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OVERSEAS TRADE AND THE SHERMAN ACT

DR. ANDRE SIMMONS*

I. *The Bases for Sherman Act Jurisdiction Over Foreign Trade*

In an antitrust case involving only domestic trade, the question of jurisdiction seldom appears today. Numerous judicial decisions in the last century have settled the question of intrastate versus interstate trade, and today the jurisdiction of the Federal courts over interstate trade is well established. The defendants who violated the antitrust laws could be reached by those statutes regardless of their citizenship or their domicile, as long as they committed acts within the United States. Even though the acts in question were only partially performed within the United States, the statutes would remain applicable.

Violations of the Sherman Act in respect to foreign trade, in contrast to domestic trade, have on numerous occasions presented several important jurisdictional problems. Many violations of the Sherman Act took place abroad. On many occasions, agreements to perform certain acts in the United States were concluded abroad. In many cases foreign companies were involved. In almost all such instances, the activities of the defendants were subject to two jurisdictions: American and foreign. It is not surprising, therefore, that a clash of conflicting judicial attitudes could very easily result. Federal courts had to find the right path between two possibly conflicting objectives. On the one hand, they had to follow the rules of the comity and of international law. On the other hand, they had to protect the national interest and to follow the intent of the Sherman Act. Many difficulties have been created by the fact that there is today no unanimous agreement on all aspects of international law, and there is no clear-cut dividing line between the rules of comity and the rules of international law. According to some experts many rules of comity are being gradually transformed into rules of international law.[1] In addition, international law

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1. L. OPPENHEIM, INTERNATIONAL LAW, 32-33 (7th ed. 1953).

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differs from municipal law in many essential aspects. According to Ross, international law is really more a conventional, noncompulsory order with the character of law, rather than actual law.[2] It is obvious, therefore, that serious judicial problems were involved in the adjudication foreign trade cases.

In cases where the Sherman Act was applied to foreign trade activities, the defendants invariably claimed that the case was outside the jurisdiction of the court, and the courts before proceeding to the examination of the economic issues of the case had to settle the question of jurisdiction. This question had several aspects; first, it involved jurisdiction in personam over the defendants; second, it involved the jurisdiction of the Sherman Act over the acts complained of; third, it dealt with the judisdiction over the relief; and finally, the question of jurisdiction had to be discussed, in several cases, with reference to the production of evidence. In order to evaluate correctly the difficulties involved, this author intends to present a general discussion of various theories of jurisdiction. This will be followed by a discussion of jurisdiction with reference to relief and the collection of evidence. Finally, arguments will be presented for and against the adoption of the objective theory of jurisdiction in cases involving violations of the Sherman Act.

A.

The most generally accepted principle of jurisdiction in international law is the principle of territoriality. This principle of territorial competence of jurisdiction "has not been invented by international law but is merely a legal confirmation of the historical fact, grounded in nature, that the instruments of power of the various states have developed and asserted themselves on a territorial basis."[3] In other words, this principle is based on the fact that "the jurisdiction of a nation within its own territory is necessarily exclusive and absolute,"[4] and that "the municipal laws of one nation do not extend, in their operation, beyond its own territory, except as regard its own citizens and subjects."[5] According to Hyde,

2. A. ROSS, A TEXTBOOK OF INTERNATIONAL LAW, 50 (1947).
3. ROSS, *op. cit., supra*, p. 155.
4. J. MOORE, 2 A DIGEST OF INTERNATIONAL LAW, § 175 (1906).
5. *Id.* ¶ 197.

> the right to pass upon the lawfulness of an act must necessarily be the exclusive possession of a single sovereign. The right must also, therefore, in every case, belong to that sovereign or political power which exercises control over the place where the particular act is committed . . . . Conversely, a State cannot determine the lawfulness of occurrences in places outside . . . . of its control.[6]

The theory of territorial jurisdiction has a long tradition in American legal history, and is based on numerous pronouncements of famous American jurists of the nineteenth century. The most illustrious among those jurists were undoubtedly Justices Marshall and Story. Marshall, Chief Justice of the Supreme Court, said in 1807: "It is conceded that the legislation of every authority is territorial; that beyond its own territory, it can affect only its own citizens."[7]

Justice Story said in 1824: "The laws of no nation can justly extend beyond its own territories. The sovereign is expected to refrain from exercising power outside his territory."[8] Some twenty-six years later, Justice Story repeated his philosophy in the following words:

> Another maxim is, that no state or nation can, by its own laws directly bind property out of its own territory, or bind persons not resident therein . . . for it would be wholly incompatible with the equality and exclusiveness of the sovereignty of all nations, that any nation should be at liberty to regulate either persons or things not within its own territory.[9]

The principle of strict territoriality found clear expression in the *Banana* case, which was the first case in which the Sherman Act was applied to foreign trade. Basing his opinion on the philosophies of Marshall and Story, Justice Holmes said that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[10] He summarized his philosophy by saying that "all legislation is prima facie territorial."[11]

6. HYDE, 1 INTERNATIONAL LAW, ¶ 218 (1945).
7. Rose v. Himely, 4 Cranch (8 U. S.) 241 at 279 (1807).
8. The Apollon, 9 Wheat. (22 U. S.) 362 at 370 (1824).
9. See A. WIESNER, *A Half Century of Jurisdictional Development: From Bananas to Watches*, 7 MIAMI L. Q., 401 (1953).
10. American Banana Co. v. United Fruit Co., 213 U. S. 347 at 356 (1909).
11. *Id.*, at 357.

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The concept of territorial jurisdiction has been extended on several occasions to acts committed outside the territory of the lawmaker but producing effects within. This principle, called the objective theory of jurisdiction, is perfectly compatible with the territorial theory of jurisdiction, and has been accepted by leading legal experts and by American courts.[12] In the famous *Lotus* case, the International Court stated that "the territoriality of criminal law . . . is not an absolute principle of international law and by no means coincides with territorial sovereignty."[13] Basing its opinion on the objective principle, the Court concluded that as the effects of the acts complained of took place on a Turkish vessel (i.e., Turkish territory), Turkey acquired jurisdiction over the persons responsible for those acts, even if those persons were not Turkish citizens. Judge Moore, who dissented on other grounds, accepted this principle also.

The principle of objective jurisdiction was probably best expressed by Hyde when he stated that

> the setting in motion outside of a State of a force which produces as a direct consequence an injurious effect therein, justifies the territorial sovereign in prosecuting the actor when he enters its domain.[14]

A similar opinion was expressed by Moore when he concluded that

> the principle that a man who outside of a country willfully 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 jurisprudence of all countries.[15]

The objective concept of jurisdiction has been approved by the Restatement of the Law, and it has been also confirmed in several cases by the United States Supreme Court. Justice Holmes accepted it in the case of *Strassheim v. Daily* in 1911, and more recently Judge Hand expressed his unqualified approval of it in the *Alcoa* case.[16]

The objective theory of jurisdiction applies primarily to acts committed by foreigners. It is generally accepted that a state can always exercise its jurisdiction over its own citizens

12. Harvard Research in International Law, *Jurisdiction with Respect to Crime* 29 AM. J. INT'L. L. (1935); RESTATEMENT, CONFLICT OF LAWS, §§ 65, 423 (1934).
13. HACKWORTH, 2 DIGEST OF INTERNATIONAL LAW, ¶ 136 (1941).
14. HYDE, *op. cit. supra*, ¶ 238.
15. MOORE, *op. cit. supra*, ¶ 201.
16. Strassheim v. Daily, 222 U. S. 280 (1911); United States v. Aluminum Co. of America, 148 F. 2d. 416 (1945).

abroad on the basis of personal supremacy.[17] This principle has been accepted by most judicial authorities.[18] It has also been confirmed on numerous occasions by American courts.[19] In a recent case, the Supreme Court stated that "the United States is not debarred by any rule of international law from governing the conduct of its own citizens . . . in foreign countries when the rights of other nations or their nationals are not infringed."[20] It is obvious, therefore, that in exercising its personal supremacy,

> a state must not perform acts of sovereignty in the territory of another state. Thus, for instance, a state is prevented from requiring such acts from its citizens abroad as are forbidden to them by the Municipal Law of the land in which they reside, and from ordering them not to commit such acts as they are bound to commit according the Municipal Law of the land in which they reside.[21]

It may be concluded, therefore, that the jurisdiction of American courts over acts committed by American citizens abroad may be based on three principles; on the principle of objective theory, on the principle of nationality, that is on the principle of personal supremacy, and also, in most cases, as *some* of the acts will probably be committed within the territory, on the principle of territoriality.

It is obvious, however, that the United States will not exercise its jurisdiction over its citizens abroad in an indiscriminate fashion; this jurisdiction will be asserted only when citizens commit acts which affect the United States or other United States citizens abroad.[22] This means in effect that, although according to the accepted rules of international law the United States could exercise jurisdiction over its citizens abroad on the basis of nationality, for all practical purposes the actual assertion of this jurisdiction will take place only on the basis of the objective theory.

In addition to the territorial theory and the objective theory, there are also certain valid non-territorial theories

17. OPPENHEIM, *op. cit. supra*, ¶ 145.
18. RESTATEMENT, CONFLICT OF LAWS, *op. cit. supra*, ¶ 47 (2). HYDE, *op. cit. supra*, ¶ 240.
19. Blackmer v. United States, 284 U. S. 421 (1932); Steele v. Bulova Watch Co., 344 U. S. 280 (1952).
20. Skiriotes v. Florida, 313 U. S. 69 at 73 (1945).
21. OPPENHEIM, *op. cit. supra*, ¶ 262.
22. Cunard S. S. Co. v. Mellon, 262 U. S. 100 (1923). Blackmer v. United States, 284 U. S. 421 (1932).

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of jurisdiction. It is generally agreed that jurisdiction may be extended by a state to cover certain specific offenses committed outside the territory of the state by its citizens or by foreigners. These offenses usually include acts of piracy, slave trade, counterfeiting of currency, and acts against the safety of the state.[23] It is also agreed by most states that this type of jurisdiction cannot extend to acts committed abroad by foreigners against the citizens of the state, if the effects of those acts are taking place entirely abroad.[24]

The principle of nonterritorial jurisdiction has been accepted on few occasions by the Supreme Court when the nature of the offenses warranted its adoption. The Court stated that there are certain offenses of such a character that

> to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds . . . .[25]

The above principle applied, however, only to offenses committed by United States citizens. In such cases, the Court obviously had jurisdiction over the defendants based on the principle of nationality. As far as foreigners are concerned, the nonterritorial principle of jurisdiction has been applied only to offenses directed against the safety of the state.[26]

B.

Before the court can establish a legislative jurisdiction over the acts complained of, it must first establish a jurisdiction in personam over the defendants. When the defendant is an American corporation, obviously the American courts will have jurisdiction, even if the acts complained of took place abroad. It may happen that courts will have an unquestionable in personam jurisdiction, while the establishment of the legislative jurisdiction will pose various complications, as has actually occurred in numerous cases in the past. The question of in personam jurisdiction may, however, present serious issues when the defendant is a foreign corporation. There may be three distinct cases involving foreign defendants; it may be an independent foreign corporation transacting business in the United States via its agents or officers;

23. MOORE, *op. cit. supra*, ¶ 202; HYDE, *op. cit. supra*, ¶ 241.
24. MOORE, *op. cit. supra*, ¶ 201 (Cutting's case).
25. United States v. Bowman, 260 U. S. 94 at 98 (1922).
26. HACKWORTH, *op. cit. supra*, ¶ 137.

it may be a foreign subsidiary of an American parent company; and, finally, it may be an American subsidiary of a foreign parent. An example of the first possibility is the *Alcoa* case; examples of the second case are the proceedings against General Electric and Timken, and the third situation is illustrated by the situation in the *ICI* case.[27]

The jurisdiction in personam over an independent foreign corporation must be decided on the basis of whether or not the corporation can be "found" here, or whether or not it can be proved that it "transacts business" here. A discussion of those two terms has taken place on numerous occasions, and in spite of several dicta on those concepts, the issue still remains rather ambiguous. This ambiguity can be best illustrated by quoting a recent dictum of the court. "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the law."[28] In the famous *Kodak* case, the court stated "that a corporation is 'transacting business' in a district . . . if in fact, in the ordinary and usual sense, it transacts business therein of any substantial character."[29] Elaborating further on this issue, the court stated that for purposes of venue it is only necessary that the defendant "transact business." For the purposes of serving process, however, it is necessary that the defendant be "found" in the district. As being "found" is, of course, a stronger test of presence than "transacting business," it could happen that the service of process might not be valid, although venue is clearly established. In the recent case of *Scophony*, the court eliminated the distinction between being "found" and "transacting business," and declared that the test of "transacting business" applies to the service of process as well as for the purpose of venue.[30] Such a decision means, in effect, a liberalization of the tests previously applied by courts, and at the same time gives a new interpretation of Section 7 of the Sherman Act and of Section 12 of the Clayton Act.[31] Nevertheless, no one really knows exactly how much business in

27. United States v. Aluminum Co. of America, 148 F. 2d 416 (1945). United States v. General Elec. Co., et al., 82 F. Supp. 753 (1949). United States v. Imperial Chem. Indus. Ltd., 100 F. Supp. 504 (1951). Timken Roller Bearing Co. v. United States, 341 U. S. 593 (1951).
28. International Shoe Co. v. Washington, 326 U. S. 310 at 319 (1945).
29. Eastman Kodak Co. v. Southern Photo Materials, 273 U. S. 359 (1927).
30. United States v. Scophony Corp. of America, 333 U. S. 795 (1948).
31. U. S. C. § 8 (1952).

the economic sense a company must transact in order to be found to be "transacting business" in the legal sense. The 1948 *De Beers* case illustrates this point.[32]

In cases involving a foreign parent of an American subsidiary, it has been established on numerous occasions that service upon the American subsidiary brings its foreign parent within the jurisdiction of the court. In the famous *ICI* case, the ICI London was brought under the jurisdiction of an American court via its subsidiary ICI in New York.[33] A similar procedure was recently applied in the case of *Swiss Watch Manufacturers*.[34] In both cases the court was satisfied that the American subsidiary was acting as an alter ego of its foreign parent.

The *General Electric* case proved again that American courts cannot establish in personam jurisdiction over foreign subsidiaries of an American parent who is a defendant in court.[35]

It may be also mentioned that in personam jurisdiction over a wholly foreign defendant may be obtained by confiscating his property within the United States. Section 6 of the Sherman Act provides that "any property owned under any contract . . . or pursuant to any conspiracy mentioned in section one of this act . . . and being in the course of transportation . . . shall be forfeited to the United States." This section was subsequently amended by the Wilson Act, so as to include imported goods already within the United States.[36] As Section 6 has been used only on two occasions in the past, it appears that its significance is rather negligible.[37]

C.

As the nature of the Sherman Act is partly penal and partly remedial, courts in deciding an antitrust case usually issue injunctions which will remedy the situation and prevent the continuation of illegal practices in the future. In antitrust cases involving foreign trade, the injunctions issued by the courts frequently refer to certain activities of defend-

32. United States v. De Beers Consol. Mines, Civil No. 29-446 (S. D. N. Y. 1948).
33. United States v. Imperial Chem. Indus. Ltd., 100 F. Supp. 504 (1951).
34. United States v. Watchmakers of Swit., 133 F. Supp. 40 (1955).
35. United States v. General Elec. Co., 82 F. Supp. 753 (1949).
36. 15 U. S. C. § 8 (1952).
37. United States v. 383, 340 Ounces of Quinine Derivatives, Civil No. 98-942 (S. D. N. Y. 1928). United States v. 5,898 Cases of Sardines, Civil No. 105-37 (S. D. N. Y. 1930).

ants that are taking place abroad. The question then arises as to what extent American courts could order the defendant to perform or not to perform certain acts abroad.

According to the Restatement of Conflict of Laws, it is generally accepted that a court may enjoin the defendants from doing certain acts outside the territorial limits of its jurisdiction, and it may also order them to perform certain acts, provided, however, that the performance of those acts will not violate the law of the country where the acts are to be performed.[38] On several occasions in the past, courts issued injunctions providing for divestiture abroad, transfer of patents, and limiting the exercise of patent rights. The injunctions issued by American courts were always based on the assumption that foreign courts would not be involved in enforcing them and, also, that foreign courts would permit the defendants to comply with them. So far, the *ICI* case involving nylon patents, is the only case where foreign courts have interfered with compliance with the injunction of an American court. No injunction has ever been issued that would require its enforcement by a foreign court. Such an injunction would be contrary to the rules of international law and of comity.[39]

In issuing injunctions in cases involving foreign trade, courts will frame their orders with considerations of comity and of public interest. In a recent case, the court stated that the relief should consider "the needs of particular case . . . always with due regard to the underlying public interest that is inherent in antitrust laws."[40] Most of the decrees issued by courts are expressed in terms of negative prohibitions rather than in positive orders to perform certain acts. The injunctions can be issued, obviously, only to the defendants in court and not to the co-conspirators who are not present in court. This fact limits, of course, the effectiveness of relief, and may also involve the defendants in litigations abroad.[41] Foreign partners who are not present in the court may sue the defendant in foreign courts for damages resulting from the non-performance of acts which are prohibited by the injunc-

38. RESTATEMENT, CONFLICT OF LAWS, *supra*, §§ 63, 94, 96 and 97. Messner, *The Jurisdiction of a Court of Equity over Persons to Compel Doing of Acts Outside the Territorial Limits of the State*, 14 MINN. L. REV., 494-529 (1929-1930).
39. OPPENHEIM, *op. cit. supra*, ¶ 295.
40. United States v. National Lead Co., 332 U. S. 319 at 360 (1947).
41. *Ibid.*

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tion directed to the defendant. The Report of the Attorney General's Committee envisage such a possibility, and suggests that the Department of State assist American companies defending such foreign suits.[42]

In several cases where foreign defendants or foreign subsidiaries of American defendants were involved, it was necessary for the court to collect documentary evidence which was located abroad. On many occasions this fact created rather serious conflicts. Courts acting on a basis of a generally agreed principle that they may order the defendant to produce any necessary documents, ordered the defendants to produce documents which were outside of the United States.[43] Even when the documents were in the actual possession of foreign subsidiaries of American defendants, courts believed that since the defendants exercised control over their subsidiaries, they should produce the documents required.[44] On two occasions foreign governments reacted very strongly to such an order issued by an American court, and prohibited the removal of any documents from their territories. They believed that American courts had exceeded their legitimate powers and had attempted to infringe upon their sovereignties. To avoid a repetition of similar situations in the future, the Dutch Government and the Ontario Government passed special acts prohibiting the removal of any documents pursuant to an order of a foreign court.[45]

The jurisdiction of American courts does not extend, of course, to foreign governments. It is universally accepted in international law that governments are exempt from the jurisdiction of a foreign court.[46] This immunity is limited, however, only to political activities of a foreign government, and does not cover its commercial activities.[47] As early as 1824, Justice Marshall said that "when a government becomes a partner in any trading company, it divests itself, so

42. 1955 ATTY. GEN. NAT'L COMM. ANTITRUST REP. 76.
43. RESTATEMENT, CONFLICT OF LAWS, *supra*, § 94. SEC v. Mines de Artemisa, 150 F.2d 215 (1945).
44. In re Investigation of World Arrangements, 13 F.R.D. 280 (D.D.C. 1952).
45. Ontario passed the Business Records Protection Act (1950) in response to In re Grand Jury Subpoena Duces Tecum Addressed to Canadian International Paper Co., 72 F. Supp. 1013 (S.D.N.Y., 1947). See also the recent Dutch Anticartel law passed in response to the American investigation of the oil cartel, N.Y. TIMES, Dec. 10, 1952, p. 57; April 23, 1953, p. 5.
46. HACKWORTH, *op. cit. supra*, ¶ 169. MOORE, *op. cit. supra*, ¶ 250.
47. HACKWORTH, *op. cit. supra*, ¶ 174.

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far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen."[48] In spite of this clear statement, however, the issue as to what constitutes a political or a commercial activity of a foreign government remains rather unsettled. In two different antitrust cases where activities of a foreign government were involved, courts arrived at different conclusions in spite of the fact that the circumstances of both cases were almost identical. In 1929, the *Kalisyndicat* case, the court declared that the defendant corporation, although partially owned and controlled by the French government, was not identical with the French government and could not claim immunity on the basis of being a "foreign sovereign."[49] In 1956, in a case where the circumstances were very similar to those of *Kalisyndicat,* the court extended the privilege of sovereign immunity to the Anglo-Iranian Corporation.[50] On the basis of this limited authority it may be concluded, therefore, that the question of sovereign immunity in commercial activities will, in all probability, be decided more on grounds of political considerations than on the basis of clearcut principles.

In exercising jurisdiction over foreign trade of the United States, American courts frequently had to face a possible conflict with foreign laws. Many activities of defendants which were illegal under the Sherman Act were perfectly legal under the law of the place where they were committed; foreign law acquiesced in such acts or did not prohibit them. The fact, however, that certain conduct was legal under the local law, has never prevented American courts from deciding that they were illegal under the Sherman Act, whenever that conduct had substantial detrimental effects upon American foreign trade. It appears, therefore, that only conduct positively required by foreign law can be exempt from the Sherman Act. So far, however, no antitrust case has been presented which would involve activities abroad which were required by foreign law. It may be presumed, further, that in order to honor the rules of international comity, the De-

48. Bank of United States v. Planters' Bank of Georgia, 9 Wheat (22 U. S.) 904 at 907 (1824).

49. United States v. Deutsches Kalisyndicat Gesellschaft, 31 F. 2d 199 (1929).

50. In re Investigation of World Arrangements, 13 F.R.D. 280 (D.D.C. 1952).

partment of Justice will not present such a case in the future.

D.

Although the objective theory of jurisdiction appears to be generally accepted by leading legal experts when applied to acts which are recognized as crimes by all civilized nations and to acts which endanger the security of a state, there has been a large area of disagreement as to whether this theory should also be applied to the antitrust law. The critics of the objective theory, who maintain that the courts should return to the territorial principle when the Sherman Act is involved, stress the fact that although this theory might have perfect validity when applied to *general criminal law*, it has no application to the *antitrust law*. They maintain that in cases of common crimes, the dispute between sovereign states will evolve only around the question as to who shall punish the offender; the act itself will, in all probability, be recognized as a crime by all civilized states. The position is, however, quite different when it comes to the antitrust law where certain acts are considered as crimes only by certain states. These critics quite rightly point out that the United States is the only country which explicitly and definitely makes the act of monopolizing a crime. No other country declares that restraints of trade are a violation of the law. The question then arises, are the United States courts justified in extending their jurisdiction to commercial activities which are perfectly legal in the places where they are performed?

Furthermore, it is maintained that each country may conduct its commercial activities according to different economic theories, and that the economic interests of the countries involved may also be different. It is also claimed that it is very difficult to ascertain the direct economic effects of certain acts. Those effects are usually very broad and complex, and unless a *specific* intent to produce them can be proved, they should not constitute a basis for the objective theory of jurisdiction. Finally, it is believed that any attempt to regulate commercial activities outside the territory of the United States may encroach upon the instincts of national sovereignty of other countries.

The advocates of the application of the objective theory to the Sherman Act claim that the maintenance of competi-

tion is an important issue of national policy and belongs in the same category as the National Prohibition Act or the rules of exchange controls. They point out that almost all countries that operate foreign exchange controls exercise extraterritorial jurisdiction whenever a violation of those controls takes place. It is also believed that, as past experience indicates, there is not much danger of a clash with foreign laws. Finally, the advocates of the objective principle believe that foreigners who are attracted to operate in the American market should not object when American courts assert jurisdiction over their activities outside of the United States which affect the American market.

Answering the criticism that the application of the antitrust law is always uncertain and ambiguous, the proponents of a strong enforcement of the Sherman Act frequently quote a rather cynical, but nonetheless correct, remark made by Justice L. D. Brandeis. Testifying before the FTC, he stated that when businessmen asked him for his advice on the application of the antitrust laws, he had answered them that, while he could not tell them how to walk along the edge of the cliff without falling off, he could always show them a safe path a little way back.[51]

In general, it may be said that private lawyers who represent their clients in antitrust actions almost unanimously advocate a return to the territorial principle. On the other hand, lawyers who are, or have been, employed by the various governmental agencies, such as the Department of Justice, Department of Commerce, or Department of State, definitely oppose return to the *Banana* philosophy, and vigorously advocate adherence to the objective principle.

William D. Whitney, a noted lawyer and an expert on antitrust law, has been probably one of the most vociferous critics of the presently accepted theory of jurisdiction and one of the stoutest advocates of the territorial principle. His attack on the objective concept of jurisdiction is centered on two points. In the first place, he firmly believes that the way the Sherman Act is presently applied to foreign trade violates international law, is contrary to the comity of nations, and amounts to molestation of foreign countries and interference with their domestic affairs. He believes that the courts are "guilty of judicial aggression" and on several occasions

51. 1915 FTC RECORDS 12.

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have applied the "law oppressively."[52] It is his impression that the United States government has been trying to convert the rest of the world to the American point of view on economic policies, and that the government has been using the courts as media of propaganda. He concludes one of his articles by saying that "the Department of Justice . . . is prostituting our courts to use them as instruments of foreign policy."[53]

Secondly, he is fully convinced that the present antitrust policy inflicts irreparable damage upon the United States businesses abroad and upon the American economy in general. He has repeatedly asserted that many American business ventures abroad have been disrupted or not undertaken at all for fear of antitrust prosecution.[54] Similar statements have been made by Carl W. Hayden, President of the American Chambers of Commerce in London.[55] Both Whitney and Hayden insistently maintain that the present policy of enforcing the Sherman Act in the foreign trade area discourages American economic operations abroad and has a substantial negative effect upon American investment abroad. However, they do not cite specific examples. When, on the other hand, the Department of Commerce undertook a special survey which might have confirmed the statements of Whitney and Hayden, it found no United States company stating that its foreign investment program was inhibited by the antitrust law.[56] A small percentage of these companies merely stated that they were somewhat reluctant to make exclusive patent license agreements with foreigners.

When Whitney testified before a Senate committee, he unequivocally stated that, in his opinion, any act committed abroad, no matter how directly and substantially it might affect United States trade, should be outside the jurisdiction of American courts. He believed that

> no principle of the international law is more universally recognized than that each nation is sovereign in its own

52. WHITNEY, *Antitrust Law and Foreign Commerce*, 11 RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 135-36 (1956).
53. *Id.*, p. 139.
54. WHITNEY, *Sources of Conflict Between International Law and the Antitrust Laws*, 63 YALE L. J., 655-62 (1954); W. D. WHITNEY, *Planning Foreign Trade*, HOW TO COMPLY WITH ANTITRUST LAWS, (Chicago; Commerce Clearing House, 1954), p. 370-78.
55. STAFF OF SUB-COMM. ON ANTITRUST LAWS, SENATE COMM. ON THE JUDICIARY, 84th Cong., 1st Sess., REPORT ON FOREIGN TRADE, Part 4, p. 1852 (Comm. Print 1955).
56. *Id.*, p. 1807.

territory and, accordingly, the rule is basic that the laws of a nation apply only to the acts and events within its own territory.[57]

Needless to say, the committee was not too greatly impressed with Whitney's approach.

Another noted antitrust lawyer, George W. Haight, may be considered as a representative of a more moderate school of thought on this subject. He recognizes the principle of objective jurisdiction but feels it should not be applied to antitrust law because this law is too vague and too complex, and the acts of monopolization are considered as crimes only in the United States and nowhere else.[58]

Another example of this moderate opposition to the principle of objective jurisdiction may be found in the writings of J. E. Lockwood and W. C. Schmeisser.[59] They also recognize the general validity of the objective theory of jurisdiction but oppose its application in the antitrust area. They believe that its application there would lead to chaos and would violate the principles of commercial cooperation between nations and mutual respect for each other's laws. To avoid this, they propose that each nation adopt a strictly territorial concept of law so far as commercial activities are concerned.

The advocates of the strictly territorial application of the Sherman Act have one thing in common — they all overlook one very significant fact which is probably the crucial issue here. They give the impression that the Department of Justice and the court have attempted to regulate all commercial activities of American companies abroad and that the courts have tried to extend their jurisdiction to commercial activities of foreigners in their own countries. Obviously, nothing could be further from the truth. Again and again the courts have explicitly stated that they have tried to control only those activities abroad which intend to, and actually do, have detrimental effects upon United States foreign trade. What the advocates of the territorial principle actually want is for the United States to give up the control over acts which, although performed abroad, affect the domestic economy of the United States. Such a surrender of control would be not only against the spirit of the Sherman Act but also contrary to the

57. *Id.*, p. 1751.

58. HAIGHT, *International Law and Extraterritorial Application of the Antitrust Laws*, 63 YALE L. J., 643 (1954).

59. LOCKWOOD AND SCHMEISSER, *Restrictive Business Practices in International Trade*, 11 LAW AND CONTEMPORARY PROBLEMS, 680-83 (1946).

provisions of the Constitution which give control over foreign trade to the Federal authorities.

Discussing the question of jurisdiction and the critics' arguments that the acts committed outside United States borders, even if they directly affect United States commerce, should in no case come under United States jurisdiction, Assistant Attorney General V. R. Hansen points out that "if the same theory were applied to all nations, it seems clear that such activities would be then outside the jurisdiction of any nation."[60]

The critics of the objective theory of jurisdiction may be found not only among American lawyers and businessmen; Sir Hartley Shawcross, when addressing the convention of the American Bar Association, criticized this theory too. In the course of his discussion of the American idea that a state may exercise jurisdiction over acts of foreigners which take place abroad and which result in illegal effects at home, he stated that

> our courts do not accept that at all. We regard it as an excess of jurisdiction contrary to international law. We do not recognize any right on the part of a foreign court to pass upon contracts lawfully made here by British concerns or by British with foreign concerns even though that contract may have some effects in the foreign country.[61]

He concluded his discussion by stating that "we should view with much anxiety any attempt to assert criminal jurisdiction in regard to economic matters over acts which are lawful here."[62]

E.

Recently, a special committee of the Association of the Bar of the City of New York presented a study of the relationship between the enforcement of the Sherman Act and foreign economic policies.[63] A major part of this study was devoted to the question of the jurisdiction of the Sherman Act over

60. HANSEN, *The Enforcement of the United States Antitrust Laws by the Department of Justice to Protect Freedom of United States Foreign Trade*, 11 ABA ANTITRUST SEC. PROC., 75 at 80 (1957).
61. SHAWCROSS, *English Restrictive Practice Legislation; Extraterritorial Effects of U. S. Antitrust Laws*, 11 ABA ANTITRUST SEC. PROC., 111 at 114 (1957).
62. *Id.* at 115.
63. *National Security and Foreign Policy in the Application of American Antitrust Laws to Commerce with Foreign Nations*, NYBA COMM. ON ANTITRUST AND FOREIGN TRADE (1957).

foreign trade. The committee analyzed the important decisions of the courts, presented its evaluations of these decisions, and finally came out with its own conclusions.

The report violently attacks the recent policy of the Department of Justice, criticizing especially the objective theory of jurisdiction. It states that the enforcement of antitrust laws was characterized by "disregard by us of traditions and and principles of public international law."[64] The committee believes that the application of the antitrust laws "not only may result in a violation of principles of international law, but also may cause disrespect for the law."[65] The way the committee presents its case against the objective principle leaves the reader with the impression that the United States courts try to control any and all acts committed abroad which have even the slightest unintentional and incidental effect upon United States economy. There is no evidence for such a conclusion. On the contrary, the courts have always stated that the Sherman Act applies only when effects upon the American economy are intended and where they are substantial. The committee further errs in attacking the supposed application of the Sherman Act to activities which are positively required by a foreign government. There is no case in the entire history of the Sherman Act in which this statute has been applied to an act required by a foreign government. Finally, the committee states that "the obligation to conform to the antitrust laws abroad is not a duty inherent in citizenship."[66] There is no evidence in the judicial history of the United States which would support a claim that courts have no jurisdiction over United States citizens abroad, when their acts violate United States laws. In the recent case of *Bulova Watch,* the court explicitly states that "Congress in prescribing standards of conduct for American citizens may project the impact of its laws beyond the territorial boundaries of the United States."[67]

The way the committee attacks the objective theory of jurisdiction creates the impression that the courts have attempted to exercise authority over acts which have nothing to do with United States economy and are totally unrelated to American markets. In its report the committee has failed

64. *Id.* at 8.
65. *Id.* at 9.
66. *Id.* at 11.
67. Steele et al. v. Bulova Watch Co., Inc., 344 U. S. 280 at 282 (1952).

to see that the issue of effects radiating from certain acts committed abroad is the crux of the problem.

F.

A new approach to the question of jurisdiction of the antitrust law has been presented recently by Professor Kingman Brewster of the Harvard School of Law. He proposes the introduction of a concept which he calls a jurisdictional rule of reason.[68] This rule of reason would have, of course, nothing to do with the rule of reason as introduced by the courts in 1911.[69] His jurisdictional rule of reason would apply only to questions of jurisdiction of the Sherman Act over issues arising from foreign trade. Professor Brewster believes that this area of antitrust presents a number of very delicate and complicated problems. In order to avoid a possibility of jurisdictional conflicts and clashes, he proposes that the following aspects of the case be analyzed before jurisdiction is claimed:

1. Relative significance of the alleged conduct.
2. Extent to which the conduct complained of was explicitly designed to affect the United States.
3. Relative seriousness of the effects on United States economy.
4. Degree of conflict with foreign laws.
5. Extent to which conflict can be avoided without serious impairment of American interest or the interest of the foreign countries.

The above factors would operate within relatively broad limits. The limits themselves are defined by Professor Brewster, as, on the one hand, "the absence of demonstrable harm to the United States," and on the other hand, "the presence of demonstrable foreign objections." Within these two extremes the jurisdictional rule of reason would function.

A proposal very close to Professor Brewster's suggestion has been outlined by Arthur H. Dean. He calls his approach to the question of jurisdiction "a rule of reasonable balancing."[70] He maintains that the rule introduced by Judge L. Hand in the *Alcoa* case is not broad enough. He believes that before

68. BREWSTER, *Extraterritorial Effects of the United States Antitrust Laws: An Appraisal*, 11 ABA ANTITRUST SEC. PROC., 65 and 72 (1957).
69. Standard Oil Co. of New Jersey v. United States, 221 U. S. 1 (1911).
70. H. DEAN, *Extraterritorial Effects of the United States Antitrust Laws: Advising the Client*, 11 ABA ANTITRUST SEC. PROC., 88 at 100 (1957).

jurisdiction is claimed over a case involving foreign trade, not only purely judicial factors should be considered but also due weight should be given to economic, political, and diplomatic issues. A process of reasonable balancing of *all* factors involved should be employed, and the antitrust issues should be placed within the larger framework of the general economic policy.

This author believes that in almost all cases involving foreign trade and the Sherman Act, the jurisdictional issues are decided by the courts with reference to the above-mentioned jurisdictional rule of reason, even if this was never explicitly mentioned. From an analysis of the cases, one may gain the definite impression that neither the courts nor the Department of Justice blindly followed the objective theory of jurisdiction; usually they apply the jurisdictional rule of reason in determining whether or not the acts of the defendants are within the court's jurisdiction. The debate which is now taking place on the subject of jurisdiction is really centered on the issue of the degree to which the jurisdictional rule of reason should be applied.

The preceding review demonstrates a gradual development and transformation of the concept of jurisdiction. The early concepts of the purely territorial approach have been replaced by broader and wider concepts of jurisdiction. Experience, apparently, requires bringing within national control that part of the economic activities of the nation which spread beyond its borders. According to some authorities, this process has been the inevitable consequence of a new concept of the state itself. Professor K. S. Carlston plainly states that "the authority of the modern state is not and cannot be confined within its national borders."[71] Following this philosophy, the concept of acts subject to national control has been expanded to include acts committed abroad which have consequences taking place within the state, or which are a part of a series of related events taking place, in some degree, within the state.

Concluding this part of the discussion, we may say that although there is a strong presumption of jurisdictional inhibition which usually limits the application of law to acts taking place within the territory of the lawmaker, nevertheless, an increase in the area of economic regulation exercised

71. CARLSTON, *op. cit. supra*, p. 581.

by governments necessitates the extension of jurisdiction beyond the boundaries of the state. The territorial limits of jurisdiction are perfectly applicable to simple crimes. The concept of strict territoriality fails, however, to provide a satisfactory and adequate approach when wider issues of economic policies are involved. Today, many experts would not deny judicial competence to a court whenever there are strong reasons for extending the jurisdiction outside the territory of the nation. Although the principle of territoriality should remain as a basic approach to the construction of law, it is believed, nevertheless, that frequently it must be replaced by a more realistic approach required by specific circumstances.

INTERNATIONAL CONFLICT OF LAWS

II. *The Imperial Chemical Industries, Ltd. Case*

In the analysis of the issues discussed here, the so called *ICI* litigation[72] occupies a special place. It is the only major case approaching a conflict between the American and British courts. It has been frequently analyzed and commented upon by American and British experts, with their opinions varying all the way from describing it as an imperialistic aggression of a United States court upon a foreign sovereignty, to saying that the case represented a perfect example of international cooperation and mutual understanding. It is believed that a close analysis of the facts will dispel many of the misconceptions which were created by the decision in the United States and Great Britain. It is interesting also to observe the behavior of the courts in these two countries in a situation where highly controversial issues were involved.

As several aspects of the ICI case were discussed in other sections of this study, only a summary outline will be presented here. Discussion will be centered on the question of conflict between the American courts trying to enforce the Sherman Act and the British courts protecting British citizens from the jurisdiction of an American court.

In 1951 the United States District Court decided that Imperial Chemical Industries, Ltd., Imperial Chemical Industries,

72. United States v. Imperial Chem. Indus., Ltd. et al., 100 F. Supp. 504 (S. D. N. Y. 1951) (opinion on violation) and 105 F. Supp. 215 (S. D. N. Y. 1952) (opinion on relief).

Ltd. (New York), and the du Pont Corporation were guilty of violating the Sherman Act by restricting American foreign trade in chemical products. The restraints were effected by jointly owned subsidiaries, patent exchanges, and other cartel arrangements. In 1952 the same District Court presided over by Judge Ryan issued a supplementary opinion on remedies. The purpose of this supplementary opinion was to prevent repetition of previous violations, destroy the effects of illegal arrangements, and restore competition among the defendants. The opinion dealt with subsidiaries and with patents. Although the remedies concerning the future of the subsidiaries did not provoke any serious complaints, the problems involved in the reassignments of patents became the center of the international controversy.

Judge Ryan found that the essence of the violations was a series of unlawful agreements to divide world markets and to eliminate competition between ICI and du Pont. Among many other things the District Court found that "exchange of patents, processes and know-how served as direct instruments used by the conspirators to achieve the unlawful purposes."[73] The evidence proved that patent agreements were used by the defendants to divide territories, to eliminate exports and imports, to eliminate competition, and thus to implement the illegal restraints upon United States foreign trade. ICI was prevented from importing into the United States; du Pont, on the other hand, was prevented from exporting from the United States into the territories of ICI or of their jointly owned subsidiaries. As patents served as a main pillar of the whole scheme of cooperation between ICI and du Pont, the court believed that their use would have to be regulated and controlled by the court. The court was of the opinion that "compulsory licensing will serve to . . . promote the flow of foreign trade to and from the United States,"[74] and although it realized that it could not directly force du Pont to export, it believed that by ordering a compulsory licensing of du Pont's patents, it would enable other companies licensed by du Pont to export, and by doing so it would, probably, compel du Pont to export too.

Concerning the patents held by ICI, the Department of Justice and the court made a clear-cut distinction between

73. 105 F. Supp. 215 at 221.
74. *Id.* at 226.

British patents and American patents held by that company. The court ordered that all their American patents be subject to the same order of compulsory licensing, while at the same time the government requested that "ICI be required to grant immunity under its foreign patents which correspond to the United States patents which we have made subject to compulsory licensing."[75] When ICI objected strongly to this order and maintained that British courts would not enforce such a provision, the court said that

> as to this, we observe that acting on the basis of our jurisdiction in personam, we are merely directing ICI to refrain from asserting rights which it may have in Britain, since the enforcement of those rights will serve to continue the effects of wrongful acts it has committed within the United States affecting the foreign trade of the United States.[76]

The Judge stated here that patents were employed to restrain du Pont's exports to Great Britain in plain violation of the Sherman Act, while at the same time patents were used as a means to prevent ICI from exporting into the United States and thus placed a restraint upon the the foreign trade of Great Britain in violation of the declared British policy of stimulating exports to the dollar area.

The court was fully aware that its judgment might create some conflicts of international law. Recognizing that "substantial legal questions may be raised with respect to our power to declare" as to the foreign patents issued to ICI and du Pont, it plainly and explicitly stated that

> the effectiveness of the exercise of that power depends upon the recognition which will be given to our judgment as a matter of comity by the courts of the foreign sovereign which has granted the patents in question.[77]

Although it was fully aware that a possibility existed that this recognition might not be forthcoming and thus the effectiveness of the order partially nullified, the court stated that "this should not deter us from making directions we feel are required, even though the application of them may be limited in operation by the possible action of an official of a foreign sovereign."[78]

75. *Id.* at 228.
76. *Ibid.*
77. *Id.* at 229.
78. *Id.* at 230.

Finally, the court approached the controversial issue of the nylon patents and of British Nylon Spinners, Ltd. The development of nylon was wholly a du Pont project. In 1939 du Pont granted an exclusive license for the production of nylon in Great Britain to ICI. In 1946 du Pont assigned its British patents for nylon to ICI which in turn granted an irrevocable and exclusive license to British Nylon Spinners Ltd., a subsidiary in which ICI had 50 per cent stock interest.

In order to remove any restrictions imposed by ICI on imports of nylon into Great Britain from the United States, the court ordered the reassignment of nylon patents back from ICI to du Pont. The problem would have been relatively simple had not ICI assigned those nylon patents to BNS, so that ICI no longer exercised any legal control over those patents. The Court realized full well that BNS was not a party before the court. It believed, however, that BNS was fully aware of all the details about the illegal arrangement between ICI and du Pont and, therefore, was *not an innocent party*. This belief appeared to be the focal point of the whole issue involving BNS. It sounds rather strange, however, that a United States court formulated its opinion about the guilt or innocence of a British corporation which was not named as a defendant or even as a co-conspirator.

After decreeing this reassignment of patents from ICI to du Pont the court for the second time stated that

> what credit may be given to such an injunctive provision by the courts of Great Britain in a suit brought by BNS to restrain such importation we do not venture to predict. We feel that the possibility that the English courts in an equity suit will not give effect to such a provision in our decree should not deter us from including it.[79]

Immediately after the District Court issued the decree, BNS sued in London for an injunction to restrain any act by ICI which would impair its contractual rights.[80] This injunction was granted by the High Court of Justice and an appeal to the Court of Appeal was dismissed. Two years later the case came for trial, and the trial court, in essence, affirmed the opinion of 1952.[81]

79. *Id.* at 231.
80. British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd. [1953] 1 Ch. 19 (C. A.).
81. British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd. [1955] 1 Ch. 37.

The substance of the opinion of the court was that the rules of comity did not require British courts to give effect to a United States judgment against a British national which affected other British nationals and two different property rights created under the British law.[82] One property right involved ICI's legal title to the British patents for nylon and the second dealt with BNS's contractual right to performance of a contract executed in Great Britain according to British law between itself and ICI. The court thus refused to deprive BNS, a British corporation over which the United States courts had no jurisdiction, of the benefits of a legal contract, and issued a decree restraining ICI from parting with any patents to which it had given an exclusive license to BNS. The court based its decree partly on the fact that BNS was not a party to, nor had any knowledge of, any illegal conspiracy contrary to United States law.

The history of the ICI case in the American and British courts undoubtedly presents at first sight *par excellence* example of a conflict of international law. This apparent conflict had its origin in the attempts of an American court to extend its jurisdiction beyond the territorial boundaries of the United States. Here we have a case of a foreign company — ICI — being caught between the blades of a scissors. On the one hand the United States court ordered it to break its contract with BNS; on the other hand the British court enjoined it from breaking this contract.

For those American lawyers who dislike and reject an effective enforcement of the Sherman Act at home and abroad, the ICI case became an excellent excuse to advocate a relaxation of the application of the Sherman Act to American foreign trade. They saw there a great international conflict and they painted a vivid picture of a great international clash. The representatives of this group were William Dwight Whitney and George W. Haight, both noted corporate lawyers and experts in antitrust law. In a voluminous body of literature they described the policy of the Department of Justice and the opinion of Judge Ryan as a "judicial aggression," a "violation of the international law," and an "imposition of

82. For a discussion of the opinion of the British Court see: TIMBERG, *Antitrust and Foreign Trade*, 48 NW. U. L. REV., 412 (1953); TIMBERG, *Problems of International Business*, 11 ABA ANTITRUST SEC. PROC., 106-20 (1953).

our laws on foreign countries."[83] Carried away by his own enthusiasm, Whitney stated that by this decision the United States courts were giving "support to totalitarian doctrines."[84] He further maintained that Judge Ryan tried to assert the general supremacy and leadership of the United States and by doing so infringed upon the sovereignty of other countries.[85] Haight concurred in most of Whitney's statements.[86] Similar exaggerated opinions were voiced by Carl W. Hayden, President of the American Chamber of Commerce in London.[87] The official report of the American Bar Association, in its discussion of the ICI case, did not spare its criticism of Judge Ryan, accusing him of making "futile gestures based on wholly unrealistic assumptions."[88]

A careful reading and thorough analysis of Judge Ryan's dicta will show clearly that he was far from committing a judicial aggression and a violation of comity of nations. Several statements of his, quoted on preceding pages, show quite obviously that he was wholly mindful of the possible intertional complications and that he knew very well that a British court would have the final word in this case. An examination of the Court's opinion plainly reveals that Judge Ryan was cautiously stepping on very slippery ground, fully aware that his words would have worldwide repercussions. He seemed aware of the possible lack of cooperation from the British, but he felt that duty compelled him to use the best possible remedial action, and he hoped that this action would be approved by the British courts. As an American judge sitting in an American court, however, he had no choice but to apply the American law in the best possible way. He certainly was interested not in destroying the licenses possessed by the BNS, but in assuring that du Pont should not by this device exclude its American products from the British market. The tone of his opinion indicated plainly that he was trying to avoid, almost at any price, any possible conflict of

83. WHITNEY, *Antitrust Law and Foreign Commerce*, II RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 135 (1956).
84. *Id.* at 137.
85. WHITNEY, *Sources of Conflict Between International Law and the Antitrust Laws*, LXIII YALE L. J., 661 (1954).
86. HAIGHT, *International Law and Extraterritorial Application of the Antitrust Laws*, LXIII YALE L. J., 639 (1954).
87. STAFF OF SUB COMM. ON ANTITRUST LAW, COMM. ON JUDICIARY, 84th Cong., 1st Sess., REPORT ON FOREIGN TRADE, Part 4, p. 1852 (1955).
88. *Impact of Antitrust Laws on Foreign Trade*, ABA COMM. ON INT'L TRADE REG. 12 (1953).

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international law. His dicta were most conciliatory and his opinion was based on an objective examination of the facts of the case.

In the first place, the evidence produced in court proved that patents were one of the major tools used in effecting an illegal conspiracy. To prevent the re-establishment of this conspiracy in the future, some judicial action on patents was essential. In the second place, ICI and BNS were aware that the nylon patent was originally the property of du Pont and was issued in the United States. Finally, it has to be mentioned that no great injustice was done to ICI. The decree authorized ICI to collect reasonable royalties on all nylon products imported in Great Britain. The real loser was du Pont, which was not allowed to collect any royalties on items destined for exports. Furthermore, it is important to remember that BNS was not a completely independent entity, but was a subsidiary owned partly by ICI. The contract of 1946 assigning the patents from ICI to BNS was, therefore, more in the nature of an internal deal within a large corporate enterprise. It was not a contract with a complete outsider who was totally independent and innocent of anything that ICI did. From the practical point of view there is no doubt that the policies of BNS were dictated by ICI. As the assignment of the nylon patents by ICI to BNS took place after the Department of Justice started the investigation of the alleged conspiracy between ICI and du Pont, there may be some ground for suspecting that ICI assigned the nylon patents to BNS in order to remove these patents from the jurisdiction of an American Court.

Looking at the whole problem from the British point of view, the courts in London stood on very firm ground. BNS was an independent party outside the jurisdiction of the United States, the contract between ICI and BNS was obviously valid and legal, and there was, therefore, no reason to permit ICI to withdraw a perfectly legal patent assignment. The important thing, however, was that the British court did not see any violation of international law in the decree of the American court, nor did it see any serious conflict of law. It explicitly stated that the United States court had jurisdiction over ICI, and that it could, therefore, direct ICI to do, or refrain from doing, certain acts outside the United States if those acts affected United States foreign

trade.[89] Lord Denning stated unequivocally that there was no conflict between the orders of the American and the British courts, since the United States judgment had "a provision which says that nothing in the judgment shall operate against the company for action taken in complying with the law of any foreign government or instrumentality thereof to which the defendant company is for the time being subject."[90]

Upon closer scrutiny of the ICI case, instead of being an example of international conflict, as the critics of Judge Ryan maintained, appears to present an example of international understanding, cooperation, mutual respect for sovereignty of national law, and a conciliatory attitude displayed by both sides in a strikingly difficult case. Being the only major instance of a situation of this sort, this case illustrates conclusively that the extraterritorial application of the Sherman Act, as used by Judge Ryan, did not necessarily lead to a conflict of law and violation of other nations' sovereignty. Victor R. Hansen, the Chief of the Antitrust Division of the Department of Justice, when commenting on this case, asserted that it "indicates a substantial agreement by American and British courts on this question of jurisdiction."[91] A similar conclusion was reached by T. V. Kalijarvi, the Deputy Undersecretary of State for Economic Affairs, when testifying before a Senate Committee investigating the effectiveness of antitrust legislation.[92] It appears, then, that the judges on both sides of the Atlantic instead of being criticized should be congratulated for their restraint and their display of complete respect.

The criticism of Judge Ryan came not only from the American lawyers and businessmen; British legal circles also did not kindly receive the decision of Judge Ryan. Several British authors expressed their doubts about the correctness of Judge Ryan's attitude. Professor O. Kahn-Freund believed that "the proposition that the American law should be able to compel an English company in England to break its English contract with another English company is plainly ab-

89. [1953] 1 Ch. 19 at 25 (C. A.). See HANSEN, *The Enforcement of the United States Antitrust Laws by the Department of Justice to Protect Freedom of United States Foreign Trade*, 11 ABA ANTITRUST SEC. PROC., 75 at 82 (1957).
90. [1955] 1 Ch. 37 (Ch.); See TIMBERG, *Antitrust and Foreign Trade*, *supra*, at 414.
91. HANSEN, *op. cit. supra*, p. 84.
92. STAFF OF SUBCOMM. ON ANTITRUST LAW, *supra*, at 1844.

surd."[93] In his opinion Judge Ryan attempted to exercise an extraterritorial jurisdiction which could not be recognized by other nations. Professor Kahn-Freund was afraid that the tendency of the United States courts to extend the Sherman Act abroad amounted actually to "the claim that this law should be a world law of practically unrestricted international application."[94] A careful reading of Judge Ryan's decree will show, as has been mentioned earlier, that he had no intentions of this sort. He was applying the Sherman Act not to world trade in general but to certain activities of foreign companies doing business in the United States, which directly and substantially affected American foreign trade.

The last word from the British side about the ICI case was probably spoken by Sir Hartley Shawcross. He viewed with the greatest apprehension the increasing tendency of American courts to pass opinions "upon contracts lawfully made here by British concerns or by British with foreign concerns even though those contracts may have some effects" in the United States.[95] He believed that great anxiety would be created in British legal and governmental circles if the United States courts were to persist in their attempts to exercise jurisdiction upon economic matters which were lawfully contracted in Great Britain, even if those matters affected markets in the United States and were contrary to American law.

The international aspects of the ICI case unquestionably presented a very serious difficulty and a dilemma for Judge Ryan and for the British courts. The difficulties present in the ICI case reflected on a small scale the complexity of the problems inherent in an effective application of the Sherman Act to American foreign trade. On the one hand, in order to secure an effective enforcement of the antitrust law in the foreign trade area the Sherman Act has to be applied on many occasions to acts which took place outside the territory of the United States. On the other hand, however, any extension of the Sherman Act beyond the territory of the United States may be met with conflicting foreign legal and economic attitudes. The ICI case, however, presented an ex-

93. O. KAHN-FREUND, *English Contracts and American Antitrust Law — The Nylon Patent Case*, XVIII MODERN L. REV., 67 (1955).
94. *Id.* at 70.
95. SHAWCROSS, *English Restrictive Practice Legislation; Extraterritorial Effects of U. S. Antitrust Laws, Report*, 11 ABA ANTITRUST SEC. PROC., 111 at 114 (1957).

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cellent example of how a potential conflict between two different economic and legal systems could be solved in an amicable and tolerant way. There are indications that should a similar situation arise in the future it would be accorded a similar restraint and respect.

The ICI case proved an additional and very interesting point. There have been many foreign critics of the Sherman Act who looked upon its application to United States foreign trade as a visible sign of American aggressiveness and American desire to spread the gospel of competition all over the world. They maintained that the benefits derived from unrestricted competition would invariably accrue to the stronger and more dominant American enterprises, while the weaker foreign business partners would be squeezed out. The ICI case proved that it is not always so. It proved that the benefits stemming from competition may also accrue to others. Within one year after the decision was announced by Judge Ryan, and after the restraints upon competition between ICI and du Pont were removed, the export trade of ICI to the United States increased from half a million dollars to five and a half million dollars.[96] In this instance the Sherman Act proved to be beneficial not only to the American public but also to the British balance of payments. It extended the advantages of competition not only to American but also to foreign markets.

96. TIMBERG, *Discussion*, 11 ABA ANTITRUST SEC. PROC., 105 at 107 (1957).