L LAW ASS'N REPORT OF THE FIFTY-FIRST CONFERENCE 369 (Tokyo 1964) [hereinafter cited as TOKYO REPORT].

4. See, e.g., *United States v. Aluminum Co. of America*, 148 F.2d 416 (2nd Cir. 1945), (a "substantial" or a "direct" effect was called for) [hereinafter cited as *Alcoa*]; *United States v. Hamburg - Amerikanische P.F.A. Gesellschaft*, 200 F. 806 (S.D.N.Y. 1911) (the contract directly and materially affects foreign commerce) *rev'd on other grounds*, 239 U.S. 466 (1916); *Thomsen v. Cayser*, 243 U.S. 66 (1917) (the combination affected the foreign commerce of this country); *United States v. General Electric Co.*, 82 F. Supp. 753 (D.N.J. 1949) (although there is no showing as to the extent of commerce restrained, the contract deleteriously affected U.S. commerce); *United States v. National Lead Co.*, 63 F. Supp. 513, (S.D.N.Y. 1945) (with the effect of suppressing imports into and exports from the United States), *mod. and aff'd*, 332 U.S. 319 (1947); *United States v. Timken Roller Bearing Co.*, 83

Case law has tended to reflect the confusion as to what standard should be applied to determine not only what an "effect" is, but also to what degree such an effect must be present.<sup>5</sup> In *United States v. General Electric Co.*, for instance, the court required, that the effects be direct and substantial.<sup>6</sup> However, in the recent decision of *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, the court held that the "effects" were sufficient if they were either direct or substantial.<sup>7</sup> On the other hand, *United States v. Aluminum Co. of America* required evidence that the violators had intended to affect, and had actually affected foreign commerce.<sup>8</sup> One writer goes so far as to suggest that there need not be any effect on commerce as long as the act occurs in the course of foreign commerce.<sup>9</sup> Confusion prevails not only as to the determination of a proper test for effects, but also as to the definition of the terms used to delineate the extent of the impact necessary for jurisdiction to attach. The standards relied on by the courts range from a requirement of direct or substantial to a requirement of direct and substantial.

The International Law Association applied the principles used in cases of common crimes<sup>10</sup> to the effects of economic activity abroad and stated:

The Restatement recognizes that to admit "effects" as a basis of jurisdiction without any qualification as to degree would be to permit well-established principles of international jurisdiction to be overturned by a sidewind [which, it may be added has blown

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F. Supp. 284 (N.D. Ohio 1949) (a direct and influencing effect on trade between the United States and foreign countries.); *United States v. Imperial Chem. Indus. Ltd.*, 100 F. Supp. 504 (S.D.N.Y. 1951) (a conspiracy which which affects American commerce); *Continental Ore Co. v. Union Carbon & Carbide Corp.*, 370 U.S. 690, 704 (1962) (a conspiracy to monopolize or restrain "domestic or foreign commerce of the United States");

5. Jennings, *General Course on International Law*, 121 RECUEIL DES COURS 329, 524 (1967).

6. 82 F. Supp. 753, (D.N.J. 1949); see also W. FUGATE, *supra* note 1, at; KINTNER & JOELSON, AN INTERNATIONAL ANTITRUST PRIMER 26 (1974); Art. 5, *Principles of International Law*, as adopted by the INT'L LAW ASS'N REPORT OF THE FIFTY-FIFTH CONFERENCE 139 (NEW YORK 1972) [hereinafter cited as NEW YORK REPORT].

7. *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 102-03 (C.D. Cal. 1971), *aff'd on other grounds per curiam*, 461 F.2d 1261 (9th Cir. ), *cert. denied* 409 U.S. 950 (1972).

8. *Alcoa*, *supra* note 4, at 444; see also ABA, ANTITRUST LAW DEVELOPMENTS 360 (1975).

9. Rahl, *Foreign Commerce Jurisdiction of the American Antitrust Laws*, 43 ANTI-TRUST L.J. 521, 523 (1974).

10. In cases of common crimes such as fraud and homicide, the conduct and effect are so strongly interconnected that the conduct cannot be classified as criminal but for the effect.

consistently from one direction only]. It attempts, therefore, to introduce a more positive nexus between cause and effect by requiring that the effects be substantial.<sup>11</sup>

An American writer adds to this idea that United States courts "have assumed jurisdiction under the antitrust laws over acts and contracts substantially and directly affecting, or interfering with, United States foreign trade even though such acts were done, or contracts executed outside of our borders."<sup>12</sup>

Despite these formulations of principle, both in the United States and Europe, the need to define "substantiality" still remains. It is useful to consider this term in light of the applications of United States' antitrust laws to extraterritorial acts since it is a familiar term in American antitrust law. It is used in exclusive dealing arrangements, tying clauses, and other situations under both the Sherman and Clayton Acts. The extraterritorial application of the Sherman Act derives its authority from Section 1: "Every contract, combination, . . . or conspiracy in restraint of trade or commerce . . . with foreign nations is declared to be illegal."<sup>13</sup> Furthermore, for Section 1 to be applicable, the restraint must be shown to have a "direct and substantial effect"<sup>14</sup> on either foreign or interstate commerce. In a majority of the foreign commerce cases, when the term "substantial" is used, it seems to imply that the effect of the restraint must not be too slight or de minimis.<sup>15</sup> Even though the courts may rely on this standard, they do not make an effort to measure the magnitude of the effect. The Clayton Act<sup>16</sup> suffers from the same lack of clarity as the Sherman Act. The test of Clayton is whether a "not insubstantial amount of interstate commerce" is affected.<sup>17</sup>

The differences between the expressions used by the courts in assuming jurisdiction are more apparent than real, for each represents a legal conclusion that the relationship between the restraint

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11. INT'L LAW ASS'N REPORT OF THE FIFTY-FOURTH CONFERENCE 235 (The Hague 1970) [hereinafter cited as HAGUE REPORT].

12. W. FUGATE, *supra* note 1, at 20.

13. 15 U.S.C. § 1.

14. W. FUGATE, *supra* note 1, at 55.

15. The "footnote fifty-nine" statement in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940), that "the amount of interstate or foreign trade involved is not material . . . since Section 1 of the [Sherman] Act brands as illegal the character of the restraint and not the amount of commerce affected."

16. Clayton Act 15 U.S.C. § 12.

17. *Id.*

and United States commerce is sufficient to justify the finding of jurisdiction.<sup>18</sup> However, the problem still remains with the vagueness of the "substantial and direct" standards.<sup>19</sup>

The Attorney General's National Committee Report took a different approach in determining a standard when it stated a substantiality requirement whose content was mixed with the law's substantive standards of unreasonableness: "[T]he Sherman Act applies only to those arrangements . . . which have such substantial anti-competitive effects on this country's 'trade or commerce with foreign nations' as to constitute unreasonable restraints."<sup>20</sup> This standard, however, does not appear to have met with judicial approval.

Finally, one authority is of the view that:

The elements of directness and substantiality may be viewed as expressing different ways of asking whether the facts rise to the level of Congressional concern. The relative importance of either would thus vary inversely with changes in the strength of the showing of the other. The less "direct" the restraint is, the more important it becomes to make a convincing showing that it produces a substantial effect. For example, a particular restraint carried out in a foreign market without being a part of an American export or import transaction may be in an "indirect" relation to American commerce; it might nevertheless be brought within the law, but only if a strong case of effect on American exports or imports is made. Conversely, if a restraint is so much a part of a foreign commerce transaction that it is easily seen to have a quite "direct" relation to that commerce, it becomes unimportant to ask how substantial it is.<sup>21</sup>

The preceding analysis of the "direct and substantial effect" test

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18. See Griffin, *A Critique of the Justice Department's Antitrust Guide International Operations*, 11 CORNELL INT'L L.J. 204, 224-25 (1978).

19. Although most of this discussion revolves around substantiality, the directness standard suffers from the same basic flaws. "Directness" as a standard has both the flexibility and the vagueness of the "proximate cause" formula of tort law, which it closely follows. COMMON MARKET AND AMERICAN ANTITRUST: OVERLAP AND CONFLICT, 61 (Rahl ed. 1970) [hereinafter cited as COMMON MARKET].

20. ATTY. GEN. NAT. COMM. ANTITRUST REP. 76 (1955). The ABA ANTITRUST SECTION SUPP. TO ATTY. GEN. NAT. COMM. ANTITRUST REP., ANTITRUST DEVELOPMENTS: 1955-1968, at 47 (1968), summarized the rule, in light of the Restatement, as being that the scope of the antitrust laws "includes the conduct of American nationals, wherever it occurs, if the conduct has substantial anticompetitive effects on the commerce of the United States with foreign nations."

21. COMMON MARKET, *supra* note 19 at 64-65.

indicates that although there has been a great deal of discussion about the "directness" and "substantiality" of the effects, no efforts have been made to define or outline any criteria for either of the two requirements. Therefore, it is reasonable to conclude that the absence of any guidelines results in greater delegation of discretion to the courts than would exist if there were a self-contained test or measure.

In the antitrust area, the doctrine of "effects" is generally accepted in the United States. The commission of the European Economic Community has substantially adopted the doctrine of "effects" in applying its competition rules. Despite the apparent trend, the exact scope of the doctrine has not yet been precisely delineated.

The doctrine of "effects" was first introduced to antitrust law in the opinion of Judge Learned Hand in the *Alcoa* case.<sup>22</sup> This opinion became the foundation for the application of the "effects" doctrine in the antitrust area. In *Alcoa*, the United States moved from the use of "acts" occurring simultaneously in and out of the territory, to "economic effects" within the territory (unaccompanied by the "acts" occurring within the territory) as a jurisdictional base.<sup>23</sup> In prior antitrust cases, some act essential to effectuate the restraint had occurred within the country, and the defendants had included United States corporations.<sup>24</sup> With the exception of *Alcoa*, all foreign commerce decisions upholding Sherman Act jurisdiction were based in whole or in part upon allegations or proof of some conduct within the United States. In the case of foreign defendants, they were found to have either acted or allegedly acted within the United States or abroad pursuant to an agreement with a United States party who had acted within the United States.<sup>25</sup> For instance the controversial case of *United States v. Watchmakers of Switzerland Information Center, Inc.*, contained allegations of conduct with the United States by domestic and foreign members of a Swiss Cartel whose primary purpose was allegedly to regulate the prices of watches exported from Swit-

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22. *Alcoa*, *supra* note 4.

23. *COMMON MARKET*, *supra* note 19, at 382.

24. *Id.*

25. The cartel cases explain this argument: *See e.g.*, *United States v. Imperial Chem. Indus. Ltd.* 100 F. Supp. 504 (S.D.N.Y. 1951); *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284 (N.D. Ohio 1949), *aff'd.* 341 U.S. 593 (1951); *United States v. General Electric Co.*, 82 F. Supp. 753 (D.N.J. 1949); *United States v. National Lead Co.*, 63 F. Supp. 513 (S.D.N.Y. 1945), *aff'd.* 332 U.S. 319 (1947).

zerland to the U.S.<sup>26</sup> *Alcoa* thus became the landmark case in which jurisdiction against foreign nationals<sup>27</sup> was based solely on the "effects" of foreign acts within the United States.

In *Alcoa*, Judge Learned Hand stated that acts committed by aliens outside of the territorial United States are within the subject matter jurisdiction of the United States courts under the Sherman Act "if they were intended to affect imports [into the United States] and did affect them,"<sup>28</sup> notwithstanding the fact that no United States party was involved in this phase of the case and no act took place in the United States. The issue before the court was whether the participation of Aluminum Limited, a Canadian corporation formed to take over the properties of the Aluminum Company of America outside the United States, in an "alliance" with certain other foreign producers of ingot, was a violation of the United States antitrust laws. In determining whether Congress intended the Sherman Act to apply to an "alliance" agreement, Judge Hand effectively adopted<sup>29</sup> what was later to be known as an

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26. See *United States v. Watchmakers of Switzerland Information Center, Inc.* (1963) Trade Cas. para. 70, 600 (S.D.N.Y. 1962), *order modified*, (1965) Trade Cas. para. 71, 352 (S.D.N.Y. 1965) [hereinafter referred to as *Swiss Watch*].

27. The fact that a party is a United States national should not by itself support Sherman Act jurisdiction. See, RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES, § 30 (1965) [hereinafter cited as RESTATEMENT]; See e.g., *Pacific Seafarers Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804, 815 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969).

28. *Alcoa*, *supra* note 4, at 444.

29. Specifically, Judge Hand wrote:

[W]e are concerned only with whether Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it. That being so, the only question open is whether Congress intended to impose the liability, and whether our own Constitution permitted it to do so; as a court of the United States we cannot look beyond our own law. Nevertheless, it is quite true that we are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the "Conflict of Laws." We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States. *American Banana Co. v. United Fruit Co.* 213 U.S. 347, 357; *United States v. Bowman*, 260 U.S. 94, 98; *Blackmer v. United States*, 284 U.S. 421, 437. On the other hand it is settled law — as "Limited" itself agrees that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the State reprehends; and these liabilities other States will ordinarily recognize. *Strassheim v. Daily* 221 U.S. 280, 284, 285; *Lamar v. United States*, 240 U.S. 60, 65, 66; *Ford v. United States*, 273, U.S. 593, 620, 621; *Restatement of Conflict of Laws*, § 65.

Both agreements would clearly have been unlawful had they been made within the United States; and it follows from what we have just said that both were

"intent-effects" test:

- i) There must be *both* an intent to and an *effect* on United States imports or exports for application of the Sherman Act;
- ii) If there is an *effect but no intent*, then there is no Sherman Act jurisdiction because of the "international complications likely to arise" which in turn make it "safe to assume that Congress certainly did not intend the Act to cover them."
- iii) And if there is an *intent but no effect*, it was held that the Sherman Act does not apply.<sup>30</sup> But at the same time, however, it had been stated that there need be no actual intent to violate the antitrust laws.<sup>31</sup> In fact, a foreigner might violate these laws without fully understanding them or, in an extreme situation, without even knowing they exist.<sup>32</sup>

The decision in *Alcoa* actually represented a deviation from prior holdings of the United States courts. Although Judge Hand called it "settled law," the statement was not entirely accurate, at least not in 1945.<sup>33</sup> Nevertheless, it has since become settled law in the United States.<sup>34</sup> The most important feature of the *Alcoa* case was the extension of the traditional application of the objective territorial principle of jurisdiction to the economic effects of wholly foreign conduct of a kind which other nations generally did not recognize as a crime or even as a tort.<sup>35</sup>

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unlawful, though made abroad, if they were intended to affect imports and did affect them. . . .

30. B. HAWK, *supra* note 2, at 28.

31. See *United States v. General Elec. Co.*, *supra* note 4, at 891; KINTNER AND JOELSON, *supra* note 6 at 27-28.

32. This position seems to be suggested by KINTNER AND JOELSON *Id.*, as well as by FUGATE, *supra* note 1, at 48.

33. B. HAWK, *supra* note 2, at 33.

34. The "effects" doctrine or some variation thereof has also appeared outside the anti-trust area, such as securities regulation.

35. COMMON MARKET, *supra* note 19, at 384-85; Professor Jennings stated that the application of the objective territorial principle "to a trade arrangement made between aliens abroad which has repercussions on United States imports or exports . . . becomes no longer a fulfillment, but a reversal of the principle of territoriality." This explains, he states, "the controversy which has long dogged the judgment of . . . [Judge Hand in *Alcoa*], a decision not right on the merits but highly controversial in its reasoning. From the proposition that 'it is settled law that any State may impose liabilities, even upon persons not within its allegiance for conduct outside its borders that has consequences within its borders'; the Judge felt able to say of the agreements in question: [quoting last paragraph of excerpt from Judge Hand: opinion set forth at *supra* note 29]. But of course the fact is that there can be very little in the way of significant commercial activity that does *not* have repercussions upon United States trade. The principle of territoriality has at this point become void of real content and has become a mere way of talking whilst exercising *extraterritorial* jurisdiction." *Supra* note 4 at 519-20.



The decision in *Alcoa*, viewed as a statement on international law, has been subject to a vast array of critical comments by both American<sup>36</sup> and foreign writers.<sup>37</sup> There have been three major criticisms. First, the adoption of the "effects" doctrine of extraterritorial jurisdiction is considered to be inconsistent with the principles of public international law.<sup>38</sup> Second, the application of the "effects" doctrine is considered to be an export of one State's economic and political values to other States.<sup>39</sup> Third, the "intent and effect" test effectively adopted in *Alcoa*, is considered to lack clarity and be of questionable operability.<sup>40</sup>

As to the first criticism, there is no doubt that international law is not sufficiently clear regarding the exact limits of the extraterritorial application of national legislation.<sup>41</sup> Moreover, United States judges have a different perception of international law as compared to the international law jurists.<sup>42</sup>

The second criticism relates to the application of the doctrine of "effects." The classic statement of the doctrine appears in the

36. See, e.g. Haight, *International Law and Extraterritorial Application of the Antitrust Laws*, 63 YALE L.J. 639 (1954); Raymond, *A New Look at the Jurisdiction in Alcoa*, 61 AM. J. INT'L. L. 558 (1967); Whitney, *Sources of Conflict Between International Law and the Antitrust Laws*, 63 YALE L.J. 655 (1954). Contra, Timberg, *Extraterritorial Jurisdiction Under the Sherman Act*, 11 REC. OF BAR ASS'N OF CITY OF N.Y. 101 (1956); Cf. Brewster, *Extraterritorial Effects of the U.S. Antitrust Laws: "An Appraisal,"* 11 ABA ANTITRUST SECTION REP. 65, 69 (1957); Miller, *Extraterritorial Effects of Trade Regulation*, 111 U. PA. L. REV. 1092. (1963).

37. Jennings, *supra* note 5; Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 1, 100-06 (1964); Kahn-Freund, *Extraterritorial Application of Antitrust Laws*, ABA SECTION OF INT'L. & COMP. L. 1957 PROCEEDINGS 33; Verzijl, *The Controversy Regarding the So-Called Extraterritorial Effect of the American Antitrust Laws*, 8 NEDERLANDS TIJDSCHRIFT VOOR INT'L RECHT 3 (1961); TOKYO REPORT, *supra* note 3, at 370-84 (Riedweg, Rapporteur); Cf., Report to the Consultative Assembly of the Council of Europe by the Legal Committee (deGrailly, Rapporteur), *The Extra-Territorial Application of Anti-Trust Legislation*, Doc. 2023 (Jan. 25, 1966).

38. *Supra* notes 32 and 33.

39. This kind of criticism is aimed more towards the extraterritorial application of anti-trust laws rather than with *Alcoa's* test. For a recent Canadian criticism, see Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad*, 11 CORNELL INT'L. L.J. 195, 210-11 (1978).

40. Hawk's work sets forth these three criticisms. B. HAWK, *supra* note 2, at 31.

41. E.g., cf. COMMON MARKET, *supra* note 19, ch. 7.; See generally, I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* Ch. XIV (2d ed. 1973); 6 WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 118-83 (1968).

42. In *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 609 (9th Cir. 1976), the court stated:

"[I]t is evident that at some point the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction."

majority opinion of the *S.S. Lotus* decision of the Permanent Court of International Justice.<sup>43</sup> The *Lotus*, a French ship, collided on the high seas with a Turkish ship, resulting in the drowning of a number of persons on board the Turkish ship. On arrival of the *Lotus* in Turkey, the Turkish Government brought criminal proceedings for involuntary manslaughter against the officer of the watch on the *Lotus*, pursuant to a Turkish law providing for punishment of any foreigner who "commits an offense abroad to the prejudice of Turkey or of a Turkish subject. . . ." The case was brought before the Permanent Court of International Justice, where France argued that such prosecution is a violation of international law. A majority of the Court sustained Turkey's right to proceed on the basis of the territorial principle, stating:

No argument has come to the knowledge of the Court from which it could be deduced that states recognize themselves to be under an obligation towards each other only to have regard to the place where the author of the offence happens to be at the time of the offence. On the contrary it is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there

. . . . .  
Consequently, once it is admitted that the effects of the offence were produced on the Turkish vessel, it becomes impossible to hold that there is a rule of international law which prohibits Turkey from prosecuting Lieutenant Demons because of the fact that the author of the offence was on board the French ship.<sup>44</sup>

The Permanent Court in the *Lotus* case was dealing with an instance of direct physical harm — a collision on the high seas — and it is certain that they had no thought that this case would be adapted to such diverse cases as those relating to extraterritorial application of the antitrust laws.<sup>45</sup> The Court itself felt "obliged . . . to recall that its examination is strictly confined to the specific situation in the present case, for it is only in regard to this situation that its decision is asked for."

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43. *S.S. Lotus*, (Fr. v. Turk.) 1927 P.C.I.J., Ser A, No. 10 at 22 (Judgment of Sept. 7).

44. *Id.* at 23.

45. Jennings, *supra* note 5, at 520.

In a discussion of the *Lotus* decision and its applicability to a situation factually diverse from that of *Lotus*, Professor Jennings states:

It is reasonable nevertheless to look at the principle as it is expressed in the judgment to see whether it contains within itself qualifications that might assist in a different kind of case. The term effects which has been erected into a doctrine means of itself nothing more than results or consequences. But it is not the single, unqualified word "effects," which forms the principle on which the Court relied, but the whole phrase . . . . This shows that by "effects" is meant activity that is not a mere repercussion or consequence, but activity that is a 'constituent element' of the crime charged.<sup>46</sup>

If the constituent element of an offense takes place in a State's territory, a proper identification of the "constituent elements" sufficient to comprise a specific economic crime is required. The problem with this approach is that what might be considered a "constituent element" by State A in a particular crime may not be treated in the same manner by State B. The Restatement elucidates:

The fact that a substantial number of States with reasonably developed legal systems do not recognize certain conduct and its effects as constituent elements of crime or torts does not prevent a State which chooses to do so from prescribing rules which make such conduct and its effects as constituent elements of activity which is either criminal, tortious or subject to regulations.<sup>47</sup>

To use "constituent elements" as a basis of assuming jurisdiction without any fixed criteria is to give the states wide discretion to interpret the concept of "constituent element," thereby causing further controversy. Nevertheless, the "effects" doctrine has been adapted by the Common Market.<sup>48</sup>

The third criticism of *Alcoa* — lack of clarity and operational vagueness — is probably the most severe.<sup>49</sup> One writer states that

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46. *Id.*, at 520-21.

47. RESTATEMENT, *supra* note 27, at 50.

48. B. HAWK, *supra* note 2, Ch. 8.

49. B. HAWK, *supra* note 2, at 34.

In dealing with the element of intent in foreign trade it is important to draw a distinction between an intent to affect U.S. foreign trade and an intent to restrain such trade. The former, if it has any relevance at all, has to do with jurisdiction: Did the acts or contracts in question directly and substantially affect U.S. foreign trade?

"while the *Alcoa* 'intent and effect' test may appear simple in its formulation, its actual operation belies such simplicity."<sup>50</sup> Although Judge Hand relied on "intent" and "effect", one might say that "intent" is the more important of the two elements of the *Alcoa* test.<sup>51</sup> However, there is another writer who argues that *Alcoa* is essentially an "effects" tort, and that the "intent" is not of primary importance. "The necessary intent is merely a general intent to affect U.S. commerce and may be satisfied by the rule that a person is presumed to intend the natural consequences of his actions. Thus, if effects are demonstrated, proof of intent would not appear to be a great problem."<sup>52</sup> It would seem that to opt for either one of the two elements as more important than the other is highly controversial.<sup>53</sup>

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Considering the question of intent without actual effect first, Judge Hand in *Alcoa* stated that "for argument we shall assume that the act does not cover agreements, even though intended to affect imports or exports, unless its performance is shown actually to have had some effect upon them." *Alcoa*, 148 F.2d at 444.

The governing rule in interstate commerce is that a contract or conspiracy to restrain trade is illegal irrespective of whether put into practice or not, and in cases other than *Alcoa*, there is considerable authority for the proposition that it is sufficient in foreign trade cases for the government in an antitrust action merely to show an unlawful contract.

The question now to be considered is, whether there must be a specific intent to restrain trade, assuming that the acts come within the U.S. foreign trade jurisdiction under the Sherman Act. As far as interstate commerce is concerned the rule is clear. The Supreme Court in *United States v. Addyston Pipe & Steel Co.* stated: "If the necessary direct and immediate effect of the contract be to violate an act of Congress and also to restrain and regulate interstate commerce, it is manifestly immaterial whether the design to so regulate was or was not in existence when the contract was entered into." 175 U.S. 211, 234 (1899). Earlier in the opinion, 175 U.S. at 228, the Court stated that Congress had the power to prohibit contracts "where the natural and direct effect of such a contract will be, when carried out, to directly and not as a mere incident to other and innocent purposes regulate to any substantial extent interstate commerce. (And, when we speak of interstate commerce, we also include in our meaning foreign commerce.)" See also, *United States v. Griffith*, 334 U.S. 100, 108 (1948); *United States v. Patten* 226 U.S. 525, 543 (1913). This rule has also been applied generally in the foreign commerce cases.

In *United States v. General Electric Co.*, 82 F. Supp. 753, 891 (D.N.J. 1949), in an answer to an objection by the foreign company, the court quoted from *Griffith* that a specific intent is not always necessary and that "[i]t is sufficient that a restraint of trade, or monopoly results as the consequence of a defendant's conduct or business arrangements." *United States v. Griffith* 334 U.S. 100, 105 (1948). "Thus it would appear that in foreign as well as in interstate commerce, no specific intent to restrain foreign trade is required and an intent to restrain is presumed if the direct and natural consequences of the acts of the parties have that effect." W. FUGATE, *supra* note 1, at 51.

50. W. FUGATE, *Id.*

51. *Id.*

52. *Id.* at 48.

53. "Fugate's argument is unpersuasive for two reasons. First, it is inconsistent with Hand's unequivocal statement that Congress did not intend the Sherman Act to apply where there are effects but no intent. Second, and more importantly, application of the

Since 1945 a number of reformulations of *Alcoa* have been offered. In 1955 the report of the Attorney General's Committee to study antitrust laws stated:

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

We believe that conspiracies between foreign competitors alone should come within the Sherman Act only where they are intended to, and actually do result in substantial anti-competitive effects on our foreign commerce.<sup>54</sup>

Nevertheless, *Alcoa* became the major source of support for the controversial rule of the *Restatement (Second) of Foreign Relations Law of the United States*, which states:

18. Jurisdiction to Prescribe with Respect to Effect within Territory.

A State has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either (a) the conducts and its effects are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or (b) (i) the conduct and its effects are constituent elements of activity to which the rule applies;

(ii) the effect within the territory is substantial;

(iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and

(iv) the rule is not inconsistent with the principle of justice generally recognized by states that have reasonably developed legal systems.<sup>55</sup>

It has been observed by one writer that "[t]his draft is by no means free from difficulty, not least in introducing a question of causation into the equation. . . ."<sup>56</sup> In addition, the principle of jurisdiction expounded by Judge Hand in *Alcoa* and stated in the

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Sherman Act in such a situation would cover an overly broad range of arrangements, many of which would neither implicate the policies underlying the Sherman Act nor be of sufficient implication to justify the resulting enforcement costs and possible international conflicts." B. HAWK, *supra* note 2, at 34.

54. ATTY. GEN. NAT'L COMM. ANTITRUST REP., *supra* note 20, at 76.

55. RESTATEMENT, *supra* note 27, § 18.

56. Jennings, *supra* note 5, at 521.

Restatement has not been subscribed to by all states having reasonably developed legal systems.<sup>67</sup> It has been further stated that

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57. A European Advisory Committee, with Lord McNair as Chairman, and Professors Francois Seidl-Hohenveldern and Johnson as Reporter and Secretary, respectively, was appointed by the American Law Institute in 1958 to advise on certain sections of the draft Restatement of the Foreign Relations Law of the United States relating to jurisdiction. While certain revisions were made on the recommendation of this Committee, the recommendations relating to the exercise of jurisdiction with respect to conduct occurring outside the territory of the prescribing State were not adopted.

The draft Section on scope of jurisdiction submitted to the Committee reads as follows:

8. A state has jurisdiction to prescribe rules attaching legal consequences to conduct, including rules relating to property, status or other interests, with respect to conduct occurring:

- (a) in its territory;
- (b) partly within and partly outside its territory;
- (c) entirely outside its territory if the conduct has, or is intended to have, effects within its territory which have a reasonably close relationship to the conduct.

TOKYO REPORT, *supra* note 3, at 537.

The European Advisory Committee's report on this draft said:

We propose here a major change, the first major change we have so far proposed. This is that paragraph (c) should be deleted . . .

The principal reason is simply one of logic. We do not see how a State's jurisdiction to prescribe rules relating to conduct outside its territory - assuming such jurisdiction exists can be said to be 'jurisdiction based on territory . . .'

To make our position absolutely plain, we would say that we agree with the sentence in the commentary . . . to the effect that the 'mere fact that the conduct takes place partly or completely outside of the territory does not bar the State from dealing with it.' But we do not agree with the sentence which immediately precedes this one, namely, the sentence which reads '[a] State may, when there is sufficient relationship between its territory and conduct occurring outside out it, *treat such conduct on the same basis as conduct occurring in its territory.*' The words in *italics* seem to us to be illogical and tend to make more difficult a sound classification of the various bases of jurisdiction. . . .

We wish to make it plain that this recommendation is not connected with any view we may have formed as to the proper limits for the extraterritorial application of the United States anti-trust laws . . . But, even if we should hold the view that in no instance has the application of the United States anti-trust laws exceeded the proper limits fixed by international law, we should still recommend the suppression of paragraph (c) for the reason which we have already mentioned, namely, that the exercise of jurisdiction over conduct occurring entirely outside the territory could not constitute a form of jurisdiction based on territory.

It will be noticed that our recommendation in regard to section 8 would bring that section very much into line with Article 3 of the Harvard Draft Convention on Jurisdiction with Respect to Crime (1935). Indeed, we find ourselves in agreement with that article and its underlying reasoning . . .

Where we seem to differ from the reporters of Tentative Draft No. 2 is in drawing a distinction - which is also drawn by the reporters of the Harvard Research Draft - between the 'essential constituent elements' of the criminal conduct on the one hand and its mere 'effects' on the other hand. In our view, the exercise of 'Jurisdiction based on Territory' is not justified in cases where all that has occurred within the territory is the effects of certain conduct and not at

"while the factors enumerated by the Restatement may well be reasonably prerequisite to a State's justifiably prescribing rules to govern foreign conduct, they nonetheless fail adequately to define limits of jurisdiction which are acceptable under theretofore established principles of international law as interpreted by most leading commercial nations."<sup>58</sup>

The most important question which arises in relation to this third criticism, is whether, under principles of international law, a State may legally assume jurisdiction over conduct by foreigners abroad only because of "effects," even though the relevant effects are limited to ones which the State determines are "constituent elements" of the act. The mere verdict by the State or its courts is not itself a conclusive basis of jurisdiction under international law, at least not jurisdiction based on any modification of the territorial principle.<sup>59</sup> Moreover, it is not only the assumption of jurisdiction

least part of the conduct itself. *Id.* at 538-39 [hereinafter cited as European Communities].

*Cf.* Professor Metzger's criticism of the final draft of section 18 - with the exception of the 'constituent elements' formula in para. (b)(1). Metzger, *The Restatement of the Foreign Relations Law of the United States: Bases and Conflicts of Jurisdiction*, 41 N.Y.U.L. Rev. 7, 15 (1966).

Comment *f* of Section 18 specifically notes that "[t]he fact that a substantial number of states with reasonably developed legal systems do not recognize certain conduct and its effects as constituent elements of crimes or torts does not prevent a State which chooses to do so from prescribing rules which make such conduct and its effects constituent elements of activity which is either criminal, tortious, or subject to regulation." Nor would a particular rule be deemed inconsistent with "generally recognized principles of justice" by virtue of the fact that "most States with reasonably developed legal systems [do not] . . . have a similar rule." *RESTATEMENT*, *supra* note 27, § 18, comment *g*.

58. *COMMON MARKET*, *supra* note 19, at 390.

59. *Id.* at 391. In 1972 the International Law Association, in reformulating the proposed rules of international law, offered the following provisions:

#### ARTICLE 3

(1) A State has jurisdiction to prescribe rules governing the conduct of an alien outside of its territory provided:-

- a) part of the conduct being a constituent element of the offence occurs within the territory; and
- b) acts or omissions outside the territory are constituent elements of the same offence.

(2) Whereas municipal law is the sole authority for the purpose of ascertaining the constituent elements of a particular offence, international law retains a residual but overriding authority to specify what is or is not capable of being a constituent element for the purpose of determining jurisdictional competence.

#### ARTICLE 4

A State has jurisdiction to prescribe rules governing conduct originating outside its territory if and in so far as such conduct is implemented within its territory by any natural or legal person whose conduct can be attributed to the author of the conduct performed abroad.

based on effects which is in dispute, but whether there should be limitations on the enforcement measures and orders employed by the court.<sup>60</sup> If Section 18 of the Restatement provides a valid basis for the assumption of jurisdiction by the United States, then the same holds true for other States if they discern "effects" within their territory.

## II. THE *Timberlane* Decision AND THE DOCTRINE OF COMPARATIVE RELATIONS

In *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*,<sup>61</sup> the court took a new approach to the issue of territorial application of jurisdiction. Judge Choy pointed out that the "effects" test as previously applied by the courts, was "by itself . . . incomplete, and did not show the proper respect for the sovereignty of other nations. . . ."<sup>62</sup> [I]t is evident that at some point the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction."<sup>63</sup> The court also suggested that emphasis laid on "substantial effects" may not be entirely appropriate or may be confusing in foreign commerce matters, thereby obscuring the issue of "whether the interests of and connections to the United States are sufficient, vis-à-vis foreign States, to justify extraterritorial application."<sup>64</sup> The court stated:

An effect on United States commerce, although necessary to the exercise of jurisdiction under the antitrust laws, is alone not a sufficient basis on which to determine whether American authority should be asserted in a given case as a matter of international comity and fairness. In some cases, the application of the direct and substantial test in the international context might open the door too widely by sanctioning jurisdiction over an ac-

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### ARTICLE 5

A State has jurisdiction to prescribe rules of law governing conduct that occurs outside its territory and causes an effect within its territory if:

- a) the conduct and its effect are constituent elements of activity to which the rule applies;
- b) the effect within the territory is substantial, and
- c) it occurs as a direct and primarily intended result of the conduct outside the territory. *NEW YORK REPORT*, *supra* note 6, at 139.

60. This point is illustrated by the *Swiss Watch* case, *supra* note 26.

61. 549 F.2d 597 (9th Cir. 1976) [hereinafter cited as *Timberlane*].

62. *Id.* at 611-12.

63. *Id.* at 609.

64. *Id.* at 613.



tion when these considerations would indicate dismissal. At other times, it may fail in the other direction, dismissing a case for which comity and fairness do not require forbearance, thus closing the jurisdictional door too tightly — for the Sherman Act does reach some restraints which do not have both a direct and substantial effect on the foreign commerce of the United States. A more comprehensive inquiry is necessary. We believe that the field of conflict of laws presents the proper approach . . . .<sup>65</sup>

The *Timberlane* case called for a tripartite analysis for all cases involving the extraterritorial reach of the antitrust laws, rather than an “effects” test:

- 1) Does the alleged restraint affect or was it intended to affect the foreign commerce of the United States?
- 2) Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act?
- 3) As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?<sup>66</sup>

The change in approach suggested by the first two questions is separating the consideration of subject matter jurisdiction from the consideration of the existence of a substantial violation of the antitrust laws.<sup>67</sup> These two issues involve two different kinds of “effects” which, as previous cases have emphasized, require individual treatment.<sup>68</sup> The first question deals with the effect on for-

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65. *Id.*

66. *Id.* at 615.

67. A conscious effort on part of the court to separate these two questions can be judged from the changes made in the *Timberlane* opinion before it was published. In the slip opinion, the section dealing with the “effects doctrine” was entitled *Subject Matter Jurisdiction*, and there was no mention of the tripartite analysis. In the amended opinion, this section is entitled the *Extraterritorial Reach of the United States Antitrust Laws* and covers not only subject matter jurisdiction, but also an examination of the effects needed to state a claim and a conflicts approach to be taken by courts to determine whether jurisdiction should be exercised. The major purpose of the amended opinion was to clarify the role of these three parts in the analysis of the case. The change in title as mentioned above, emphasizes that the tripartite analysis is not limited to the issue of subject matter jurisdiction. Question two is not relevant to the issue of whether jurisdiction exists; it is aimed at the merits of the case. Compare 549 F.2d at 608, 612-13 with *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, Civ. No. 74-2142, at 15, 22-23 (9th Cir. Dec. 27, 1976).

68. See, e.g., *Rasmussen v. American Dairy Ass'n*, 472 F.2d 517, 521-22 (9th Cir. 1972), cert. denied, 412 U.S. 950 (1973); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd on other grounds per curiam*, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950 (1972). See also, Comment, *The Confusing World of Interstate Commerce and Jurisdiction Under the Sherman Act*, 21 VILL. L. REV. 721, 724-25 & n. 28

eign commerce, whereas the second addresses itself to an effect on competition, the essential element of any antitrust violation.<sup>69</sup>

The court viewed the first question as the single determining factor as to the existence of subject matter jurisdiction. However, the extent to which this effect must be felt in order to assume jurisdiction has rarely been taken into consideration, even in domestic antitrust matters.<sup>70</sup>

One writer is of the opinion that "[i]f the *Timberlane* approach to subject matter jurisdiction is followed it is difficult to envision a foreign act which will not be deemed to have some effect upon our foreign commerce. Taken by itself, the first part of *Timberlane's* tripartite test asserts United States jurisdictional power to a greater extent than has ever before been suggested."<sup>71</sup> Thus, the first test would extend the United States jurisdiction further over acts which were *intended* to affect its foreign commerce, even if they did not actually affect it. Such acts represent an unprecedented and unilateral extension of jurisdictional power, thereby causing concern to other States.

The second question, whether there is a violation of the Sherman Act, is clearly directed at the merits of the case.<sup>72</sup> It presupposes that the basic requirements of subject matter jurisdiction have been met and proceeds to ask whether the facts are sufficient to state a claim under the antitrust laws.<sup>73</sup> The opinion itself did not give any guidance for future applications of the first two tests. It merely noted the allegation that the activities of the Bank of America "were intended to, and did, affect . . . the flow of United States foreign commerce,"<sup>74</sup> and on that basis found the requisite federal jurisdiction. As to the second question, Judge Choy asserted that "the magnitude of the effect alleged . . . [was] sufficient to state a claim."<sup>75</sup> In a footnote, however, he did point out that those domestic antitrust cases requiring a substantial effect on commerce could "offer some guidance for determining the degree of restraint necessary to support a claim for relief in the foreign

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(1976).

69. Occidental Petroleum Corp. v. Buttes Gas & Oil Co., *Id.*

70. ABA, ANTITRUST LAW DEVELOPMENTS, *supra* note 8.

71. Fry, *Antitrust - Extraterritorial Jurisdiction Under the Effects Doctrine - A Conflict Approach*, 46 FORDHAM L. REV. 354, 357-58 (1977).

72. See, *supra* note 67.

73. See, Fed. R. Civ. P. 12(b)(6).

74. *Timberlane*, *supra* note 61, at 615.

75. *Id.*

commerce context as well.”<sup>76</sup> Judge Choy noted further that in domestic interstate cases a “‘substantial’ restraint [effect on competition] [was] in any event necessary for the establishment of jurisdiction itself.”<sup>77</sup>

The third and most important test, grows primarily out of the court’s recognition of international comity considerations frequently present in foreign commerce cases. The court put forth the question, “whether the interests of, and links to, the United States — including the magnitude of the effect on the foreign commerce — are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority?”<sup>78</sup>

In answering that question, the opinion sets forth the following criteria:

- (1) the degree of conflict with foreign law or policy,
- (2) the nationality or allegiance of the parties and the location or principal places of business of corporations,
- (3) the extent to which enforcement by either state can be expected to achieve compliance,
- (4) the relative significance of effects on the United States as compared with those elsewhere,
- (5) the extent to which there is explicit purpose to harm or affect American commerce,
- (6) the foreseeability of such effect, and
- (7) the relative importance to the violations charged of conduct within the United States as compared with the conduct abroad.<sup>79</sup>

Having outlined the “conflict,” the courts in the United States must then determine whether, in the face of it, the contacts and interest suffice to justify the United States taking extraterritorial jurisdiction.<sup>80</sup>

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76. *Id.* at 615 n. 35.

77. *Id.* Judge Choy relied on *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976). This reliance reflects a misreading of that case. The issue in this case was whether the actions allegedly taken by a local hospital and its officers to prevent the expansion of another local hospital constituted an anticompetitive restraint substantially affecting interstate commerce. The court held, that, because an increase in purchases of supplies from out of state would result from any expansion, any activities restricting such an expansion would substantially affect interstate commerce, 425 U.S. at 744. Fry, *supra* note 71, at 362.

78. *Timberlane*, *supra* note 61, at 613.

79. *Id.* at 614.

80. Shenefield, Assistant Attorney General in Charge of the Antitrust Division has stated that *Timberlane* does not require a balancing of “interests of the United States parties against those of the [foreign] nations,” but rather “that the interests of the United

In the past two decades, these standards have been recommended by some writers,<sup>81</sup> one of whom has suggested that "taking all things into consideration [in applying the old effects doctrine] we were showing a politically unwise disrespect for the interests and prerogatives of other nations."<sup>82</sup> In *Timberlane*, the court relied heavily on the proposals suggested by Brewster,<sup>83</sup> and also on the conflict of laws approach in the *Restatement (Second) of Foreign Relations Law*.<sup>84</sup>

A reliance on Section 40 and on the criteria established by the court has been questioned on several grounds.<sup>85</sup> Professor Rahl comments:

[T]he idea of balancing "vital national interests" of other nations by a national court is likely to seem somewhat presumptuous to the foreign state concerned, notwithstanding the qualifications of the judges. "Self-judging" is not likely to elicit enthusiasm from those who are judged to be wrong — especially since what is involved falls outside the area of generally accepted crimes and torts.<sup>86</sup>

He further states that, "[r]eliance upon Sections 18(b) and 40 of the Restatement clearly will not suffice."<sup>87</sup>

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States in prosecuting the violation be measured both quantitatively and qualitatively against the potential damage to United States foreign relations generally that might result." Shenefield, Address before the ABA International Law Section in New York, August 9, 1978.

81. See F. BREWSTER, TRUST AND AMERICAN BUSINESS ABROAD 445-46 (1958); COMMON MARKET, *supra* note 19, at 409-16; Victor, *Multinational Corporations: Antitrust Extraterritoriality and the Prospect of Immunity*, 8 J. INT'L L. & ECON. 11, 27-28 (1973); Zwarenstein, *The Foreign Reach of the American Antitrust Laws*, 3 AM. BUS. L.J. 163, 170-71 (1965).

82. F. BREWSTER, at 286.

83. Brewster recommended that the following criteria be considered: "(a) the relative significance to the violations charged of conduct within the United States as compared with conduct abroad; (b) the extent to which there is explicit purpose to harm or affect American consumers or American's business opportunity; (c) the relative seriousness of effects on the United States as compared with those abroad; (d) the nationality or allegiance of the parties or in the case of business associations, their corporate location and the fairness of our applying the law to them; (e) the degree of conflict with foreign laws and policies; and (f) the extent to which conflict can be avoided without serious impairment of the interests of the United States or the foreign country." *Id.*, at 446.

84. Section 18 of the Restatement deals with the prescriptive jurisdiction of a State to prescribe rules of law. Section 40 modifies the impact of Section 18, and the balance of the court's criteria were borrowed from Section 40 of the Restatement.

85. B. HAWK, *supra* note 2, at 42-43.

86. *Id.* at 44.

87. *Id.*

Since *Alcoa*, *Timberlane* is the most important decision relevant to the "extraterritorial" application of the Sherman Act.<sup>88</sup> *Timberlane* has outlined the steps necessary to analyze questions of jurisdiction over extraterritorial antitrust violations, but unfortunately the court did not make a definite statement of when extraterritorial jurisdiction will be exercised. By leaving this issue unanswered, the exercise of extraterritorial jurisdiction is still at the discretion of the court. By weighing the interests of other nations against those of the United States, the court attempted to show its deference to the sovereignty of other nations. However, the fact remains that it is still the United States courts that will decide whether the United States laws should apply to acts abroad. Furthermore, the Justice Department's International Antitrust Guidelines are quite consistent with the decision in *Timberlane*<sup>89</sup> and reflect governmental support for the doctrine of "effects," which adds yet another factor to the problem of extraterritoriality.

The recent case law in the United States supports the adoption of a comparative relation analysis. In three recent decisions,<sup>90</sup> the courts have applied a conflict of laws analysis in order to determine whether jurisdiction should be exercised. This analysis, which evaluates a full range of relevant factors in order to determine the question of jurisdiction, is clearly a better tool than the more restricted effects test.<sup>91</sup> The comparative relations test would determine which State's rules should govern a situation<sup>92</sup> on the basis of which State has the most powerful relation-based interest in regulating the relevant conduct. This test itself has general formula-

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88. *Id.*

89. U.S. Dept. of Justice, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 6-7 (1977), reprinted in 5 TRADE REG. REP. (CCH) ¶ 50,309 (Mar. 14, 1977).

90. For the analysis of *Timberlane*, see preceding discussion. See discussion below for the two other recent decisions.

91. In *Montreal Trading Ltd. v. Amax, Inc.*, the court, after applying the "balancing" test prescribed in *Timberlane*, declared itself to be without jurisdiction because the extraterritorial action had "too insignificant an effect on . . . commerce to justify federal court jurisdiction." The renunciation of jurisdiction was not, however, based on the application of international law. No. 79-1999 (10th Cir., Oct. 14, 1981). Comment, *Defenses to Actions Against Foreign States Under the United States Antitrust Laws*, 20 HARV. J. INT'L L. 583, 617 (1979).

92. "[S]urely the test which determines whether United States law is applicable must focus on the nexus between the parties and their practices and the United States, not on the mechanical circumstances of effect on commodity exports or imports." *Pacific Seafarers Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804, 815 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969). See generally, Trautman, *The Role of Conflicts Thinking in Defining the International Reach of American Regulatory Legislation*, 22 OHIO ST. L.J. 586 (1961).

tions.<sup>93</sup> The strongest factor against such a test lies in the fact that the domestic court would sit as a transnational court and make a comparative determination of which State's law should govern. Professor Falk remarks: "The essence of horizontal order [the situation in which there is no centralized authority] is that rational self-limitation should take maximum account of the existence of other states and give effect to a mutually satisfactory standard of reciprocity."<sup>94</sup> Justice Jackson stated it thus:

[I]n dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our laws to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.<sup>95</sup>

The reciprocal self-limitation among States and the treatment accorded by one State to another needs to be strengthened. It has been said that: "If states and their courts act so as to promote such a value, rather than mere reciprocity, the division tendencies of a system based upon state sovereignty might well be ameliorated."<sup>96</sup>

The third circuit, in *Mannington Mills Inc. v. Congoleum Corp.*,<sup>97</sup> followed the *Timberlane* approach of applying a conflict of laws analysis to the jurisdictional issue. The case involved allegations that the defendant, a United States corporation, fraudulently obtained foreign patents which were used as a means to harm the plaintiff. Under the *Alcoa* "intent and effects" test, the court noted the existence of subject matter jurisdiction.<sup>98</sup> However, the court

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93. See, e.g., Fortenberry, *Jurisdiction Over Extraterritorial Antitrust Violations - Paths Through the Great Grimpen Mire*, 32 OHIO ST. L.J. 519 (1971).

94. R. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* 51 (1964).

95. *Lauritzen v. Larsen*, 345 U.S. 571, 582 (1953).

96. Comment, *supra* note 91, at 618. The Restatement (Second) of the Conflict of Laws states: "When there is no such [statutory] directive, the factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue . . ." Kintner, Joelson and Vaghi, *Groping for a Truly International Antitrust Law*, 14 VA. J. INT'L L. 75, 77 (1973) states: "It is submitted that the legal system of any one country is inadequate in its efforts to curb restrictive business practices in an international setting both because of the inherent limitations of a system which is based primarily on protection of one's own national market and industry . . ."

97. 595 F.2d 1287 (3d Cir. 1979). For a general discussion on the case, see, *Foreign Investment: Joint Venture Law*, 20 HARV. INT'L L.J. 667 (1979).

98. *Id.* at 1292. The court noted that the "intended effects" test has been approved by

then considered whether jurisdiction should be exercised,<sup>99</sup> agreeing mainly with *Timberlane* on the factors to be considered.<sup>100</sup>

In *Dominicus Americana Bohio v. Gulf & Western Industries*,<sup>101</sup> the district court agreed with *Timberlane* and *Mannington Mills* that "the effects test alone is inadequate, because it fails to take into account potential problems of international comity."<sup>102</sup> However, the court did not indicate which approach to the comparative relations doctrine is best; it did not choose between the use of the doctrine as a threshold test and its use as a doctrine of abstention.<sup>103</sup>

It is highly desirable that certain rules to regulate anti-competitive conduct are formulated, and that the application of a single State's laws to conduct abroad on the basis of effects should generally be avoided because of its potentially disintegrative ef-

the Supreme Court, citing *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 705 (1961). However in *Continental Ore*, the Supreme Court used *Alcoa* merely to support the proposition that "[a] conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries." *Id.* at 704.

99. *Supra* note 91, at 1294. The court finds support for the further analysis in *SEC v. Kasser*, 548 F.2d 109 (3d Cir.), *cert. denied* 431 U.S. 438 (1977) (applying securities laws to transnational cases where some conduct occurs within the United States), and *Straub v. Vasiman & Co. Inc.*, 540 F.2d 591 (3d Cir. 1976) (finding conduct within the United States sufficient for the application of United States securities law). These cases base assertion of jurisdiction in part on policy rationales. *See also*, *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1335 (2d Cir. 1972).

100. The court in *Mannington Mills* considered the following factors:

1. Degree of conflict with foreign law or policy;
2. Nationality of the parties;
3. Relative importance of [sic] the alleged violation of conduct here compared to that abroad;
4. Availability of a remedy abroad and the pendency of litigation there;
5. Existence of intent to harm or affect American commerce and its foreseeability;
6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
8. Whether the court can make its order effective;
9. Whether an order for relief would be acceptable if made by the foreign nation under the similar circumstances;
10. Whether a treaty with the affected nations had addressed the issue.

101. [1979-2 Trade Cas.] TRADE REG. REP. (CCH) ¶ 62,757 (S.D.N.Y. 1979).

102. *Id.* at 78, 368. The court noted that *Mannington Mills* treated the conflict-of-laws issue as a question of abstention whereas *Timberlane* treated it as a threshold jurisdictional issue. *Id.*

103. *Id.*

fects upon international trade. Brewster has stated that "[t]he use of regulatory law to assert this adversary economic interest is an open invitation to outrage and retaliation, a progressive anarchy of legal conflict. It is the very negation of comity and the promise of international legal order.<sup>104</sup> If any state were to use its economic, political, or military power to enforce the judgments of its peculiar legal phenomenon on a foreign sovereign, the satisfaction would be at the expense of the development of international law that might precipitate unfortunate reactions, such as retaliation.<sup>105</sup>

### III. OBSERVANCE AND INTERPRETATION OF INTERNATIONAL LAW BY THE UNITED STATES COURTS IN APPLYING ITS LAWS EXTRATERRITORIALLY

In conjunction with recent United States legal decisions, international law itself supports the adoption of the comparative relations doctrine to determine the applicability of United States laws to extraterritorial conduct.<sup>106</sup> Furthermore, international law assists in the interpretation of United States law,<sup>107</sup> and provides relevant standards for determining whether the anti-competitive conduct has a stronger influence on the United States than on other States, and whether regulation of the conduct by the United States is warranted. The Supreme Court held that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction."<sup>108</sup> This principle has always been conditioned on there being "no controlling executive or legislative act."<sup>109</sup> For instance, in *The Over the Top*<sup>110</sup> it was held that "[an] act [of Congress] may contravene recognized principles of international comity, but that affords no more basis for judicial disregard of it than it does for executive disregard of it."<sup>111</sup> However, the practice of the courts reflects that they have adopted a "clear statement" doctrine which has influenced the extraterritorial application of antitrust laws. This doctrine refers to the presumption that Congress intends to comply with international law

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104. BREWSTER, *supra* note 81 at 298.

105. Comment, *supra* note 91, at 69.

106. *Id.*

107. *Paquete Habana*, 175 U.S. 677, 700 (1900).

108. *Id.*

109. *Id.*

110. 5 F.2d 838 (D. Conn. 1925).

111. *Id.* at 842.



unless the contrary is unavoidable.<sup>112</sup>

In determining the international legality of the extraterritorial application of United States antitrust laws, it is important to consider, as evidence of customary international law, the trend among other States.<sup>113</sup> Two aspects of these trends are especially important and require attention: the international consensus concerning the extraterritorial application of national antitrust legislation based merely on effects, and the presence or absence of an international anti-competitive standard which might serve to legitimize such an application. The extraterritorial application of national legislation has always been protested, and such an act has been considered to be an infringement of State sovereignty.<sup>114</sup>

In the past, the United States was long the only State with a vigorous antitrust enforcement policy. Since World War II, however, there has been a remarkable antitrust legislative movement not only in the developed but also in the developing nations.<sup>115</sup> In

112. See, e.g., *Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812): "[U]ntil such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction which it would be a breach of faith to exercise." FALK, *supra* note 94, at 126-73.

113. In *Alcoa*, Judge Hand stated: "[W]e are concerned only with whether Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it . . . . [A]s a court of the United States we cannot look beyond our own law. Nevertheless, it is quite true that we are not to read general words, such as those in [the Sherman Act], without regard to the limitation customarily observed by nations upon the exercise of their powers. . . ." *Supra* note 4, at 443; In *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969), Judge Levanthal stated that "it may fairly be inferred, in the absence of clear showing to the contrary, that Congress did not intend an application [of the Sherman Act] that would violate principles of international law." *Id.* at 814.

114. F. BREWSTER, *supra* note 81 at 45-51; W. FUGATE, *supra* note 1, at 50-51.

115. W. FUGATE, *supra* note 1, at 467: "Rather surprisingly, many nations which are not primarily industrial have enacted antitrust law." See, *Hearings before the Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm.* 89th Cong., 1st Sess., pt. 2 (1965). They include Argentina, Brazil, India, Pakistan and Yugoslavia. For a description of the laws of Argentina and Brazil, see UNCTAD, *Control of Restrictive Business Practices in Latin America*, U.N. Doc. ST/MD/4 (1975). For a description of the laws of India, Pakistan and Yugoslavia, see UNCTAD, *Laws and Regulations Relating to the Control of Restrictive Practices*, at 9-41, 56-58, 69-75, U.N. Doc. TD/B/C.2/AC.5/Misc.1 (1975). "Many of the developing countries look to the traditional U.S. concern for the development of infant industries, and thus have displayed a tendency to regard antitrust laws as applicable primarily to large foreign firms rather than to their fledgling enterprises at home." Davidow, *Extraterritorial Application of U.S. Antitrust Law In a Changing World*, 8 L. & POL'Y INT'L BUS. 897 (1976). See, U.N. ECOSOC, *The Impact of Multinational Corporations on the Development Process and on International Relations*, U.N. Doc. E/5500/Add.1/Rev. 1-ST/ESA/6 (1974). Other countries, Mexico, for example, have legislation aimed at monopolies and unfair business practices rather than strictly antitrust laws. Some other Latin American coun-

addition, a number of States have enacted "counter legislation" against the extraterritorial application of foreign national laws to cases which they considered as coming under their sovereignty.<sup>118</sup>

tries have constitutional provisions against monopoly. "In 1954, only 8 member nations of the Organization for Economic Cooperation and Development (OECD) had enough interest in antitrust law to send a delegation to meetings of the Ad Hoc Committee of Experts on Restrictive Business Practices of the Economic and Social Council of the United Nations (ECOSOC). By 1973, antitrust legislation embodying rules comparable to those found in U.S. law had been adopted by more than half of the 23 members of OECD. FUGATE, *Id.* The European Economic Community (EEC), which applies competition rules to nine members and a number of associate nations, has developed a sophisticated and stringent system for the regulation of competition influenced by U.S. experience and values. See, Thompson, *The Competition Policy of the European Community*, 9 J. WORLD TRADE LAW 79 (1975).

116. The most recent and the striking counter legislation was enacted by the British Government "Protection of Trading Interests Act 1980" BRITISH STATUTE SIGNED BY QUEEN ELIZABETH ON MARCH 20, 1980, TO PROTECT BRITISH INTERESTS FROM FOREIGN ANTITRUST JUDGMENTS, BNA, ATRR, (no. 95a) F-1 (4-10-80); The United States has no comparable laws for the protection of its citizens against actions of foreign antitrust authorities. Germany has no law comparable to the Protection of Trading Interests Act, 1980. On one occasion, in connection with the United States antitrust activities against the international freight conferences in the sixties, Germany reacted by altering section 11 of the law relative to the powers of the German Federal Authorities in the Field of the Merchant Marine. The Federal Minister for Communications has used this power by issuing a regulation of December 14, 1966, according to which any disclosure of documents to or answer to a request for information by a foreign authority needs the permission of the Federal Minister. In extraordinary cases, in which foreign antitrust authorities might try to collect information or carry out searches in Germany, pretending to act by authorization of a German authority this would be a violation of German criminal law (section 132 StGB). No provision exists under EEC law for protection of Community nationals or residents against actions of foreign antitrust authorities. As far as French companies are concerned, French law does not contain any special procedure regarding requests of foreign States. Although Switzerland has no specific provision in law for protecting its citizens and companies against actions of foreign administrative agencies, there are a series of provisions in its penal system which contribute to establishing such protection. See, PROCEDURAL PROBLEMS IN THE EXTRATERRITORIAL APPLICATION OF ANTITRUST LAWS, Report Submitted to Committee C - Antitrust Law and Monopolies during the IBA Berlin Conference, 99-105 (August 1980).

There is Canadian Legislation proposed which will protect Canadian corporations and citizens from the reach of U.S. Antitrust laws. The bill was introduced July 11, 1980 by Marc Lalonde, the minister for Energy, Mines and Resources, on behalf of Justice Minister Jean Chretien. The "Foreign Proceedings and Judgments Bill" would prevent the enforcement of foreign antitrust judgments in Canada when, in the opinion of the Attorney General of Canada, such action would harm Canadian international trade and commerce. BNA, Daily Report for Executives, DER No. 142, A-14, July 22, 1980. Another such retaliation comes from Australia, *Foreign Antitrust Judgments (Restriction of Enforcement) Act of 1979*, No. 13, Austl. Acts (1979). The adoption of the Act by the Australian Parliament illustrates Australia's disagreement with the extraterritorial application of United States antitrust laws and underscores some of the basic conflicts in this area. The Act was adopted in response to a default judgment entered against four Australian uranium producers in a United States antitrust suit brought by Westinghouse Electric Corporation. See AUSTR. PARL. DER. S. (Weekly Hansard No. 1, 1979) 127-29 (1979) (remarks of Sen. Durack).

Some States have set up notification and consultation mechanisms with the United States, through which they could discuss the application of the United States antitrust leg-

What one can infer from the prevailing practice is that all countries are under increasing pressure to extend their laws, either to deal more effectively with the great expansion of international trade and investment, especially in the area of multinational enterprises, or to use their laws to deal with the extraterritorial application of another State's domestic legislation in their territory. As a consequence, an increasing number of countries are adopting anti-trust-type laws.

There are countries other than the United States where national legislations have also been applied extraterritorially but on different grounds. For instance, a Japanese administrative agency has applied Japanese anti-monopoly law extraterritorially where there was territorial conduct.<sup>117</sup> The European Economic Community applies its competition laws extraterritorially although mere effects would not constitute a sufficient basis for jurisdiction. In *Raymond Nagoya*,<sup>118</sup> the Commission stated that an agreement granting a license for Eastern Asia did not affect competition within the Common Market. This means, however, that in cases where export to the Common Market is possible, any restriction of the Eastern Asian licensee to export would, in the opinion of the Commission, violate Article 85(1) of the EEC Treaty. In *Imperial Chemical Industries Ltd. v. Commission*,<sup>119</sup> the Court of Justice of the European Communities permitted extraterritorial jurisdiction, but did so on the basis of conduct rather than effects.<sup>120</sup> From these judgments one may reasonably conclude that so far the European court has not expressly approved the "effects" doctrine.

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islation to their nationals. See, Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, United States - Federal Republic of Germany, 27 U.S.T. 1956, T.I.A.S. No. 8291; Joint Statement Concerning Cooperation in Anti-Trust Matters, November 3, 1969, Canada - United States, reprinted in 8 INT'L LEGAL MATS. 1305 (1969); Retaliatory legislation is not only confined to antitrust but to other areas as well, such as production of evidence or records.

117. Yazawa, *Recent Developments in Japan*, INT'L LAW ASS'N REPORT OF THE FIFTY-FOURTH CONFERENCE 183-84 (1970). See also, Yazawa, *International Transactions and the Japanese Antimonopoly Act*, 4 LAWASIA 169 (1973).

118. Decision of 09.66.1979 - *Raymond Nagoya* - O.J. Nr.L. 143/39.

119. Court of Justice of the European Communities, Case No. 48/69, [1972] ECR 619.

120. *Id.* The Commission's reasoning reached nearly as far as that of *Alcoa*, but the court did not adopt the effects test. See, Pappalardo, *Common Market Antitrust Extraterritorial Application*, ANNUAL PROCEEDINGS OF THE FORDHAM CORPORATE LAW INSTITUTE: INTERNATIONAL ANTITRUST 109, 110-12 (1975). The Commission treated the case as demanding jurisdiction based on effects; however, the European Court in its review of the case, based jurisdiction on the existence of control and direct orders between parent and subsidiary. *Id.*, at 112.

The United States position on the validity in international law of the extraterritorial application of its antitrust laws is quite clear from Section 18(b) of the Restatement.<sup>121</sup> It endorses the assumption of extraterritorial jurisdiction based on mere effects, but draws its origin from the *Alcoa* and *Lotus* cases, which were based on the principle of objective territoriality. Even if the Geneva Convention on the High Seas<sup>122</sup> had not overruled the holding in *Lotus*, the extraterritorial application of the penal law of manslaughter is distinguishable from the extraterritorial application of antitrust laws. The universal condemnation of manslaughter, as distinguished from the parochial character of competition law, makes the extraterritorial application of one State's law acceptable in the *Lotus* situation,<sup>123</sup> but there is no indication that anything less than the universally recognized law is acceptable to apply extraterritorial jurisdiction.<sup>124</sup> It has been stated that "although international law does not clearly proscribe jurisdiction based solely upon effects, it clouds the legitimacy of the exercise of such jurisdiction."<sup>125</sup>

Thus, the international norms with respect to the exercise of extraterritorial jurisdiction based upon mere effects are not clear, especially when there exists no consensus among the States as to the proper exercise of extraterritorial application of national legislation based on effects alone. Since an increasing number of countries are adopting antitrust-type laws, it is arguable that the increase in such legislation strongly evidences a trend of emerging customary international law in this field. However, such an argument may be rebutted by the fact that in most cases the reasons for adoption of antitrust or similar laws are entirely different from those of the United States.

#### IV. APPLICABILITY OF EFFECTS DOCTRINE TO RESTRICTIONS ON EXPORTS FROM THE UNITED STATES

The decisions discussed above concern arrangements which to some extent have had an impact on the United States foreign commerce and have affected mainly imports into the United States.

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121. RESTATEMENT, *supra* note 27, § 18.

122. CONVENTION ON THE HIGH SEAS, art. 11(1), April 29, 1959, 13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82.

123. See, Jennings, *supra* note 5; TOKYO REPORT, *supra* note 3, at 362-85.

124. *Id.*

125. Comment, *supra* note 97, at 623.

However, restrictions affecting exports raise different issues and may entail different policy considerations from those raised by restrictions affecting imports. It has been suggested that the two instances should be distinguished even if the same general criteria are employed, *i.e.* *Alcoa's* "intent and effect" test or *Timberlane's* balancing approach.<sup>126</sup>

There are fewer cases dealing with the issue of of the Sherman Act's applicability to restrictions affecting exports rather than imports, but the Sherman Act does apply to exports, as was most recently stated in *Pfizer Inc. v. Government of India*.<sup>127</sup>

Exportation from the United States has different variations, and assumptions regarding jurisdiction vary accordingly. One instance is where the alleged restraint on exports adversely affects the United States competitors, irrespective of whether the act constituting restraint took place in the United States or abroad.<sup>128</sup> The effects on competitors may be direct or indirect.<sup>129</sup> An indirect effect can be caused by an agreement among companies to coordinate exports, which might have a spillover anti-competitive effect on the relevant market.<sup>130</sup>

The majority of the decisions upholding Sherman Act jurisdiction on the basis of restraints on exports are amenable to the direct effects test. The export cases do not raise many issues different from those raised in cases involving effects on imports. Therefore, the restraints affecting exports (affecting the United States competitors) are treated for jurisdictional purposes in much the same way as restraints affecting imports.<sup>131</sup>

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126. B. Hawk, *supra* note 2, at 45.

127. See, 98 S.Ct. 584, 588 n.11 (1978) where the majority stated: "The dissent seems to contend that the Sherman Act's reference to commerce with foreign nations was intended only to reach conspiracies affecting goods imported into this country. . . . But the scope of congressional power over foreign commerce has never been so limited, and it is established that antitrust laws apply to exports as well." See, *e.g.*, *Timber Roller Bearing Co. v. United States*, 341 U.S. 593, 599 (1951); *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. Mass. 1950).

128. For example, a conspiracy among United States manufacturers to pool foreign patents in order to prevent other United States manufacturers from exposing to those States covered by the patents. B. Hawk, *supra* note 2, at 45.

129. In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), the effects were direct. See also, *Pacific Seafarers Inc. v. Pacific Far East Lines*, 404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969).

130. *Cf. United States v. Minnesota Mining & Mfg. Co.*, *supra* note 127.

131. B. Hawk, *supra* note 2, at 46-52.

## V. DOCTRINE OF EFFECTS AND THE PROTECTIVE PRINCIPLE

In determining the applicability of the protective principle as a basis of jurisdiction in an economic crime, the question arises as to whether the particular economic activity is perceived by other nations as a threat to the affected State's security, thereby warranting the exercise of extraterritorial jurisdiction. It has been suggested that:

Proponents of extraterritoriality would argue that enforced competition is no less an instrument of public ordering than the activities of the state itself would be in a nationalized industry. Or they might draw upon the exchange control analogy and argue that the maintenance of the integrity of the competitive system is no less important to the functioning of the [State] economy than is the maintenance of the value of the nation's currency. Both have been contended by some States to justify them in specifying the terms on which business can be done with the economy or the currency respectively.<sup>132</sup>

According to the Restatement:

(1) A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a State or the operation of its governmental functions provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems.

(2) Conduct referred to in Subsection (1) includes in particular the counterfeiting of the state's seals and currency, and the falsification of its official documents.<sup>133</sup>

Under this principle, a foreigner may be prosecuted by an offended State for an act committed wholly outside its territory. There need be no "effects" within the borders of the offended State.<sup>134</sup> One can see that this principle is easily capable of abuse.

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132. F. BREWSTER, *supra* note 81, at 296.

133. RESTATEMENT, *supra* note 27, at § 33.

134. In *United States v. Pizzarusso*, 388 F.2d 8, 10-11 (2d Cir. 1968), Judge Medina stated the principle as follows: "[T]he objective territorial principle is quite distinct from the protective theory. Under the latter, all the elements of the crime occur in the foreign country and jurisdiction exists because these actions have a 'potentially adverse effect' upon security and governmental functions (Restatement (Second) Foreign Relations Law, Comment to Section 33 at p. 33), and there need not be any actual effect in the country as would be required under the objective territorial principle. Courts have often failed to perceive this distinction. Thus, the Ninth Circuit, in upholding a conviction under a factual situation similar to the one in the instant case, relied on the protective theory, but still felt con-

Professor Mann has pointed out:

[I]t is clear that States must make a reasonable and just assessment of acts which so much affect their interests as to make it proper to impose punishment for them irrespective of the identity of place and person. It would be abusive if a State invoked the protective principle without due regard to the importance of the offence. In all cases, here as elsewhere, the standard is supplied solely by international law, i.e. by the general practice of the civilised States.<sup>135</sup>

Not only is the principle susceptible to abuse but it could also lead to friction among States. For instance, what one State might consider an essential freedom to be enjoyed by its nationals, another might consider prejudicial to its national interests. Harvard Research sets forth the protective principle in Article 7, but with a proviso restricting such jurisdiction to instances in which "the act or omission which constitutes the crime was not committed in exercise of liberty guaranteed the alien by the law of the place where it was committed."<sup>136</sup> A comparable restriction is provided in Section 33 of the Restatement, with the explanation that the limitation "prevents a state from basing an extension of its jurisdiction on the rule. . ."<sup>137</sup>

The possibility of utilizing the protective principle to justify the application of national antitrust legislation was considered in a comment to Section 32 of Tentative Draft No. 2 of the Restatement.<sup>138</sup> It was, however, rejected. The utilization of the protective principle was likened to the doctrine of public policy in conflict of laws and abandoned, because such a principle does not lend itself

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strained to say that jurisdiction rested partially on the adverse effect produced as a result of the alien's entry into the United States. The Ninth Circuit also cited *Strassheim* and *Aluminum Company of America* as support for its decision. With all due deference to our brothers of the Ninth Circuit, however, we think this reliance is unwarranted. A violation of 18 U.S.C. Section 1546 is complete at the time the alien perjures himself in the foreign country. It may be possible that the particular criminal sanctions of Section 1546 will never be enforced unless the defendant enters the country, but entry is not an element of the statutory offence. *Were the statute re-drafted and entry made a part of the crime we would then be presented with a clear case of jurisdiction under the objective territorial principle.*" (emphasis added.)

135. Mann, *supra* note 37, at 94.

136. HARVARD RESEARCH IN INTERNATIONAL LAW, JURISDICTION WITH RESPECT TO CRIME, 29 AM. J. INT'L L. 435, 543 (Supp. 1935) [hereinafter cited as HARVARD RESEARCH].

137. RESTATEMENT *supra* note 27, at § 33, comment d.

138. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Section 32 at 94 (Tent. Draft No. 2, 1958).

to objectivity.<sup>139</sup> The European Advisory Committee, appointed by the American Law Institute to advise on Tentative Draft No. 2, was of the same opinion as expressed in the Tentative Draft No. 2. The Committee stated: "[T]he protective principle does not, in our opinion ordinarily apply to the protection by a State of its economic policies, such as policies regarding the control of imports or restrictive trade practices."<sup>140</sup>

The protective principle, as a basis of assuming jurisdiction on effects, has been rejected on two major grounds: First, the competitive trade policy is of a lower order of importance than those interests which have traditionally warranted extraterritorial reach on the basis of effects alone. Second, by the application of economic regulations extraterritorially, the level of conflict among States is likely to rise. It has always been stated that the use of the protective principle is limited to matters affecting a State's security or integrity, and at the same time it has been emphasized that the security of a State is quite different from maintaining a particular type of economic pattern or interest. Although one can always argue that the implementation of economic policies is as vital as the security of the State itself, there is a consensus among international jurists that the level of threat in both instances is not the same and therefore the application of the protective principle is not warranted.<sup>141</sup>

The major problem lies in the dissimilarity of laws related to the same or closely similar policy goals. In instances where the exercise of regulatory laws of a State results in a conflicting economic policy in another State, the situation offers an open invitation to

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139. *Id.* at 94 (emphasis added).

140. FINAL REPORT OF THE EUROPEAN ADVISORY COMMITTEE ON TENTATIVE DRAFT NO. 2, RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (JURISDICTION) 30 (1961) (unpublished draft). Cf. The European Advisory Committee did not categorically reject the protective principle. It advised: "We can see no reason why a State shall lose the jurisdiction referred to in Article 7 of the Harvard Draft merely because the law of another State on whose territory these acts are committed permit the preparation to do them. . . . Whether . . . jurisdiction may be exercised under the protective principle will depend, in our view, on whether the acts committed by aliens outside the territory of the State are or are not against its security, territorial integrity or political independence. We admit that expressions such as 'security', 'territorial integrity' and 'political independence' are somewhat vague and difficult to define precisely. Nevertheless they are in general use in international law and appear in the Charter of United Nations and other international treaties. . . ." *Id.* at 27-30.

141. F. BREWSTER, *supra* note 81, at 297-98; TOKYO REPORT, *supra* note 3; COMMON MARKET, *supra* note 19, at 397-401; W. FUGATE, *supra* note 1.



outrage and retaliation.<sup>142</sup> Such an act is the very negation of comity and the promise of international legal order.

Since there is no consensus among different countries about the merits of competition or about economic policies in general, the exercise of jurisdiction over agreements made by foreigners abroad on the basis of effects implies an intervention which may be contrary to the express domestic policy of another State. The extraterritorial application of antitrust laws may result in further unfairness in instances where an alien is made accountable to standards he cannot foretell.<sup>143</sup> With regard to United States practice, one writer remarks: "Instead of being an announced condition of access to the American Market, it is arguably in fact a potential trap which may be sprung as an unforeseeable consequence of doing business in the United States."<sup>144</sup>

It can be concluded that both the British and American courts would deny the validity of the protective principle in economic affairs as such, because of its inherent invitation to conflict among States.<sup>145</sup> One authority in the field suggests:

Indeed, to apply the protective principle as a basis for the extraterritorial application of antitrust laws would be releasing a most "unruly horse," a danger the United States has long recognized. If every state could determine for itself what protective measures were necessary, and could punish every alien it might catch who infringed those measures, the international community would be far more chaotic than it is.<sup>146</sup>

## VI. DOCTRINE OF CONSTITUENT ELEMENTS AND THE EFFECTS DOCTRINE

Harvard Research, in the commentary to Article 3, discusses the doctrine of "constituent elements:"

The modern formula, incorporated in this article, recognizes that there is territorial jurisdiction of any crime which is committed in whole or in part within the territory. A crime is committed "in whole" within the territory when every essential constituent element is consummated within the territory, it is consummated "in part" within the territory when any essential

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142. See HAGUE REPORT, *supra* note 11.

143. F. BREWSTER, *supra* note 81.

144. *Id.* at 299.

145. *Id.* at 300.

146. COMMON MARKET, *supra* note 19, at 401.

constituent element is consummated there. If it is committed either "in whole or in part" within the territory, there is territorial jurisdiction.<sup>147</sup>

The emphasis of the above commentary was to support jurisdiction as objectively territorial so that some "*essential constituent element*" of the conduct must have occurred within a State's border.<sup>148</sup> One writer is of the opinion that "[a]n 'essential constituent element' is something necessary to the completion of the crime; i.e., without which the crime would not be legally proscribed. Mere consequential or remote effects within the territory which are not themselves essential ingredients of the offence are not determinative."<sup>149</sup>

The spectrum of criminal activity classified as economic crime is quite broad<sup>150</sup> and subject to differentiation in a number of ways. However, there are common elements, including economic motivations and reactions to economic incentives and deterrents. One writer states:

[p]ractically, burglary is as much an economic crime as embezzlement or price fixing. However, in the lexicon of crime, burglary is referred to as 'street crime,' embezzlement as 'white collar crime' and price fixing as 'corporate crime'. These diverse labels have no special utility in explaining criminal activity, discouraging criminal behavior or effecting equal justice. All are criminal yet each varies with respect to alternative to crime, opportunities for crime and response to probable punishment.<sup>151</sup>

The *actus reus* of any crime is normally susceptible to being analyzed by its different constituent elements. There is a general consensus among nations to permit a State to assume jurisdiction over the acts or omissions of a foreigner committed abroad, where such conduct is a constituent element of an offence which, if it occurred wholly within that State's territory, would be punishable under its national law, provided that it can refer to some other constituent element of the same act which has occurred within its

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147. HARVARD RESEARCH, *supra* note 136, at 495.

148. "Generally accepted and often applied is the objective territorial principle, according to which jurisdiction is founded when any essential constituent element of a crime is consummated on State territory." I. BROWNIE, *supra* note 41, at 263.

149. COMMON MARKET, *supra* note 19, at 376-77.

150. See, e.g., CHAMBER OF COMMERCE OF THE UNITED STATES, WHITE COLLAR CRIME (1974).

151. Solomon, *The Economist's Perspective of Economic Crime*, 14 AM. CRIM. L. REV. 641 (1977).

territory.<sup>152</sup> The presence of "constituent elements" appears to cause no problems for the assumption of jurisdiction in the classic example of shooting across the border, where a State may prosecute conduct which commences within its border but is consummated abroad or which commences abroad and is consummated at home, provided only that the conduct which occurs within its own border is a constituent element of the offence. Regarding this principle, it was stated in the International Law Association's Report: "It must, however, be firmly borne in mind that no international tribunal has ever applied the principle outside the context of common crimes, that is offences involving some form of *malum in se*."<sup>153</sup>

The most important issue posed is whether the principle outlined in the above example can be applied in a broader context, and in particular, whether it can be extended to economic offenses which are *mala prohibita*. The problem revolves around the meaning of the term "constituent element." In the commentary to Article 3 the International Law Association states:

It seems clear to us that while it is for the municipal law of a State to determine in the first instance what is a constituent element of a particular offence, international law retains a residual but overriding authority and international courts an obligation, if called upon, to specify what is or is not capable of being a constituent element for the purposes of assigning jurisdictional competence.<sup>154</sup>

The commentary states that in order for a State to assume jurisdiction, "it must be able to point to at least one integral part of the *actus reus* which is recognized by international law, both as a constituent element of the offence and as localized within the State's territory."<sup>155</sup> One may disagree with the commentary, because the determination of a constituent element of an economic crime by municipal law is not practicable, especially when there are no guidelines for such determination. As opposed to an economic crime, the finding of a constituent element is not at all complicated in a murder, since a murder is not deemed to have been committed unless both the act which causes death and the death itself are established. In other words, the act is not murderous unless a pre-

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152. HAGUE REPORT, *supra* note 11, at 227.

153. *Id.* at 228.

154. *Id.*

155. *Id.*

cisely defined result is produced. Moreover, the constituent elements of this kind of act are universally recognized.

The "constituent element" doctrine was suggested as an alternative to the "effects" doctrine, but the International Law Association's studies indicated that the former doctrine has quite serious drawbacks.<sup>156</sup> The major problem is that it has potential to allow many anti-competitive practices to flourish and go unredressed.<sup>157</sup> The second major criticism of the "constituent element" doctrine, is "that it serves as an open invitation to the most intellectually barren kind of legal conceptualism."<sup>158</sup> At the Tokyo meeting of the International Law Association, Professor Jaenicke pointed out that "by skillful drafting of a penal statute" a State "can make any effect of conduct abroad a constituent element of the crime."<sup>159</sup> Another criticism of the "constituent element" doctrine is that "it spends too much time *defining* what can be legitimately called 'conduct' within the territory of the prosecuting State, and not enough time *analyzing* and *balancing* the various interests involved in the extraterritorial application of the prosecuting State's laws."<sup>160</sup>

A discretionary judgment by a State as to what constitutes the constituent elements of an economic crime is further complicated where, unlike the situation in common crimes, what has occurred within the territory of the State assuming jurisdiction cannot properly be characterized as an act of the alleged offender. In the context of antitrust prosecutions there is every possibility that the act committed abroad by foreigners may or may not be characterized by having occurred within the territory of the aggrieved State, although the act may well have had a substantial effect on the State's economy.<sup>161</sup> Therefore, it is suggested that the determination of constituent elements in economic crimes should be only one aspect of a broader judicial inquiry which includes various additional factors indicative of the State's relative interests in the questioned conduct.

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156. NEW YORK REPORT, *supra* note 6, at 135.

157. *Id.*

158. *Id.* at 135-36.

159. TOKYO REPORT, *supra* note 3, at 319.

160. NEW YORK REPORT, *supra* note 6, at 136.

161. Dr. Mann states "what the law considers relevant is, as a rule, the necessary legal effect, not the ulterior effect, economically or socially." *Supra* note 37, at 87.

## VII. CONCLUSION

At present, international law has not developed sufficiently to recognize "economic effects" as a separate basis for asserting jurisdiction. In contrast, it has been stated about the common crime that "[t]he principle that a man who outside of a country wilfully puts in motion a force to take effect in it is answerable at the place where the evil is done, is recognized in the criminal jurisdiction of all countries."<sup>162</sup> Furthermore, "the setting in motion outside of a state of a force which produced as a direct consequence an injurious effect therein, justifies the territorial sovereign in prosecuting the actor when he enters its domain."<sup>163</sup>

With regard to economic effects, the European Advisory Committee<sup>164</sup> stated: "In our view the exercise of 'Jurisdiction based on Territory' is not justified in cases where all that has occurred within the territory is the effects of certain conduct and not at least part of the conduct itself."<sup>165</sup> In addition, the International Law Association Report in 1966 stated: "At least half of the Committee go further and consider that contemporary international law has not yet reached the stage, as evidenced by the response of governments to jurisdictional claims, that would permit such intrusion into their domestic affairs . . . ."<sup>166</sup> The 1970 Report stated:

Of course, underlying the technical and doctrinal objections to the recognition of the "effects" doctrine is the substantial objection that antitrust laws are parochial in nature since they intimately reflect a State's economic and political philosophy. It is appropriate, therefore, that their operation should be restricted within the limits of the State's sovereign authority. The notion of the equality of sovereign nations from which all principles of international jurisdiction are derived demands that States do not intrude on the *ordre public* of other States.<sup>167</sup>

Therefore, there are arguments both for and against the recognition of the doctrine of "effects" as an additional basis for the assumption of jurisdiction. One can understand the frustration of a justifiably aggrieved State which may wish to assume jurisdiction

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162. *Report on the Extra-territorial Crime and the "Cutting" Case*, U.S. FOR. REL. 757, 771 (1887).

163. C. HYDE, *INTERNATIONAL LAW* 798 (2d rev. ed. 1947).

164. *EUROPEAN COMMUNITIES*, *supra* note 57.

165. *TOKYO REPORT*, *supra* note 3, at 539.

166. *INT'L LAW ASS'N REPORT OF THE FIFTY-SECOND CONFERENCE* 141-42 (Helsinki 1966).

167. *HAGUE REPORT*, *supra* note 11, at 239.

on the basis of "effects," yet is unable to refer to any element of the offense as having being committed within its territory. On the other hand, one can also understand the desperation of the States whose entities may be exposed to legal actions merely because of certain unintentional effects in the prosecuting State.

Certainly there is a vacuum, and it is less than clear how to proceed when there is an activity in a foreign State which has its impact in one or more jurisdictions. It has been suggested that "although territoriality must remain a natural canon of construction, it is bound to yield to some realistic considerations as situations require, whether those considerations lead to jurisdictional expansion or to greater inhibition than the territoriality test would produce."<sup>168</sup> The above suggestion may be a realistic start to deal with the application of national laws on the basis of "effects," but the question remains how?

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168. F. BREWSTER, *supra* note 81, at 327.