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The Extraterritorial Application of the Antitrust Laws of the United States

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I. INTRODUCTION

This Commentary will summarize some of the principal rules and standards through which the United States antitrust laws are applied to business transacted overseas.

For over forty years, United States law has been applied to transactions abroad. The rationale is that these transactions have "effects" within the United States. A review of the case law and legislative history demonstrates, however, that the "effects requirement" has evolved significantly over the past forty years. In fact, the most recent amendments to the antitrust laws reflect congressional desire to limit the application of those laws to United States businesses.

II. GENERAL RULES AND STANDARDS FOR APPLYING UNITED STATES ANTITRUST LAWS TO OVERSEAS TRANSACTIONS

The United States antitrust laws include the Sherman,[1] Clayton,[2] Robinson-Patman,[3] and Federal Trade Commission Acts.[4] Because these laws are stated broadly, their meaning must be ascertained by an

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1. 15 U.S.C. §§ 1-7 (1982). Originally passed in 1890, the Sherman Act prohibits collusion and conspiracies among competitors, prohibits monopolies and attempts to monopolize, and can result in criminal and civil sanctions.

2. 15 U.S.C. §§ 12-27 (1982). Originally passed in 1914, the Clayton Act includes specific prohibitions against certain distribution practices (exclusive dealing and product tying), and mergers and acquisitions which have an "adverse effect" on competition.

3. 15 U.S.C. §§ 13-13b, 21a (1982). Originally passed in 1936, the Robinson-Patman Act is an amendment to the Clayton Act and deals principally with narrowly defined practices of price differentials in the sale of goods, the most common being "price discrimination and rebates."

4. 15 U.S.C. § 45 (1982). This Act empowers the Federal Trade Commission to enjoin

analysis of the case law. The facts, rather than general principles, determine the results in each case. Consequently, even the "clearest" language, such as the word "every" in section 1 of the Sherman Act, has been subject to interpretation and re-interpretation. In short, the statutes mean what the courts say they mean, and their meanings have changed over time.

The first Supreme Court decision on the extraterritorial application of the antitrust laws resulted in a rigid and inflexible rule. In *American Banana Co. v. United Fruit Co.*,[5] Justice Holmes held that the Sherman Act did not apply to transactions outside the United States:

> [T]he acts causing the damage were done, so far as appears, outside the jurisdiction of the United States . . . . It is surprising to hear it argued that they were governed by the act of Congress . . . .[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.[6]

Not surprisingly, this terse statement did not provide a satisfactory answer to many complex problems arising in international commerce and, therefore, was gradually undermined. The result of this process was the landmark decision, *United States v. Aluminum Co. of America*,[7] in which Judge Learned Hand examined the economic effects of foreign conduct in the United States. Judge Hand concluded that if these economic effects were "intended" by the parties, the United States would have jurisdiction under the antitrust laws.[8]

Since *Alcoa*, this "effects" test has been analyzed and modified. The major case construing the "effects" test is *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*[9] In *Timberlane*, the Ninth Circuit Court of Appeals stated the "effects" test was "by itself . . . incomplete because it fail[ed] to consider other nations' interests" or the relationship between the parties and the United States.[10] To cure these deficiencies, the court prescribed a three-part test for applying American antitrust principles: (1) is there some effect on American foreign commerce? (2) is the alleged restraint "of such a type and magnitude so as to be cognizable as a viola-

"[u]nfair methods of competition in or affecting commerce" and "unfair or deceptive acts or practices in or affecting commerce."

5. 213 U.S. 347 (1909).
6. *Id.* at 355-56.
7. 148 F.2d 416 (2d Cir. 1945).
8. *Id.* at 443-44.
9. 549 F.2d 597 (9th Cir. 1976).
10. *Id.* at 611-12.

tion of the Sherman Act?"[11] and (3) "[a]s a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted?"[12] With respect to the third element, the court suggested that all of the following factors must be weighed:

> [i] the degree of conflict with foreign law or policy, [ii] the nationality or allegiance of the parties and the locations or principal places of business of corporations, [iii] the extent to which enforcement by either state can be expected to achieve compliance, [iv] the relative significance of effects on the United States as compared with those elsewhere, [v] the extent to which there is explicit purpose to harm or affect American commerce, [vi] the foreseeability of such effect, and [vii] the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.[13]

The complex analysis suggested by *Timberlane* seems to have inspired other circuits to new and idiosyncratic views of the "effects" test. For example, the Third Circuit affirmed the vitality of *Alcoa* but held that in determining whether jurisdiction should be exercised the trial court should "balance" the *Timberlane* factors "against our nation's legitimate interest in regulating anticompetitive conduct."[14] Similarly, the Seventh Circuit ruled that subject matter jurisdiction should be determined under *Alcoa* but that the court then "should consider additional factors not set out in *Timberlane*."[15] In contrast, the Fifth Circuit was opposed to the notion of discretionary jurisdiction, holding that the courts should not apply antitrust laws if such application "would violate principles of comity, conflicts of law, or international law."[16] The Second Circuit also expressed concern that a court using the *Timberlane* analysis might premise jurisdiction on only minor effects on United States commerce.[17]

To provide a clear and reasonable test, the Antitrust Division of the

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11. *Id.* at 615.

12. *Id.*

13. *Id* at 614. In a subsequent decision in the same case, the Ninth Circuit recently affirmed the original *Timberlane* analysis and granted a defendant's motion to dismiss under the third prong of that analysis. *Timberlane Lumber Co. v. Bank of America*, 749 F.2d 1378 (9th Cir. 1984). After an extensive review of the seven factors defining "international comity and fairness," the court concluded that although the restraint affected the foreign commerce of the United States in a manner cognizable under the Sherman Act, "[t]he potential for conflict with Honduran economic policy and commercial law is great [and] [t]he effect on the foreign commerce of the United States is minimal." *Id.* at 1386.

14. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979).

15. Uranium Antitrust Litigation, 617 F.2d 1248, 1254-56 (7th Cir. 1980).

16. Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 884 (5th Cir. 1981).

17. National Bank of Canada v. Interbank Card Ass'n, 666 F.2d 6 (2d Cir. 1982).

United States Department of Justice published the *Antitrust Guide for International Operations* (*Guide*) in 1977.[18] The *Guide* states that "a substantial and foreseeable effect on United States commerce" should be required to invoke jurisdiction.[19] Most recently, in 1982, the Foreign Trade Antitrust Improvements Act provided that the Sherman Act shall apply to foreign trade only where "such conduct has a direct, substantial and reasonably foreseeable effect" on United States domestic or import trade, or on the export trade of a person engaged in such trade in the United States.[20]

The precise impact of this amendment has yet to be determined.[21] As of this writing, the only reported decision relying directly on the 1982 statute is *Eurim-Pharm GmbH v. Pfizer, Inc.*[22] In that case, the district court held that jurisdiction did not lie under United States antitrust laws where the plaintiff "failed to allege any facts demonstrating a causal connection between defendants' conduct in Europe and the price increase [of certain pharmaceuticals] in the United States."[23] The court went on to state:

> Plaintiff has not and apparently cannot allege that defendants' conduct has prevented the import of foreign manufactured Vibramycin into the United States or prevented United States companies other than Pfizer, Inc. from manufacturing and selling the drug in the United States. Indeed, plaintiff has made no allegations whatsoever regarding the manufacture, sale or marketing of Vibramycin in the United States other than its allegation that the United States price has increased. Thus the

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18. ANTITRUST DIVISION, UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977) [hereinafter cited as GUIDE].

19. GUIDE, *supra* note 18, at 6.

20. 15 U.S.C. § 6a (1982). This statute provides as follows:

§ 6a. Conduct involving trade or commerce with foreign nations

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—
(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

21. The Federal Trade Commission Act was amended in 1982 to comply with the Foreign Trade Antitrust Improvements Act. *See* 15 U.S.C. § 45(a)(3) (1982).

22. 593 F. Supp. 1102 (S.D.N.Y. 1984).

23. *Id.* at 1107.

> link between defendants' conduct abroad and the price of Vibramycin in the United States is far from apparent.
>
> Plaintiff has utterly failed to establish that defendants' alleged foreign price-fixing and market allocation scheme resulted in an anticompetitive effect on United States domestic or import commerce. This is precisely the type of case Congress sought to eliminate from United States antitrust jurisdiction when it amended the Sherman Act in 1982 to "more clearly establish when antitrust liability attaches to international business activities". . . . Accordingly, this Court grants defendants' motion to dismiss for lack of subject matter jurisdiction.[24]

Title III of the Export Trading Company Act of 1982,[25] another recent statute affecting the antitrust laws, has created a procedure by which a party engaged in export trade may obtain partial immunity from the antitrust laws. To obtain partial immunity, the party requests a "Certificate of Review" from the Secretary of Commerce. The certificate must be granted if the applicant's activities will:

> (1) result in neither a substantial lessening of competition or restraint of trade within the United States nor a substantial restraint of the export trade of any competitor of the applicant,
>
> (2) not unreasonably enhance, stabilize, or depress prices within the United States of the goods, wares, merchandise, or services of the class exported by the applicant,
>
> (3) not constitute unfair methods of competition against competitors engaged in the export of goods, wares, merchandise, or services of the class exported by the applicant, and
>
> (4) not include any act that may reasonably be expected to result in the sale for consumption or resale within the United States of the goods, wares, merchandise, or services to be exported.[26]

The Secretary of Commerce may not issue a certificate until the Attorney General agrees that the above standards are met. The Secretary must publish notice of the application in the Federal Register and must act within ninety days of receiving the application. All grants, denials, amendments, revocations, and modifications of Certificates of Review are subject to judicial review.

If the Certificate of Review is granted, the certificate holder is protected against criminal liability and treble-damages under the antitrust laws for all conduct specified in the certificate occurring while the certifi-

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24. *Id.* (footnote omitted) (quoting H.R. REP. NO. 686, 97th Cong., 2d Sess. 7 (1982), *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2492 (remarks of Chairman Rodino)).

25. 15 U.S.C. §§ 4011-4021 (1982).

26. 15 U.S.C. § 4013(a) (1982).

cate is in effect. This protection does not apply, however, where the certificate is obtained by fraud.[27]

III. PROBLEMS IN EXTRATERRITORIAL APPLICATION

Cartels, vertical restraints, joint ventures, acquisitions, and mergers have always presented problems of the extraterritorial application of the antitrust laws. About thirty years ago, the Justice Department brought a series of cases against private cartels in which a United States firm was involved. The cases were never clearly resolved. Today, the House Report to the 1982 Improvements Act suggests that antitrust jurisdiction might lie where a cartel's actions have a "spillover effect" on United States prices.

Vertical restraints in foreign distribution between supplier and customer, which frequently take the form of "exclusive dealing" or "requirements contracts," generally do not violate the antitrust laws. Thus, in the words of the Department of Justice's *Guide*:

> The appointment of an exclusive foreign distributor by an American firm does not by itself raise U[nited] S[tates] antitrust concerns. That is essentially a customer-supplier relationship which does not necessarily have a direct impact on either the U[nited] S[tates] domestic market or the export opportunities of other U[nited] S[tates] firms.[28]

The apparent laxity with which antitrust principles are applied to vertical restraints may have been derived from *Continental T. V., Inc. v. GTE Sylvania, Inc.*[29] In *Continental*, the Supreme Court held that nonprice vertical restraints were to be judged according to the rule of reason and, thus, business considerations would apply in determining whether a violation had occurred. It must be stressed, however, that related legal issues such as those rules governing the termination of distributors in foreign countries are significant, and those laws should be carefully reviewed.

With reference to joint ventures, the 1982 amendments are geared to reducing the likelihood these arrangements will be challenged. This aim has practical support from the United States Justice Department which states in its *Guide*:

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27. 15 U.S.C. §§ 4011-4021 (1982).

28. GUIDE, *supra* note 18, at 46.

29. 433 U.S. 36 (1977).

> Normally, the Department would not challenge a merger or joint venture whose only effect was to reduce competition among the parties in a foreign market, even where goods or services were being exported from the United States. The rules are even less stringent where a limited "one shot" type of venture is involved creating a special limited competitor for a special limited purpose.[30]

Certain types of joint ventures are susceptible to antitrust challenge. These include joint ventures in which one of the parties is a potential entrant into the market and is precluded from entry as a result of the joint venture. The joint venture is particularly vulnerable when it exists between competitors and precludes entry into a United States market.[31]

In the case of acquisitions and mergers, section 7 of the Clayton Act has been applied to acquisitions by a United States firm of a foreign firm, by a foreign firm of a United States firm, and by a foreign firm of a foreign firm. In all of these situations, the Clayton Act requires a showing that competition may be substantially lessened. Some exemptions to this requirement may apply and can be found in the reporting requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

IV. EXCEPTIONS AND DEFENSES

A number of defenses are available to international business entities which are challenged under the United States antitrust laws. One such defense is sovereign immunity.

A foreign sovereign has long been immune from suit in the United States. In 1976, however, the Foreign Sovereign Immunities Act established that immunity does not extend to litigation arising out of "commercial activity" in the United States. The definition of "commercial activity," therefore, became extremely important in determining the existence of sovereign immunity.

The courts have deemed "commercial" such diverse activities as a government's purchase of cement on the open market and the sale of golf carts by a government trade association. Notably, a district court found price-fixing by OPEC immune because the price-fixing related to the terms and conditions for the "removal of natural resources," rather than to the "commercial" venture. On appeal, however, the court of appeals applied the "act of state" doctrine and avoided deciding the case on

30. GUIDE, *supra* note 18, at 21.

31. *In re* Brunswick Corp., 94 F.T.C. 1174 (1979), *aff'd as modified sub nom.* Yamaha Motor Co. v. F.T.C., 657 F.2d 971 (8th cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

"commercial" versus "non-commercial" grounds.[32]

The act of state doctrine differs from sovereign immunity in that it establishes a conclusive presumption that certain acts by a foreign government are valid. The basic rule is that one country will not sit in judgment on the acts of another country's government. The doctrine has been recognized in cases involving nationalization of property, foreign policy considerations, and matters of public policy. "Ministerial" acts by a government, however, will not be adequate to invoke the doctrine.

Compulsion may serve as a defense when a party defendant claims that it was forced to undertake certain anticompetitive acts by a foreign government. A recent example of a case in which the defense was raised, although unsuccessfully, is *In re Uranium Antitrust Litigation*.[33] Although the court in *Uranium Antitrust* found governmental involvement, it held there was insufficient compulsion.

Difficult constitutional questions can also arise when the executive branch imposes restraints or quotas. The issue of presidential authority to impose restrictions was raised during the litigation over steel import quotas but never resolved. One area where presidential authority remains largely unchallenged is national defense. At the request of the President, businesses may be granted immunity from the antitrust laws.[34]

Another defense to the antitrust laws is the Noerr-Pennington Doctrine. This doctrine permits parties to bring lawsuits and petition and lobby legislative bodies without fear that their actions will violate the antitrust laws.[35] Sometimes, lobbying is exempted from the antitrust laws by statutes such as the Export Trading Company Act of 1982 and the Webb-Pomerene Act. The Webb-Pomerene Act also provides a limited exemption from the Sherman Act for associations formed solely for the purpose of engaging in export trade and requires these associations to register and file reports with the Federal Trade Commission.[36] Should the associations' actions interfere with domestic competition or restrain the export trade of domestic competitors, the exemption does not apply.

32. International Ass'n of Machinists and Aerospace Workers v. OPEC, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

33. 480 F. Supp. 1138 (N.D. Ill. 1979).

34. *See* Defense Production Act of 1950, ch. 932, Pub. L. No. 774, § 708, 64 Stat. 798, 818-19 (1950).

35. Coastal States Marketing, Inc. v. Hunt, 694 F.2d 1358 (5th Cir. 1983). *See* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) and GUIDE, *supra* note 18, at 63.

36. 15 U.S.C. §§ 61-66 (1982).

V. PRACTICAL PROBLEMS IN INTERNATIONAL ANTITRUST LITIGATION

The test applied for jurisdiction over antitrust matters is familiar: (1) an affirmative act by the defendant establishing "minimum contacts" with the jurisdiction, and (2) fairness and reasonableness in requiring the defendant to come into the forum and defend. Like the jurisdiction test, the venue provisions are traditional. Section 4 of the Clayton Act provides that venue is proper at defendant's "residence, where defendant is found, or has an agent," and section 12 provides that a corporation may be sued where "it may be found or transacts business." The general venue statute[37] which provides that an "alien may be sued in any district," may also serve as a basis for antitrust venue.

The problems involved in antitrust litigation become more serious once discovery commences. Despite the existence of various conventions and treaties, obtaining documents from abroad for litigation in the United States remains difficult.[38] For example, "blocking statutes" are designed to frustrate discovery requests from United States litigation.

In spite of difficulties with discovery and recent restrictions on extraterritorial application, the antitrust laws maintain their vitality in proper cases. A recent example is *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*,[39] in which the Court of Appeals for the District of Columbia was faced with conflicting orders under the laws of United States and Great Britain. Laker brought an antitrust action against its competitors in the United States district court and obtained an injunction restraining its competitors from taking actions designed to prevent the court from hearing the antitrust case. British Airways and British Caledonian, two of the defendants, obtained an order from the Secretary of State for Trade and Industry of the United Kingdom enjoining Laker from proceeding on its antitrust claims. Faced with this conflict, the United States court of appeals upheld the district court's injunction. In a lengthy opinion, the court noted that the British actions were designed solely to thwart the United States antitrust suit and that, based on "principles of comity and concurrent jurisdiction,"[40] the United States district court's injunction against foreign interference should stand.[41]

37. 28 U.S.C. § 1391(d) (1982).

38. *See* Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444.

39. 731 F.2d 909 (D.C. Cir. 1984).

40. *Id.* at 930.

41. *Id.* at 916.

VI. CONCLUSION

Through narrow applications of the "effects" test, the upholding of key defenses and exceptions by the courts, and a more flexible attitude by Congress and the executive branch, the impact of United States antitrust laws on overseas business transactions seems to be on the wane. Whether this is a part of a general de-emphasis of the antitrust laws in the 1980's or relates strictly to international business remains to be seen.