Notes

EXTRATERRITORIAL APPLICATION OF THE SHERMAN ACT TO FOREIGN CORPORATIONS*

I. Introduction

The importance of the Sherman Antitrust Act1 to American commerce cannot be overstated. Our “‘antitrust laws have long been considered cornerstones of this nation’s economic policies, have been vigorously enforced and the subject of frequent interpretations by our Supreme Court.”2 They are the Magna Carta of free enterprise and “are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”3

Few words have generated as much controversy in their application as “trade or commerce . . . with foreign nations,”4 as found in sections one and two of the Sherman Antitrust Act.5 This controversy centers around the Act’s jurisdictional applicability to foreign corporations.6 American courts may exercise extraterritorial juris-

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2. United States v. First Nat’l City Bank, 396 F.2d 897, 903 (2d Cir. 1968).
5. Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (1982), in relevant part provide:
   § 1 Trusts, etc., in restraint of trade illegal: penalty.
   Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal . . . .
   § 2 Monopolizing trade a felony: penalty.
   Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .
6. See Kitner, Jurisdiction, supra note 4, at 199; Fortenberry, Great Grimpen

(513)
diction under the Sherman Act over foreign corporations doing business in the United States or affecting American commerce. This note will focus on the extraterritorial application of the Sherman Act to businesses which are affecting domestic trade even though they are not conducting business within the United States.

Federal district courts have original jurisdiction over matters that are alleged to be in violation of the Sherman Act. Normally, jurisdiction is exercised based upon the principles that govern the granting of equitable relief. However, when considering whether extraterritorial jurisdiction should be exercised, principles of comity and territoriality in international law must also be considered.

Extraterritorial application is a matter of concern for foreign countries, and these nations have at times "resented and protested, as excessive intrusions into their own spheres broad assertions of authority by American courts." It is evident that at some point the interests of international harmony are too great to justify extraterritorial assertions of jurisdiction. However, that point is not defined by international law nor is it found in the text of the Sherman Act or its legislative history. This leaves the determination to the courts.

This note will initially discuss the application of the law in extraterritorial jurisdictional matters. Next, the discussion will turn to the development of the law to what it is today. Finally, an analysis will be made of certain defenses that may be asserted by a foreign defendant.

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9. See Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613 (9th Cir. 1976); Beausang, Sherman Act, supra note 6, at 188.
10. Timberlane, 549 F.2d at 609.
11. Id.
12. Id.
14. See Kitner, Jurisdiction, supra note 4, at 202; Ongman, Chaos, supra note 6, at 736-39.
II. The Law and its Application

The Sherman Act provides that any restraint on commerce is illegal.\(^1\)\(^5\) As with most statutes, however, its proper application depends upon a showing of certain essential elements. As the markets of the United States have become increasingly involved with the international marketplace, the Act's application has been expanded to reach non-American parties. As might be expected, this has raised issues of comity and international fairness.

A. Application of the Sherman Antitrust Act

In order to state a claim for relief against the actions of a foreign corporation under the Sherman Act, two elements must be established. The first element which is necessary to establish jurisdiction in the federal courts is the finding of a restraint of trade or commerce with foreign nations.\(^1\)\(^6\) The Supreme Court has held that the Sherman Act is to be construed broadly to allow Congress to exercise the full extent of its powers under the commerce clause of the Constitution.\(^1\)\(^7\) Consequently, the Sherman Act applies to import and export transactions\(^1\)\(^8\) as well as to other commercial transactions.\(^1\)\(^9\)

Once it has been established that trade or commerce is being restrained, the inquiry shifts to a determination of whether the facts establish that the restraint is unreasonable. While the Sherman Act prohibits every contract, combination or conspiracy in restraint of trade, it does not expressly require a showing of unreasonableness.\(^1\)\(^9\) Courts, however, have incorporated this as a second element.\(^1\)\(^6\) There-

\(^{15}\) See supra note 5.

\(^{16}\) See Kitner, Jurisdiction, supra note 4, at 203; Ongman, Chaos, supra note 6, at 733.


See also Kitner, Jurisdiction, supra note 4, at 203 ("No matter of trade between this country and any other country is beyond the Act's reach.").

\(^{18}\) See, e.g., United States v. Sisal Sales Corp., 274 U.S. 268 (1927); United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945) [hereinafter cited as Alcoa].

\(^{19}\) See, e.g., Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) (domestic corporation conspired with foreign corporations to restrain sale of artificial bearings in interstate and foreign commerce).

\(^{20}\) See supra note 4.

\(^{21}\) Standard Oil v. United States, 221 U.S. 1 (1910).
fore, the plaintiff must prove there is an agreement which unreasonably restrains trade and has an affect on commerce among the states of the United States, or with foreign nations.\(^2\)

In order to sustain a violation, both elements must be shown. Therefore, if the court finds that one of the two is missing, jurisdiction cannot lie.\(^3\) Once these two elements have been satisfied, however, the Sherman Act may be applied to any set of facts as long as its application does not violate the United States Constitution.\(^4\)

Courts, fearful of the disruption to the international system which could result from the enforcement of an Act which may violate international law, have developed restraints on the extraterritorial application of the Sherman Act.\(^5\)

### B. Development of the Law

At one time the activities of foreign corporations which were conducted outside the territorial limits of the United States were immune from prosecution under the antitrust laws, no matter how damaging they were to American foreign commerce.\(^6\) This rule of law was expounded in *American Banana Co. v. United Fruit Co.*,\(^7\) the first significant international antitrust case.\(^8\)

*American Banana* involved a plaintiff and defendant which were both American corporations. The plaintiff alleged that the Costa Rican government, at the instigation of the defendant, had seized the plaintiff’s banana plantation. After the seizure the Costa Rican court held an *ex parte* hearing and declared the plantation the property of a Costa Rican citizen. The Supreme Court affirmed the circuit court\(^9\) and the circuit court of appeals, holding that there was not a Sherman Act violation. The Court stated that “the general and almost universal rule is that the character of an act as lawful or

\(\footnotesize{22. \text{See Linseman v. World Hockey Ass'n, 439 F. Supp. 1315, 1320 (D. Conn. 1977); Beausang, Sherman Act, supra note 6, at 187; Ongman, Chaos, supra note 6, at 733.}}\)

\(\footnotesize{23. \text{Ongman, Chaos, supra note 6, at 734. See generally Kitner, Jurisdiction, supra note 4, at 204-05; Timberlane, 549 F.2d at 597.}}\)

\(\footnotesize{24. \text{Alcoa, 148 F.2d at 443.}}\)

\(\footnotesize{25. \text{See generally Ongman, Chaos, supra note 6, at 735-41.}}\)

\(\footnotesize{26. \text{See Note, Enforcement of United States Antitrust Laws Over Alien Corporations, 43 Geo. L.J. 661 (1955) [hereinafter cited as Note, Enforcement].}}\)

\(\footnotesize{27. \text{213 U.S. 347 (1909).}}\)

\(\footnotesize{28. \text{Fortenberry, Great Grimen Mire, supra note 4, at 523.}}\)

\(\footnotesize{29. \text{The Supreme Court referred to the trial court as the circuit court.}}\)
unlawful must be determined wholly by the law of the country where
the act is done.”

The Supreme Court’s decision in *American Banana*, therefore,
foreclosed extraterritorial application of the Sherman Act. However,
this rule has been modified by later cases. The first erosion of *American
Banana* occurred only four years later in *United States v. Pacific &
Arctic Railway & Navigation Co.* In *Pacific*, the plaintiff alleged Can-
adian and American corporations had conspired to monopolize
transportation between the United States and various Alaskan and
Canadian ports. Despite the defendant’s contention that the Sher-
man Act did not apply to transportation to foreign countries, the
Court found jurisdiction over those acts which occurred within the
United States. The Court reasoned that the existence of a foreign
corporation does not defeat jurisdiction so long as a section of the
transportation route affected the United States. The Court’s holding
was based on the concern that acceptance of the defendant’s con-
tention and denial of extraterritorial jurisdiction would prevent both
the laws of the United States and Canada from exercising jurisdiction
over the railroad line. The Court stated that while “we may not
control foreign citizens or corporations operating in a foreign ter-
ritory, we certainly may control such citizens and corporations op-
erating in our territory, as we undoubtedly may control our own
citizens and our own corporations.” Thus, the Court was willing
to extend jurisdiction under the Sherman Act to conduct that occurred
at least partly in foreign nations.

30. *American Banana*, 213 U.S. at 356. The Court went on to say:
For another jurisdiction, if it should happen to lay hold of the actor,
to treat him according to its own notions rather than those of the place
where he did the acts, not only would be unjust, but would be an
interference with the authority of another sovereign, contrary to the comity
of nations, which the other state concerned justly might resent.

Id.

32. 228 U.S. 87 (1913).
33. *Id.* at 101-03.
34. Defendant, relying on *American Banana*, contended that American laws
could not be extended to permit jurisdiction to be exercised over foreign railroad
lines without the consent of the owners of such foreign lines. *Id.* at 100.
35. *Id.* at 105-06.
36. *Id.*
37. *Id.* at 106.
38. *Id.*
39. The Court in *Pacific* did not expressly distinguish *American Banana*; however,
these cases can be distinguished. *American Banana* involved a domestic plaintiff and
defendant, but all the relevant acts occurred outside the United States. In *Pacific*,
The decision in *Pacific* was followed four years later when the Supreme Court held the rule established in *American Banana* did not apply to a conspiracy which was formed in New York by a foreign corporation to monopolize a shipping route between New York and South Africa. Later, the Supreme Court held that the rule did not apply to a conspiracy founded in the United States to monopolize the exportation of sisal from Mexico. These modifications to *American Banana* gave American courts jurisdiction over foreign corporations whose activities were formed or partially executed in the United States and where the activities were intended to have a detrimental effect on American commerce. However, all activities conducted outside the United States were still beyond the jurisdiction of the Sherman Act even if they caused a detrimental effect within the United States.

The rule established in *Pacific* remained the law until 1945 when American jurisdiction over foreign corporations was further extended by the Second Circuit in *United States v. Aluminum Co. of America (Alcoa)*. In *Alcoa*, a Canadian company entered into two agreements with several European producers of aluminum to limit the amount of aluminum sold in the United States. These agreements were formed outside the territorial limitations of the United States. The

while some of the defendants were not domestic corporations, some of the acts occurred inside the United States.

40. Thomsen v. Cayser, 243 U.S. 66 (1917). In Thomsen, the plaintiff alleged that defendants combined to restrain trade by offering lower prices to American companies which shipped goods exclusively on their shiplines than to those that did not use their shiplines exclusively. *Id.* The Supreme Court held that although the conspiracy was formed abroad, it was put into operation in the United States and affected American foreign commerce. *Id.*

41. *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927). The complaint alleged that three domestic banks combined with other American companies and a Mexican company to obtain a monopoly in the sisal trade. Defendant allegedly instigated the government of Mexico to pass discriminatory legislation in favor of the Mexican company. Because of the legislation, defendants obtained control of all sisal trade in Mexico and the United States. The Supreme Court held that jurisdiction was satisfied since American commerce was affected and some of the conduct occurred within the United States. *Id.*

42. *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), where the Supreme Court reasoned that "[a] conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries." *Id.* at 704.


44. 148 F.2d 416 (2d Cir. 1945).

45. *Id.* at 439-41.

46. *Id.*
court determined that a domestic court has jurisdiction over acts of foreign corporations outside the United States if the acts were intended to and actually did affect American foreign commerce.\(^47\) Once the requisite intent was proven, the burden of proof shifted to the defendants to show there was no actual effect on commerce.\(^49\) The court held that a state may impose liabilities upon aliens for conduct outside that state’s borders if the conduct has consequences within its borders.\(^49\)

It can be inferred from the \textit{Alcoa} decision that a significant overhaul of the extraterritorial application of antitrust laws had occurred.\(^50\) Prior cases based jurisdiction upon the question of whether an action took place in the United States;\(^51\) however, jurisdiction in \textit{Alcoa} was based upon its newly formulated “intended effects” test.\(^52\) This test permitted a domestic court to exercise extraterritorial reach under the Sherman Act to conduct taking place anywhere in the world so long as the conduct was intended to and actually did affect American commerce.

Therefore, the holding in \textit{Alcoa} was in direct conflict\(^53\) with the \textit{American Banana} holding which declined to exercise jurisdiction over

\(^{47}\) \textit{Id.} at 443-444. With respect to the consequences of the conspiracy, the court explained that “[t]he Act does not cover agreements, even though intended to affect imports or exports, unless its performance is shown actually to have had some effect upon them. Where both conditions are satisfied, the situation certainly falls within [the jurisdiction of the Sherman Act].” \textit{Id.} at 444.

\(^{48}\) \textit{Id.} at 444-45.

\(^{49}\) \textit{Id.} at 443-44. The court in \textit{Alcoa} explained that

\[w]e should not impute Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States. On the other hand . . . any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.

\textit{Id.} at 443 (citations omitted).

\(^{50}\) Fortenberry, \textit{Great Grimes Mire}, supra note 4, at 529.

\(^{51}\) See supra note 26-29 and accompanying text.

\(^{52}\) Subsequent courts have referred to the test announced in \textit{Alcoa} as the “intended effects” test. See, e.g., \textit{Mannington Mills}, 595 F.2d at 1292; Uranium Antitrust Litig. v. Rio Algon, Ltd., 617 F.2d 1248, 1253 (7th Cir. 1980). Other courts have referred to it as the “effects test.” See, e.g., National Bank of Canada v. Interbank Card Assoc., 666 F.2d 6 (2d Cir. 1981); Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597 (9th Cir. 1976).

The “intended effects test” was cited with approval by the Supreme Court in \textit{Continental Ore}, 370 U.S. at 690.

\(^{53}\) \textit{American Banana}, \textit{Pacific}, and \textit{Alcoa} involve a trilogy of the law. The Court in \textit{American Banana} refused to exercise extraterritorial jurisdiction over American corporations acting in foreign countries even though their actions affected American
the foreign conduct of American citizens or aliens. The court in *Alcoa* did not distinguish *American Banana*. However, the court did refer to the statement in *American Banana* that it was not the intent of Congress to punish all whom the courts could catch. The *Alcoa* court, citing *Pacific*, narrowed this statement by stating that jurisdiction was applicable if the act was intended to and actually did affect American commerce. After *Alcoa* there can be no question that the extraterritorial limitations of *American Banana* are no longer controlling.

Four years after *Alcoa* was decided, the "intended effects" test was utilized by the United States District Court for the District of New Jersey in *United States v. General Electric Co.*, to obtain jurisdiction over agreements made abroad by aliens. There, several foreign corporations and an American company through its subsidiary entered into an agreement to allocate the world market for incandescent lamps. The agreement contained a clause which expressly excluded American commerce from its provisions and American companies from the agreement. The court was not impressed by this attempt to contractually avoid the Sherman Act, and held the Act applied. The court reasoned that the foreign companies knew or should have known that the agreement was part of the American company's plan to exclude foreign competition in the domestic market. This agreement was found to have a "direct and substantial effect" on United States commerce; hence a violation of the Act existed.

commerce. This decision was followed by *Pacific*, which held that the Sherman Act applies the acts that affect American commerce as long as they have occurred at least partly within the United States. Finally, in *Alcoa*, the court held that extraterritorial jurisdiction could be exercised over corporations whenever the act was intended to and actually did affect American commerce.  

55. *Alcoa*, 148 F.2d at 443.
56. *Id.* at 444.
57. *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 74 (2d Cir. 1977).
59. *Id.* at 843-45.
60. *Id.* at 887.
61. *Id.* at 891.
62. *Id.* Other courts have followed the rationale advanced in *Alcoa*. See, e.g., *United States v. Watchmakers of Switzerland*, 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. 1963), *modified*, 1965 Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y. 1965) (Swiss firms violated Sherman Act because of the effect on American watchmaking industry); *In re Grand Jury Investigation of Shipping Indus.*, 186 F. Supp. 298
The extraterritorial application of the Sherman Act was further modified by the United States District Court for the Southern District of New York in Fleischmann Distilling Corp. v. Distillers Co. This action involved a suit by two domestic companies against three foreign companies. The domestic companies, pursuant to the terms of a distributorship agreement, were the exclusive American distributors of scotch whiskey manufactured by the defendants. Upon termination of the distributorship, plaintiffs filed a complaint alleging that the defendants conspired to impose unreasonably short terms for distributorship and notices of termination provisions, in violation of the Sherman Act. The court held that the acts of the defendant affected American foreign commerce and that the intent requirement established in Alcoa could be "satisfied by the rule that a person is presumed to intend the natural consequences of his actions." Thus, the court substantially eased the plaintiff's burden in pressing an antitrust allegation against extraterritorial conduct by allowing the trier of fact to presume intent from the result.

The last major modification of the rule established in American Banana came in 1976 when the Court of Appeals for the Ninth Circuit decided Timberlane Lumber Co. v. Bank of America N.T. & S.A. The court determined that the analysis as to whether jurisdiction can be exercised should include consideration of comity, magnitude of conflict, and effect (or intent to affect). The decision set forth a balancing test to aid in this determination. The factors expressly noted by the court to be considered included:

the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or

(D.D.C. 1960) (Sherman Act applies to ocean transportation between two foreign ports as long as it affects United States commerce); United States v. Imperial Chem. Indus., 100 F. Supp. 504 (S.D.N.Y. 1951) (British firm held to have violated the Act because of its effect on American commerce in the field of man-made fabrics).

64. Id. at 223.
65. Id. at 226.
66. Id. at 227 (quoting W. Fugate, Foreign Commerce and the Antitrust Laws 48 (rev. ed. 1973)).
67. Kitner, Jurisdiction, supra note 4, at 222. The presumption of intent enables the plaintiff to show that the actual effects on American commerce are the natural consequences of the acts of the defendant. Once this is shown, the plaintiff is relieved, by the presumption, of the burden of producing evidence to show that the defendant intended the consequences.
68. 549 F.2d 597 (9th Cir. 1976).
69. See id. at 615.
principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.70

By weighing and balancing these considerations, the court sought to identify the degree of potential conflict with foreign policy if American authority was asserted71 and to determine whether the interests of

70. Id. at 614. Other authorities have cited similar factors. The Restatement (Second) of Foreign Relations Law of the United States at § 40, states that a court should act in the light of such factors as:
   (a) vital national interests of each of the states,
   (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
   (c) the extent to which the required conduct is to take place in the territory of the other state,
   (d) the nationality of the person, and
   (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.


This list was further expanded in the sixth draft of the Restatement (Revised) of Foreign Relations Law of the United States § 403 (Tent. Draft. No. 6 1985).

Professor Brewer lists the following variables:
   (a) the relative significance to the violations charged of conduct within the United States as compared with conduct abroad; (b) the extent to which there is explicit purpose to harm or affect American consumers or Americans' business opportunities; (c) the relative seriousness of effects on the United States compared with those abroad; (d) the nationality or allegiance of the parties or in the case of business associations, their corporate location, and the fairness of applying our law to them; (e) the degree of conflict with foreign laws and policies, and (f) the extent to which conflict can be avoided without serious impairment of the interests of the United States or the foreign country.


The Third Circuit expanded upon the factors presented in Timberlane. See Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979) (American flooring manufacturer alleged that other American company violated antitrust laws by obtaining foreign patents through fraud).

71. Timberlane, 549 F.2d at 614. See Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 922 (D.C. Cir. 1984) (court exercised extraterritorial jurisdiction under the Sherman Act where a British plaintiff sought to obtain a
the United States were sufficient to support an exercise of extraterritorial jurisdiction. 72

With respect to the question of intent, the court of appeals in Timberlane interpreted Alcoa as no longer requiring that intent be alleged. 73 Therefore, although there still must be a showing of some effect on American commerce for a court to properly exercise jurisdiction, the effect does not have to be intended. 74 The court further cautioned that the mere finding of an effect alone is not necessarily a sufficient basis upon which to determine jurisdiction. 75 Matters of international comity and fairness must also be considered. 76

Comity is the degree of deference that a domestic forum will pay to the acts of a foreign tribunal not otherwise binding on the forum. 77 Whenever possible, decisions of foreign governments should be given effect in domestic courts, since recognition promotes international cooperation and encourages reciprocity. 78 In today's complex economic system, people and products move freely among countries, causing "national interests [to] cross territorial borders." 79 Nations cannot expect their laws to reach further than the limits of their jurisdiction. Therefore, they must rely on each other for assistance in enforcement outside of these boundaries. 80 Thus, comity forces nations to increase international ties in order to advance their own laws. 81

Comity, however, is not without limitation. No nation is compelled to enforce foreign interests which are prejudicial to the interests of the domestic forum. Thus, the obligations of comity expire when strong domestic public policies exist. 82 If American interests are at stake, the United States may impose liability for conduct occurring

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72. Timberlane, 549 F.2d at 614-15.
73. Jurisdiction may be exercised if the conduct actually affects American commerce or was intended to affect such commerce.
74. Id.
75. Id. at 613.
76. Id.
77. Laker Airways, 731 F.2d at 937.
78. Id.
79. Id.
80. Id.
81. Id.
82. Id.
outside its borders but which has consequences within its borders.\textsuperscript{83} However, when the effect on American commerce is minimal, the courts will not accept jurisdiction.\textsuperscript{84} The effect of the \textit{Timberlane} decision was to invoke a "judicial rule of reason" test.\textsuperscript{85} Once a judge determines that jurisdiction exists, he must consider additional factors in order to determine whether the exercise of jurisdiction is appropriate.\textsuperscript{86} If American interests are strong, jurisdiction may be imposed for conduct which occurs outside the United States but which results in domestic consequences.\textsuperscript{87} However, the test requires that when those contacts are few and the effect upon domestic commerce is minimal, jurisdiction must be declined.\textsuperscript{88}

In 1982, Congress amended the Sherman Act to add the Foreign Trade Antitrust Improvements Act.\textsuperscript{89} The amendment was enacted to clarify when jurisdiction should be exercised over alleged antitrust violations based on foreign activities.\textsuperscript{90} The Act provides that conduct which has a "direct, substantial and reasonably foreseeable" effect

\begin{itemize}
  \item \textsuperscript{83} \textit{Id.}
  \item \textsuperscript{84} \textit{Id.} at 938.
  \item \textsuperscript{85} The court in \textit{Timberlane} referred to the rule as the "jurisdictional rule of reason test." \textit{Timberlane}, 549 F.2d at 613. See also \textit{Wells Fargo & Co. v. Wells Fargo Express Co.}, 556 F.2d 406 (9th Cir. 1977); \textit{Uranium Antitrust Litig.}, 617 F.2d at 1255.
  \item \textsuperscript{86} See \textit{Uranium Antitrust Litig.}, 617 F.2d at 1255.
  \item \textsuperscript{87} Montreal Trading, Ltd. v. Amax, Inc., 661 F.2d 864, 869 (10th Cir. 1981).
  \item \textsuperscript{88} \textit{Id.}
  \item \textsuperscript{89} The Foreign Trade Antitrust Improvement Act provides as follows:
    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—
    \begin{enumerate}
      \item such conduct has a direct, substantial, and reasonably foreseeable effect—
        \begin{enumerate}
          \item on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
          \item on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
        \end{enumerate}
    \end{enumerate}
    (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. 15 U.S.C. \S 6(a) (1982).
  \item \textsuperscript{90} \textit{Akzona, Inc. v. E.I. du Pont de Nemours & Co.}, 607 F. Supp. 227, 234 (D. Del. 1984).
\end{itemize}
on commerce will permit the exercise of extraterritorial jurisdiction under the Sherman Act. 91 Congress apparently believed that anticompetitive activities, the effect of which were felt only in foreign nations, should not be subject to American antitrust regulations. However, activities carried out in a foreign nation which have a "direct, substantial and reasonably foreseeable" effect in the United States would continue to be subject to the Sherman Act. 92

III. SPECIAL DEFENSES

Even where a court has jurisdiction over an antitrust violation involving extraterritorial conduct, and considerations of comity do not prevent it from hearing a case, it may nonetheless abstain from exercising jurisdiction. Acts involving foreign commerce which are alleged to be in violation of the Sherman Act present an opportunity for the assertion of three special defenses which, if proved, will relieve the defendant of liability.

A. Sovereign Immunity

Sovereign immunity is an affirmative defense which protects foreign governments from suits in American courts without their permission. 93 Prior to the passage of the Foreign Sovereign Immunity Act of 1976, 94 the defense had to be asserted in one of two ways. 95 First, the State Department could "suggest" immunity for a foreign sovereign defendant. 96 Upon the "suggestion" of immunity, courts would generally relinquish jurisdiction, desiring not to "embarrass the executive arm of the government in conducting foreign relations." 97

92. RESTATEMENT (REVISED) FOREIGN RELATIONS LAW OF THE UNITED STATES § 415 comment (Tent. Draft No. 6 1985).
95. Goodman, supra note 93, at 885.
Second, the foreign sovereign could appear and assert the defense. Prior to 1956, this assertion was an "absolute defense" under which United States courts would relinquish jurisdiction whenever a foreign sovereign was involved in a suit, regardless of the activity in which the sovereign was engaged. 98 Subsequently, the State Department adopted a "restrictive" immunity doctrine.99 Under this theory, courts must first determine whether the sovereign has engaged in "public acts."100 If the acts are public, jurisdiction is relinquished; however, if the activity is found to be "private," jurisdiction is exercised.101

An example of a pre-1956 application of the sovereign immunity doctrine is found in the decision of the District Court for the District of Columbia in *In re Investigation of World Arrangements.*102 There the court extended sovereign immunity to an oil company which the court found indistinguishable from the government of Great Britain.104 Noting that Great Britain obtained an interest in the oil company for purposes of national defense,104 the court averred that to bring a foreign sovereign into an American court for an action in which the sovereign was acting in its public capacity was contrary to international law.105

Eight years later, under the "restrictive" doctrine, the same court decided *In re Grand Jury Investigation of the Shipping Industry.*106

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98. Goodman, supra note 93, at 890.
100. Public acts are those acts engaged in by a foreign sovereign which are of a non-commercial nature that are not normally practiced by private parties. They are governmental in nature. 101. 26 DEP't St. BUlt. 984 (1952), cited in Kitner, Jurisdiction, supra note 4, at 228.
103. Id. at 291.
104. Id. at 290-91.
105. Id. at 291.
106. 186 F. Supp. 298 (D.D.C. 1960). This case involved a situation in which the Philippine government sought to quash a *subpoena daces tecum* served on the Philippine National Bank. The Philippine government alleged that the company was an instrumentality of the government. The State Department refused to "suggest" immunity because the activities seemed to be commercial. Id. at 318.
The court conditioned its granting of sovereign immunity on a showing by the Philippine government that its activities were not substantially commercial.107 Accordingly, if a foreign sovereign is engaged in commercial activities, its actions may be subjected to United States jurisdiction.103

In 1976, Congress passed the Foreign Sovereign Immunities Act109 intending to recognize the exception for commercial activities. The Act grants to the courts the power to determine immunity and removes from the State Department the power to issue "suggestions" of immunity.110 This legislation adopts the "restrictive" theory distinction between governmental activities which are private and those which are public.111

B. Act of State Doctrine

The second theory which may be proffered to a court as grounds for dismissal of a suit is the act of state doctrine. This doctrine precludes American courts from inquiring into the validity of public acts112 committed by a foreign sovereign within its own territory.113

107. Id. at 319.
108. When a foreign sovereign is engaged in commercial activities, the court's jurisdiction will not be exercised if such would offend the principles of comity and fairness. See Montreal Trading, 661 F.2d at 869; Uranium Antitrust Litig., 617 F.2d at 1255.
109. 28 U.S.C. §§ 1602-1611 (1982). The relevant part of the Act is § 1605, which states:

§ 1605. General exceptions to the jurisdictional immunity of a foreign state.

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.
110. Kitner, Jurisdiction, supra note 4, at 229.
111. Id.
112. See supra note 100 and accompanying text.
113. Sabbatino, 376 U.S. at 401. See also Arango v. Guzman Travel Advisors
Unlike the defense of sovereign immunity, which relieves a foreign
government of liability, the act of state doctrine merely precludes
judicial inquiry into the validity of such acts.\textsuperscript{114}

The classic enunciation of the act of state doctrine is found in
\textit{Underhill v. Hernandez},\textsuperscript{115} where the plaintiff attempted to sue the
commander of the Venezuelan army for failing to grant him a
passport to leave the country. The Supreme Court affirmed the court
of appeals’ dismissal of the case,\textsuperscript{116} and held that one sovereign may
not sit in judgment of the acts of another sovereign done within the
latter’s own territory.\textsuperscript{117} The doctrine as formulated in \textit{Underhill}
indicates that the Judicial Branch, if allowed to pass on the validity
of the actions of foreign sovereigns, may hinder rather than further
the political and economic interests of the United States.\textsuperscript{118}

\begin{footnotesize}
\textsuperscript{114} National Am. Corp. v. Federal Republic of Nigeria, 448 F. Supp. 622, 640 (S.D.N.Y. 1978), \textit{aff'd}, 597 F.2d 314 (2d Cir. 1979). \textit{See also Arango}, 621 F.2d at 1380 (United States cannot inquire into validity of Dominican Republic’s actions of denying tourists into country). \textit{See, e.g., Hunt}, 550 F.2d at 77 (United States cannot inquire into validity of Libyan government’s actions of preserving a competitive advantage over crude oil). The act of state doctrine may be invoked by private litigants. However, sovereign immunity may only be pleaded by the foreign sovereign itself. Williams v. Curtiss-Wright Corp., 694 F.2d 300 (3d Cir. 1982).

\textsuperscript{115} 168 U.S. 250 (1897) (only four judges took the position that the act of state doctrine does not apply to purely commercial activities).

\textsuperscript{116} Id. at 254.

\textsuperscript{117} The Court in \textit{Underhill} stated: “Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.” Id. at 252.


The judiciary’s reluctance to interfere with international matters was expanded upon by the Court in \textit{Sabbatino} which stated that:

[t]he doctrine as formulated in past decisions expresses the strong sense
of the Judicial Branch that its engagement in the task of passing on the
validity of foreign acts of state may hinder rather than further this country’s
Although originally formulated in an action to recover damages for wrongful detention, the Underhill doctrine has been applied to antitrust litigation since its initial expression. In American Banana, the Supreme Court held that American courts, when applying Underhill, could not adjudicate the legality of a foreign sovereign’s actions. However, the significance of the American Banana holding has been obscured by the fact that the real thrust of the Court’s opinion was the restrictive view of the Sherman Act’s extraterritorial jurisdiction. Although the latter aspect of the opinion is no longer considered to have any precedential value, the holding in American Banana that the act of state doctrine bars review of a foreign sovereign’s actions under the Sherman Act is still good law.

The decision in Underhill was reaffirmed in Banco Nacional de Cuba v. Sabbatino. In Sabbatino, petitioner, an instrumentality of the Cuban government, sued a broker of a corporation for proceeds from the sale of sugar. The respondent averred that the petitioner did not have title to the sugar since it was expropriated from a third party. Petitioner asserted that the respondent was precluded from asserting expropriation as an affirmative defense under the act of state doctrine. The Supreme Court, in finding for the petitioner and reversing both the district court and the court of appeals, pursuit of goals both for itself and for the community of nations as a whole in the international sphere.

Sabbatino, 376 U.S. at 423.
119. Timberlane, 549 F.2d at 605.
120. American Banana, 213 U.S. at 357-58.
122. See supra notes 68-92 and accompanying text.
124. Sabbatino, 376 U.S. at 398.
125. Id. at 406.
126. Id. at 406, 413.
127. Id.
128. See Banco Nacional de Cuba v. Sabbatino, 193 F. Supp. 375 (S.D.N.Y. 1961), aff’d, 307 F.2d 845 (2d Cir. 1962). Both the district court and the court of appeals agreed that the act of state doctrine did not apply to violations of international law. However, the Supreme Court held that the doctrine applies regardless of whether or not there is a violation of international law. Sabbatino, 376 U.S. at 436-37, 439.

The Court stated that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unam-
stated that although the doctrine was neither compelled by international law, nor by the constitution, it was a response to the need to preserve a balance "between the judicial and political branches of the Government on matters bearing upon foreign affairs."

The doctrine, however, does not bestow blank check immunity upon all conduct of foreign sovereigns. Potential interference with foreign nations is a critical element in determining whether deference should be accorded a foreign sovereign. Domestic courts do not wish to challenge the wisdom of a foreign sovereign's policy, integrity, or motivation. "[T]he less important the implications of an issue are for our foreign relations, the weaker the justifications for exclusivity in political branches."

The act of state doctrine was further narrowed as a result of the Supreme Court's decision in *Alfred Dunhill of London, Inc. v. Cuba*, a non-antitrust case. The Court adopted the "government/
commercial' distinction employed in sovereign immunity cases. Noting that the principal purpose of the act of state doctrine was to prevent embarrassment to the Executive Branch, the Court stated that matters involving purely commercial conduct of foreign sovereigns would not present such an embarrassment.

The Second Circuit applied the Dunhill "governmental/commercial" distinction in Hunt v. Mobil Oil Corp., an antitrust action, and found the act of state doctrine applicable. The court acknowledged that purely commercial activity of a sovereign is not exempted from application of the act of state doctrine. However, it found that the actions of the Libyan government in nationalizing an independent oil producer's property were not purely commercial. The court based its holding on the fact that expropriations of an alien's property held within the boundaries of a sovereign state were traditionally considered public acts.

C. Sovereign Compulsion

A third defense available to foreign nongovernment defendants is sovereign compulsion. This is a corollary to the act of state doctrine in the antitrust field. The principle of this doctrine is that corporate

137. Id. at 705. The Court stated that the governmental/commercial distinction must be considered.

For all the reasons which led the Executive Branch to adopt the restrictive theory of sovereign immunity, we hold that the mere assertion of sovereignty as a defense to a claim arising out of purely commercial acts by a foreign sovereign is no more effective if given the label "Act of State" than if it is given the label "sovereign immunity."

Id.

138. Id. at 703-04. Foreign governments, when acting in their commercial capacity, do not exercise powers peculiar to sovereigns. Instead, they exercise powers that may also be exercised by private citizens. "Subjecting them in connection with such acts to the same rules of law that apply to private citizens is unlikely to touch very sharply on 'national nerves.'" Id. at 704.


140. Id. at 77.

141. Id. at 73.

142. Id.

143. Id. For cases where the activity of the foreign sovereign was found to be commercial, and where the court declined to apply the act of state doctrine, see Kalamazo, 729 F.2d at 422; Curtis-Wright, 694 F.2d at 303.

144. The defense of sovereign compulsion is available to private litigants, and is a bar to litigation, when their actions are mandated by a foreign sovereign. See Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970). It differs from sovereign immunity in that the latter may only be asserted by the foreign government. Restatement (Second) of Foreign Relations
conduct which is compelled by a foreign sovereign and which occurs within that sovereign's territory will be shielded from antitrust liability, as if it were the act of the state itself. Therefore, this defense is intended to avoid offending the sovereign and to protect the defendant from being penalized for compelled conduct. The doctrine is principally concerned with the question of whether the challenged action was compelled by the sovereign, and does not look to the legality of the foreign government's order.

Thus, in *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, the district court granted summary judgment for the defendant upon determining that the defendant had acted under the government's compulsion. In this case, the defendant had boycotted the plaintiff and discontinued its sales of crude oil in response to an order from the government of Venezuela. The court stated that "anticompetitive practices compelled by foreign nations are not restraints of commerce, as commerce is understood in the Sherman Act, because refusal to comply would put an end to commerce." A sovereign has the right to regulate commerce within its nation. When acts are compelled by the sovereign, firms have no choice but to obey; their acts become, in effect, the acts of the sovereign. Consequently, sovereign compulsion is a complete defense. Were it not, firms acting abroad faced with a government order would have to choose one country or the other in which to do business.

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**Law of the United States § 41, comment e (1965).** The doctrine also differs from the act of state defense which, while available to private litigants, is based on a policy of judicial abstention from inquiry into the validity of acts by a foreign government. Curtis-Wright, 694 F.2d at 302.


147. *Mannington*, 595 F.2d at 1293.


149. Id. at 1301.

150. Id. at 1293. There was no evidence that the defendants had acted voluntarily or acted to procure the Venezuelan order. Id. at 1297.

151. Id. at 1298.

152. Id.

The court in *Interamerican Refining* stated that "[t]he Sherman Act does not confer jurisdiction on United States courts over acts of foreign sovereigns. By its terms, it forbids only anticompetitive practices of persons and corporations." *Id.*

153. Id. at 1298-99.

154. Id. at 1298.
Mere approval of the defendant's actions by the foreign sovereign, however, will not exempt the defendant from American antitrust laws. The foreign sovereign must coerce155 the defendant into violating domestic antitrust laws.156

United States v. Watchmakers of Switzerland Information Center, Inc.157 required a determination of whether the defendants' acts were compelled by a foreign sovereign. There, the manufacturers of Swiss watches entered into private agreements designed to protect the Swiss watch industry. In so doing, however, they also created a negative effect on the imports and exports of the United States.158 In an action unrelated to the private contracts, the government of Switzerland passed certain legislation intended to aid the manufacturers.159 The defendants attempted to assert the defense of foreign compulsion. The district court found that the defendants' activities were not required by the laws of Switzerland; rather, they were formulated privately without compulsion on the part of the government.160

Courts have established the rule that in order to assert the defense of compulsion, the foreign decree must be fundamental to the overall illegal cause of conduct.161 Where the governmental action is shown to be merely approval and not compulsion, the defense will not be recognized.162 Nor will the defense be available if the defendant was not legally obligated to obey the foreign sovereign's wishes.163

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155. This is coercion and not merely compulsion because foreign sovereigns may prohibit the defendant from doing business in the nation if the sovereigns' demands are not met.
156. Id. at 1293. See Continental Ore, 370 U.S. at 690; Timberlane, 549 F.2d at 597.

A court, in considering defense by a foreign corporation, quoted with approval the Supreme Court in a domestic case. "The Court has already decided that state authorization, approval, encouragement or participation in restrictive private conduct confers no antitrust immunity." Linseman, 439 F. Supp. 1324 (citing Cantor v. Detroit Edison Co., 428 U.S. 579, 592-93 (1976)).

158. 1963 Trade Cas. (CCH) ¶ 77,416 (S.D.N.Y. 1963).
159. Id. ¶ 77,423.
160. Id. ¶ 77,457. The court conceded, however, that "[i]f... the defendants' activities had been required by Swiss law, this court could indeed do nothing." Id. ¶ 77,456.

161. Mannington, 595 F.2d at 1293.
162. See Continental Ore, 370 U.S. at 690; Timberlane, 549 F.2d at 597.
163. See Sisal, 274 U.S. at 268; Watchmakers, 1965 Trade Cas. (CCH) ¶ 71,352.
IV. Conclusion

American commerce was once quite isolated and therefore easily segregated from commercial activities conducted in other parts of the world. Consequently, early antitrust decisions involving foreign corporations greatly limited the reach of the Sherman Antitrust Act. Only that conduct which occurred within the United States was subject to review as this was the only conduct perceived as affecting American interests.

Today, American commerce is so intertwined with world commerce that it seems unlikely that any significant act by a foreign corporation, performed within or beyond our borders, will leave American commerce unaffected. If the act is one which restrains trade, it is apt to restrain American trade as well. With this change in the dynamics of the world market, the reach of the Sherman Act had to be expanded to keep that Act as the cornerstone of American economic policy. Through a series of decisions, this result was achieved by shifting the focus of inquiry from the locus of the act to the locus of the effect.

Hence, it is difficult to foresee any international business arrangement amounting to a violation of the antitrust laws wherein an American court will not be able to exercise extraterritorial jurisdiction over the parties under the Sherman Act. This is not to suggest that American courts always will assert this jurisdiction, even when they may. The extended reach of the Sherman Act has been tempered by the courts in recognition of the fact that the international political arena does not favor broad assertions of extraterritorial jurisdiction. In order to avoid unnecessarily upsetting sister nations, a comity factor has developed in antitrust analysis where foreign corporations are involved.

With the question as to the reach of jurisdiction very nearly settled, the issue of defenses available to defendants under the Sherman Act will almost certainly become the focus of future decisions. Although certain defenses have long been recognized, the more recent cases have attempted to develop an analysis and application consistent with the realities of the modern world. With the expansion of Sherman Act jurisdiction, it will be interesting to see whether the defenses will be used, like comity, to limit this reach, or whether the defenses will be narrowly applied to supplement the policy behind the broader antitrust protection. These answers will have to await further court action.

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