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Richard D. Allred

University of Richmond

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THE INTERNATIONAL REACH OF UNITED STATES ANTI-TRUST LAW AND THE SIGNIFICANCE OF TIMBERLANE LUMBER CO. V. BANK OF AMERICA

I. INTRODUCTION

The United States Congress clearly has the power to regulate commerce within its territorial boundaries and with foreign nations, pursuant to Article I, Section 8 of the Constitution. However, implementation of the framers' policy decision to protect American markets and provide an open economic atmosphere has created a myriad of problems and questions with the overwhelming rise of multinational corporations internationally and domestically. In early attempts to deal with anti-competitive forces, Congress in 1890 enacted the Sherman Anti-trust Act. In addition to its efforts in 1890, Congress has periodically responded to international and domestic antitrust needs. The Clayton Act of 1914, Federal Trade Commission Act of 1918, and the Wilson Tariff Act of 1894, supplement the dominant Sherman Act in regulating foreign commerce.

However, what is the significance of U.S. legislation on international markets? Are U.S. antitrust policies in agreement with foreign concepts of competitive trade markets and the effects of trade restraints? What are the potential adverse effects of applying U.S. antitrust law extraterritorially? How far can U.S. courts reach? These and many other questions have resulted from the growth of international markets. These questions have one predominant issue, though, and that is jurisdiction. As far as jurisdiction is concerned, the strongest position for application of U.S. antitrust law is where a domestic corporation dealing internationally and affecting U.S. commerce is attacked. However, at the opposite end of the spectrum is a foreign corporation, operating totally extraterritorially, that has an adverse effect on U.S. commerce. What supports U.S. intervention in that

5. The following excerpts from the Sherman Act have proven to be the most significant tools for the judiciary in antitrust development.

§ 1. 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 hereby declared to be illegal . . . 15 U.S.C.A. § 1 (1970).

§ 2. 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 misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. 15 U.S.C.A. § 2 (1970).
factual situation? In the transitional area, how does the U.S. gain jurisdiction or enforcement over cartels? Can the U.S. prohibit an international merger as it may within its territorial limits?

Obviously, even a superficial analysis of the application of U.S. antitrust law on international fronts presents the primary problem of scope involved in such a multifarious undertaking. Therefore, it is the objective of this analysis, through a primarily case study approach, to provide limited background material on U.S. and foreign antitrust rationales, and focus on the jurisdictional aspect of U.S. antitrust law with special emphasis on the judiciary’s approach in Timberlane Lumber Co. v. Bank of America, N.T. & S.A.6 Secondarily, decisions on foreign acquisitions and mergers shall be analyzed and, finally, recent trends and enforcement considerations shall be scrutinized.

6. 549 F.2d 597 (9th Cir. 1976).

In Timberlane, there were four separate actions, including one brought under the Sherman Antitrust Act, Sections One and Two, and three which were diversity tort actions. The district court dismissed Timberlane's action under the act of state doctrine and for lack of subject matter jurisdiction. The basic allegation in Timberlane was that officials of the Bank of America and others located in the United States and Honduras conspired to prevent Timberlane, through its Honduras subsidiaries, from milling lumber in Honduras and exporting it to the United States, thus maintaining control of the Honduran lumber export business in the hands of a few select individuals financed and controlled by the Bank. The intent and result of the conspiracy was to interfere with the exportation to the United States, including Puerto Rico, of Honduran lumber for sale or use there by the plaintiffs, thus directly and substantially affecting the foreign commerce of the United States.

The United States Court of Appeals decision to vacate dismissal and to remand for new consideration was based on an expanded and fresh analysis of past and present international antitrust principles. Basically, the court expanded the element to be considered [Id. at 614] and concluded that a balancing approach is to be applied. Succinctly, the court concluded that foreign policy also is a primary concern and that the analysis should focus on whether the contacts and interests of the United States are sufficient to support the exercise of extraterritorial jurisdiction. Id. at 614-15.

The court, examining the problems with extraterritorial application of U.S. law, further expressed a three-prong test for determining jurisdiction.

We conclude, then, that the problem should be approached in three parts: Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States? Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act? As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it? The district court’s judgment found only that the restraint involved in the instant suit did not produce a direct and substantial effect on American foreign commerce. That holding does not satisfy any of these inquiries.

Id. at 615. Timberlane appears to be the modern trend in international application of U.S. antitrust law.
II. Background

As legislative concern indicates, the United States has been most sensitive to preserving a pervasive atmosphere of free economic competition. Europe, however, has not displayed as intense a concern for preserving broad competition. The primary difference in U.S. antitrust policy is its prophylactic approach. U.S. legislation is framed to allow intervention into the commercial market if there is even the possibility of an adverse effect on commerce. In order to facilitate broad competition, Congress has provided the means to stop combinations and mergers before they occur, and to discourage anti-competitive ventures.

Conversely, European antitrust laws are focused upon control of companies already in dominant market positions and not upon prevention of such achievement. Paul Nixon differentiates the two positions succinctly.

Our [U.S.] policy rests on the twofold presumption, well supported by the facts of industrial experience, as your recent hearings on economic concentration have shown, (1) that mergers of market leaders usually do not result in social efficiencies, and (2) competition is a regulating force to be preserved in its own right . . . .

In Europe, in contrast, antitrust policy is one of passive acquiescence in merger, the theory being that once a firm reaches a dominant position in the market it may then be subject to regulation. Some European antitrust officials take the position that mergers are imperative in order to achieve increased efficiencies, and that competition may well be sacrificed on the alter of such alleged gains in efficiency. But then they take a harsh view of dominant firms.7

Since the underlying antitrust rationales are in conflict, the problem of dealing with trade restraints internationally is compounded. There cannot be a uniform approach and, consequently, the reach of U.S. law becomes the primary question in protecting U.S. commerce from adverse effects abroad. Besides the fundamental policy conflict and political differences affecting international commerce, Congress elected to imminently inscribe its legislative intent concerning antitrust reach and further complicate evolution of uniform law procedure. Broad and vague statutory language has precipitated dealing with international restraints of trade judicially on a case by case basis, and, therefore, much is left to judicial discretion and to prevailing attitudes.

III. LEGISLATIVE JURISDICTION

The Sherman Act provides broad jurisdiction over foreign commerce by prohibiting acts that restrain interstate or foreign commerce. A host of cases have interpreted and expounded on the general principle, delineating rules and exceptions. While it was American Banana Co. v. United Fruit Co. that first dealt with antitrust impact on foreign commerce in a private action, it was United States v. American Tobacco Co. that established the posture for pervasive U.S. jurisdiction in foreign antitrust violations. When the Supreme Court reversed a lower court finding and held that two British companies, which were involved in trade restraint with American Tobacco, were within the purview of the U.S. judiciary, American Banana began to evolve into one of three basic modern defenses to extraterritorial jurisdiction and the long reach of U.S. antitrust regulations.

Following two intervening cases, the judiciary, led by Judge Learned Hand in 1945, made the most significant and imposing advancement in antitrust policy. In United States v. Aluminum Co. of America (Alcoa), the court opined that it had jurisdiction, regardless of U.S. territorial contact, as long as the acts intentionally affected U.S. foreign commerce. After Alcoa was found not to be a member of a group of foreign aluminum producers attempting to dominate the international market, the court nonetheless asserted jurisdiction, even though the parties were nonnationals and the conduct was outside the territorial limits of the U.S. The

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8. "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 hereby declared to be illegal." 15 U.S.C.A. § 1 (1970).
10. American Banana was based on what later proved to be unpopular reasoning. In holding that jurisdiction was not established under the Sherman Act because the cause of action in the complaint arose outside U.S. territorial jurisdiction (Panama and Costa Rica), the court construed the Sherman Act as being confined to the territorial jurisdiction of the U.S. on the surface. Id.
11. 221 U.S. 106 (1911).
12. Three major defenses to the extraterritorial application of U.S. antitrust law are: (1) sovereign immunity, (2) the Act of State Doctrine, and (3) sovereign compulsion. See notes 47-57 infra and accompanying text.
13. In Thompson v. Cayer, 243 U.S. 66 (1917), the court rejected an American Banana assertion of territoriality. The defendant attempted to apply the rationale to a conspiracy entered into in a foreign country between U.S. and foreign corporations. The court held that the conspiracy restrained foreign commerce and was made effective by acts in the U.S. See United States v. Sisal Sales Corp., 274 U.S. 268 (1927), which held Banana inapplicable even though foreign legislation (Mexico and Yucatan) granted the trade restraint in the commodity sisa because there was an "effect" on U.S. commerce here and the conspiracy precipitating the trade restraint was entered into by parties in the U.S. and consummated by acts in the U.S.
14. 148 F.2d 416 (2nd Cir. 1945).
most significant aspect of Judge Hand's decision, which expanded jurisdiction to conduct outside of the U.S. by non-nationals, was the two-prong test which he enunciated. Judge Hand held there must have been an intent to affect U.S. foreign commerce and an actual effect on commerce.\textsuperscript{15}

\emph{Alcoa} not only opened the door to expansion of U.S. antitrust law, but also instigated inquiry and subsequent judicial diversity in defining "effects" on commerce as another topic emerged for case law development. A uniform definition of "effects" necessary to trigger antitrust jurisdiction has not been asserted judicially. Will an indirect effect on commerce suffice? J. Von Kalinowski offers an excellent analysis of the judicial usage of "effects" and notes four particular categories. Opinions using "effects" language have predominantly involved multinationals engaged in joint ventures and the restraint has been framed to 1) simply affect, 2) directly affect, 3) substantially affect, or 4) directly and substantially affect the flow of commerce.\textsuperscript{18}

While case development has at best provided a choice of analyses to follow, the Department of Justice, Antitrust Division, has taken a strong position on this matter.

\vspace{1em}

\textsuperscript{15} Id. at 444.

\textsuperscript{16} J. Von Kalinowski, Antitrust Laws and Trade Regulation, \S\ 5.02[2] 5-124-5-129 (Supp. 1977) [hereinafter cited as \textit{Von Kalinowski}]. The following offers examples and case analyses of the four types of "effects" language: (1) "simply affect" - \emph{Alcoa}, which already has been discussed, offers the best example of "affect" used without direction. Judge Hand ruled the acts "were intended to affect imports and did affect them." \emph{Alcoa}, note 14-\textit{supra}, at 444. (2) "directly affect" - United States v. Imperial Chem. Indus. (ICI) Ltd., 100 F. Supp. 504 (S.D. N.Y. 1951). Here, the jurisdictional question focuses on reaching a Canadian subsidiary (CXL) of ICI, a British company, and E.I. duPont Nemours formed to compete in Canada. It was agreed the company would not compete with ICI and duPont by exporting into the U.S. It was held this directly affected commerce and personal jurisdiction was gained over ICI through its New York-based subsidiary. That decision was based on the reasoning that the parent and subsidiary were so closely related that the decisions of the subsidiary actually were directed by the parent. See M. Joel and J. Griffin, Multinational Joint Ventures and The U.S. Antitrust Laws, 15 Va. J. Int'l L. 487 (1925). (3) "substantially affect" - United States v. R.P. Oldham Co., 152 F. Supp. 818 (N.D. Cal. 1957). Although jurisdiction was sought only over U.S. nationals for a conspiracy in restraint of commerce in Japanese wire nails and the situs of the conspiracy was in Japan, where the acts were legally condoned, the court held that the substantial and direct effect of the conspiracy supports jurisdiction regardless of the situs of the conspiracy. (4) "directly and substantially" - United States v. General Elec. Co., 82 F. Supp. 753 (D.N.J. 1949) focused on intent and held that the defendant need not have specific intent to violate the antitrust law. Arguing that a lesser standard of intent should apply to foreign corporations and that jurisdiction should not follow as long as a direct and substantial effect was not resultant, the defendant lost because the intent to enter the territorial restraint agreement alone was sufficient. The defendant, at least, should have known the effect on commerce would be forthcoming. \textit{Id.} at 890, 891. It is significant to note that where "substantially" is used the effect always is direct even if such language is not employed.
Analysis of whether there is sufficient impact on U.S. Commerce to confer jurisdiction generally involves the same practical analysis of purpose and effect . . . Accordingly, considerations of jurisdiction, enforcement policy, and comity often, but not always, lead to the same conclusion: the U.S. antitrust laws should be applied to an overseas transaction when there is a substantial and foreseeable effect on the United States commerce; and, consistent with these ends, it should avoid unnecessary interference with the sovereign interests of foreign nations.\(^{17}\) (emphasis added).

*Timberlane Lumber Co. v. Bank of America*\(^{18}\) preceded this statement of the Antitrust Department's apparent modern trend and offers excellent analysis of the present considerations involved in the "effects" prong of *Alcoa*. Essentially holding that an act of state\(^{19}\) is not an absolute bar to U.S. antitrust actions and that such a defense should be strictly scrutinized by applying a conflicts of laws approach to analyze the jurisdictional question,\(^{20}\) *Timberlane* contends:

The effects test by itself is incomplete because it fails to consider the other nation's interests. Nor does it expressly take into account the full nature of the relationship between the actors and this country. Whether the alleged offender is an American citizen, for instance, may make a big difference: applying American laws to American citizens raises fewer problems than application to foreigners.\(^ {21}\)

The court went on to assert the actual regard for comity in many U.S. antitrust decisions and the need for a more comprehensive examination of the circumstances and underlying relationships in discerning the effect of acts abroad on U.S. commerce.\(^ {22}\) While *Timberlane* supports the strict

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18. 549 F.2d 597 (9th Cir. 1976).
19. The Act of State doctrine is a defense to establishment of jurisdiction in international law cases. See notes 47-56 infra and accompanying text.
20. 549 F.2d at 613.
22. American courts have, in fact, often displayed a regard for comity and the prerogatives of other nations and considered their interests as well as other parts of the factual circumstances, even when professing to apply the effects test. To some degree, the requirement for a "substantial" effect may silently incorporate these additional considerations, with "substantial" as a flexible standard that varies other factors.
549 F.2d at 612.

An effect on United States commerce, although necessary to the exercise of jurisdiction under the antitrust laws, is alone not a sufficient basis on which to determine whether American authority should be asserted in a given case as a matter of international comity and fairness. In some cases, the application of the direct and substantial
scrutiny and balancing test in determining jurisdiction, *Alcoa* arguably intimates the same approach by inserting the intent criterion. In providing the subjective element, the court at least has the capability to expand the purview of its discretion.

Long before *Timberlane*, the judiciary as well as defendants focused on the intent criterion of *Alcoa* to determine jurisdiction and to deal with scope restraints often inherent in international matters.23 Although the second element of the two-prong jurisdictional test opens the door to broadening judicial discretion in applying U.S. antitrust law extraterritorially,24 the development of the "intent" element of *Alcoa* has not been interpreted, or applied to perform that function. This development is best exemplified by the multinational cases involving joint ventures, acquisitions and cartel arrangements.

*United States v. General Electric Co.*25 is an excellent example of the defendant's versus the court's emphasis on intent. The court applied a unique expanded reasonableness standard in holding the defendant foreign company responsible for intent to affect U.S. commerce because it should have known, if it didn't know, the eventual consequences of its agreement with General Electric.26

In leading cases involving multinational business ventures, *United States v. Timken Roller Bearing Co.*27 and *United States v. Minnesota Mining and Manufacturing Co.*,28 the judiciary focused on the parties' broad intent to restrain foreign trade by entering joint ventures and licensing agreements. Both defendants attempted to shield themselves behind test in the international context might open the door too widely by sanctioning jurisdiction over an action when these considerations would indicate dismissal. At other times, it may fail in the other direction, dismissing a case for which comity and fairness do not require forbearance, thus closing the jurisdictional door too tightly—for the Sherman Act does reach some restraints which do not have both a direct and substantial effect on the foreign commerce of the United States. A more comprehensive inquiry is necessary. We believe that the field of conflict of laws presents the proper approach

549 F.2d at 613.


24. "The intent requirement suggested by *Alcoa*, 148 F.2d at 443, is one example of an attempt to broaden the courts' perspective, as is drawing a distinction between American citizens and non-citizens." 549 F.2d at 612.

25. See note 16 supra.


joint venture arguments and asserted such agreements were necessary to combat market conditions and operate profitably. The basic philosophy on such joint ventures by multinationals was asserted in *Timken*:

If a joint venture or partnership is formed for the purpose of a lawful business enterprise and restraints result from the right to protect established business interests no violation of law occurs. But if the association is formed for the purpose of continuing a combination to allocate exclusive sales territories in the world, to fix prices and to eliminate competition both within and without the combination, it cannot hide from the effects of the law under the cloak of a joint venture or partnership.⁹

The essence of *Timken* and *Minnesota* leave multinationals in a precarious situation. When combined with *General Electric* and the two-prong test of *Alcoa*, joint ventures by multinationals apparently are under strict scrutiny by the judiciary. While the facts of *Timken* and *Minnesota* support the obvious conclusion of significant effects on commerce (agreements among corporations in each case constituted 70 to 80 percent of the respective product markets), it can be argued the holdings reflect the attitude that joint ventures and acquisitions abroad by multinationals *per se* affect foreign commerce.

It is obvious, then, that most acts can easily be linked to foreign commerce, and once that hurdle is cleared it is a small step to infer conspiratorial intent from those acts. This is the position asserted by the Southern District of New York in *Fleischmann Distilling Corp. v. Distillers Co. Ltd.*. In a private suit whereby United States distributors of imported Scotch whiskey brought an action against British distillers claiming the distillers unlawfully required inclusion of unreasonably short terms and notice of termination provisions in their distributorship agreements, the court held plaintiffs adequately alleged "intent" to restrain. District Judge Robert L. Carter opined:

The intent requirement . . . is a general intent to affect commerce, 'and may be satisfied by the rule that a person is presumed to intend the natural consequences of his actions.' . . . Defendants' intent to affect United States commerce is *inferred* from the assignment of exclusive distributorship rights in the United States. ¹⁰

Since the intent requirement essentially has evolved to present no real jurisdictional problem, a stricter scrutiny of the substantial effects test

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29. *See* note 27 *supra*, at 312.
31. *Id.*
32. *Id.* at 227 (emphasis added).
should be utilized to insure a comprehensive and balanced test for discerning legislative jurisdiction. The balancing approach provides a much better framework in dealing with the primary jurisdictional defenses to antitrust actions as well.

IV. ADJUDICATORY JURISDICTION

Before analyzing the major defenses, however, adjudicatory jurisdiction must be considered. Even if legislative jurisdiction is established, adjudicatory jurisdiction must be within the reach of the U.S. judiciary. However, this has not proven too burdensome to the judiciary since the international capital market is strongly linked to the United States and most foreign multinationals are dependent on U.S. financial sources or are connected via subsidiary structures.

Since there is little or no problem in gaining adjudicatory jurisdiction over domestic corporations, this section shall analyze the case law dealing with alien corporations. Service of process is the first requisite for establishing adjudicatory jurisdiction. In order to gain jurisdiction over an alien corporation, two landmark procedure cases hold that the corporation must have certain minimum contacts with the forum, and that those contacts must be of such a nature that the exercise of jurisdiction does not offend fundamental notions of fair play and substantial justice.

The most significant decision relating to jurisdiction over an alien corporation in an antitrust case came in 1948. In viewing the “doing business” test and in construing the jurisdictional statute involved to meet minimum contacts, United States v. Scophony Corp. held that the Court would look at all circumstances and the entire business operation to meet the “transacting business” and “found” requirements in order to gain the requisite service of process for in personam jurisdiction. For achieving service of process, Justice Frankfurter noted in Scophony, “a corporation

33. Domestic corporations generally are amenable to personal service of process due to numerous business contacts and agents.
34. See W. Fugate, Foreign Commerce and the Antitrust Laws, § 3.1-3.20 (2d ed. 1973) [hereinafter cited Fugate].
37. The statutory basis for the claim was § 12 of the Clayton Act, 15 U.S.C.A. § 22. It provides: “Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district wherein it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.”
38. 333 U.S. 795 (1948).
39. Id. See also Eastman Kodak Co. v. Southern Photo Material Co., 273 U.S. 359 (1927), held “found” requires something more than transacting business.
can be ‘found’ anywhere, whenever the needs of the law make it appropriate to attribute location to a corporation provided that the activities on its behalf that are more than episodic are carried on by its agents in a particular place."

Since Scophony, it clearly has been the judiciary’s policy to liberally grant jurisdiction on a host of contacts including agency relationships in the United States, subsidiary, land-parent relationships, and property located in the U.S. However, actual service and appearance of the alien corporation are essential in obtaining adjudicatory jurisdiction. The present policy of the Antitrust Division is clearly expansive. This is indicative of the greater weight placed on the “effects” test and obtaining legislative jurisdiction as foreign relations and enforcement policy are more closely scrutinized.

40. Id. at 819.
41. Frummer v. Hilton Hotels Int’l., 19 N.Y.2d 533, 281 N.Y.S.2d 41, cert denied, 389 U.S. 923 (1967). Frummer involved a claim by a U.S. citizen injured while vacationing at a Hilton Hotel in London. The plaintiff filed suit in New York against United Kingdom Hilton, a British corporation, and Hilton International, a Delaware corporation which owned all but one share of United Kingdom. The court held 4-3 that the British corporation was present in New York. The court further noted that the fact Hilton Reservation Service and U.K. Hilton are owned in common by Hilton International and Hilton Hotels Corporation gives rise to a valid inference as to the broad scope of the agency in the absence of an express agency relationship. Id. at 45.
42. United States v. Imperial Chemical Industries, Ltd., 100 F. Supp. 504 (S.D. N.Y. 1951), holds the control of U.S. subsidiaries by alien corporations provides sufficient “contacts.”
43. United States v. Watchmakers of Switzerland Information Center, Inc., 133 F. Supp. 40 (S.D. N.Y. 1956). This is another important case in that it established jurisdiction by piercing the corporate veil. It was held that where a New York corporation, which was jointly owned by two Swiss corporations, conducted a watch repair service to advance their business and the New York corporation had no independent business of its own, the Swiss corporations were present in this country for purposes of service of process.
44. The seizure method of gaining jurisdiction in rem is a potential threat to foreign corporations, but the statutory provisions are rarely invoked. See Fugate at 108-11.
45. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969), held that a subsidiary’s stipulation that it is the same entity as its parent was insufficient to support personal jurisdiction over the foreign parent, absent service on such parent and appearance in court by that parent.
46. Second, there is the question of personal jurisdiction over those who would be charged with a violation of our law. The general trend of modern history has been to expand the personal jurisdiction of our courts to reach those who transact business in a certain place, even if they are not “found” there in a traditional jurisdictional sense. The Department will utilize these principles to seek to exercise the fullest permissible jurisdiction over those who illegally cartelize our markets.

V. Defenses

There are three basic defenses to the assertion of jurisdiction over foreign parties. They include the act of state doctrine, sovereign compulsion and sovereign immunity. Banco Nacional de Cuba v. Sabbatino\(^4\) sets forth the act of state doctrine, but Alfred Dunhill of London, Inc. v. Republic of Cuba,\(^4\) reaffirmed the precept in traditional terms.\(^4\) The court in Dunhill succinctly stated the underlying policy of the doctrine in conjunction with a glimpse of the movement toward Timberlane.

The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations . . . . But based on the presently expressed views of those who conduct our relations with foreign countries, we are in no sense compelled to recognize as an act of state the purely commercial conduct of foreign governments in order to avoid embarrassing conflicts with the Executive Branch.\(^5\)

Available whether the defendant is acting for the sovereign or is a sovereign, the act of state doctrine is closely related to the sovereign compulsion defense. While the "act of state" must be the only act and the restraint must have been the sovereign's act, or compelled by the sovereign, the sovereign compulsion defense is more substantive and focuses on whether the defendants were "totally" compelled to perform the acts constituting a restraint of trade because of the foreign sovereign.\(^4\) Interamerican Refining Corp. v. Texaco Maracaibo, Inc.\(^2\) provides a recent example of the sovereign compulsion defense. The defendants succeeded in asserting the foreign sovereign forced compliance with a boycott of a domestic refinery through threats of expropriation.\(^3\) However, Timberlane again provides an excellent example of the modern trend in this area where the court stated: "[W]e do not necessarily endorse the strict view that American courts can never review action compelled by a foreign government."\(^4\)

47. 376 U.S. 393 (1964).
49. The court in Dunhill reaffirmed its past position. "[The Act of State doctrine] precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory . . . and, that it applies to 'acts done within their own States, in the exercise of governmental authority.'" Id. at 706. Hence, expropriation of an alien's property within the boundaries of a sovereign state is traditionally considered to be a public act of the sovereign outside the reach of the U.S. judiciary.
50. 425 U.S. at 697-98.
53. Id.
54. 549 F.2d at 607 n.10.
Sovereign immunity is the long-standing rule that the sovereign is absolutely immune from suit.55 While sovereign immunity issues at one time were as much within executive purview as the judiciary's scope,56 the Congress has clearly changed its former liberal approach in favor of the sovereign to a much more restrictive policy. The Sovereign Immunities Act of 197657 is indicative of this shift. The most significant aspect of the Act segregates commercial activity from governmental activity and allows jurisdiction to stand for the former.58 Neither does the Sovereign Immunities Act interfere with the act of state doctrine. The legislation was not designed to address the act of state defense.59

The act of state doctrine accordingly remains a viable defense on its face. However, analysis of a government statement in an amicus brief in Dunhill56 reveals that the defense's significance in accordance with the Sabbatino approach may be waning.

The committee has found it unnecessary to address the act of state doctrine in this legislation since decisions such as that in the Dunhill case demonstrate that our courts already have considerable guidance enabling them to reject improper assertions of the act of state doctrine. For example, it appears that the doctrine would not apply to the cases covered by H.R. 11315, whose touchstone is a concept of 'commercial activity' involving significant jurisdictional contacts with this country. The conclusions of the committee are in

56. See note 23 supra.
   The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.
   (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
      (1) in which the foreign state has waived its immunity either explicitly or by implication, . . .
      (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 . . .
59. See note 51 supra.
60. 425 U.S. 682 (1976).
concurrence with the position of the government in its amicus brief to the Supreme Court in the *Dunhill* case where the Solicitor General stated:

[U]nder the modern restrictive theory of sovereign immunity, a foreign state is not immune from suit on its commercial obligations. To elevate the foreign state's commercial acts to the protected status of "acts of state" would frustrate this modern development by permitting sovereign immunity to re-enter through the back door, under the guise of the act of state doctrine.41

*Dunhill* supports the proposition that sovereign immunity does not provide a defense for a sovereign acting in its proprietary capacity.52 The Court refused to extend the act of state defense to a sovereign that has descended to the level of an entrepreneur.53 Coupled with *Timberlane*, which employed a conflicts approach in determining that the act of state doctrine did not provide shelter from antitrust action, it appears that antitrust defenses have been substantially weakened. However, *Timberlane* may be interpreted as merely returning some consideration and power to the State Department and executive branch in consideration of foreign relations.

VI. ACQUISITIONS, MERGERS, JOINT VENTURES

The foregoing analysis indicates the pervasive state of flux that has plagued international antitrust authorities from the inception of the protective legislation. A brief examination of the application of antitrust law to acquisitions, mergers and joint ventures should explain some of the underlying reasons for this skewed development and should clarify the present state of the law. Section 7 of the Clayton Act, as amended in 1950 by the Celler-Kefauver Act,54 is the most important legislation in this area.55 The other statutes also are relevant, though, and must be considered as well in attacking mergers, joint ventures or acquisitions.56

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61. Von Kalinowski, *supra* n. 423, at 5-145.
62. "We decline to extend the Act of State doctrine to acts committed by foreign sovereigns in the course of their purely commercial operations." 425 U.S. at 706.
63. "Because the act relied on by respondents in this case was an act arising out of the conduct by Cuba's agents in the operation of cigar business for profit, the act was not an act of state." *Id.*
64. The Celler-Kefauver provision substantially improved the effectiveness of the Clayton Act by expanding its application to cover "asset acquisitions" as well as the normal course of acquisition through stock trading. 15 U.S.C.A. § 18 (1970).
65. The Clayton Act as amended is designed to prevent the adverse effects of anti-competitive acquisitions before the corporations' actions have had the opportunity to affect trade. The Act is broad in nature and applicable to all acquisitions and mergers in which there is the probability of adverse effects on competition. For analysis of this philosophy in merger cases, see *Fugate* § 10.12.
66. The Sherman Act's significance is highlighted when compared to the Clayton Act. The Sherman Act does not require the parties to the suit to be "engaged in commerce" as Clayton
United States v. Penn-Olin Chemical Co., which comments on the potential effects of mergers, essentially eliminated the technical distinctions between mergers, acquisitions and joint ventures for the purpose of establishing jurisdiction. By far, this 1964 decision has had the most significant impact on recent antitrust law relating to merger activity. Penn-Olin holds that Section 7 applies to joint ventures and, in effect, classifies such activity as an acquisition by the two venturers. Thus, this reasoning disposes of the technical argument that the "new" entity was not engaged in commerce for purposes of Section 7. The Supreme Court emphasized the corporate strength of both parties and the ability to compete individually in concluding that potential competition was sufficient to invoke Section 7.

In addition, the Court asserted that mergers and joint ventures are not governed by the same criteria, but held that "[o]verall, the same considerations apply to joint ventures as to mergers . . . ." Although there appears to be a conflict in fundamental reasoning, especially when considered in relation to the Court's differentiation of the two methods of corporate expansion, the opinion simply exemplifies the Court's overall attitude in this area and clarifies reasons for prevailing confusion in international antitrust. The Court simply refuses to tightly close any doors.

It is apparent the judiciary's reach has expanded substantially to touch any and all corporate activity on the international field. United States v. Joseph Schlitz Brewing Co. represents this impact with regard to foreign

and has a broad jurisdictional base as previously noted. The Sherman Act however, also has a stricter standard with respect to "substantial effects." Clayton only has to show the potential effect.

Section 5 of the Federal Trade Commission Act expands the reach of U.S. antitrust law even farther than Clayton. This act does not require either the acquiring entity or the acquired company to be "engaged in commerce." This section is much stronger than Sherman in that, like Clayton, it is aimed at arresting restraints on their incipiency. The FTC provision could be used where both Sherman and Clayton Tests are not met. The FTC act also applies to "persons" where Clayton is only addressed to "corporations." See generally E. Kintner, AN ANTITRUST PRIMER (1973).

68. Fugate § 10.11 at 342.
69. See Joelson and Griffin, note 17 supra, at 498.
70. Id.
71. See note 61 supra.
72. 378 U.S. at 170.
73. The Court said: "The merger eliminates one of the participating corporations from the market while a joint venture creates a new competitive force therein." Id. Arguably, absent any agreement restraining trade, the joint venture supports fundamental United States antitrust policy.
acquisitions by United States corporations.\textsuperscript{75} Unlike previous cases, there was no relationship to other anti-competitive activity.\textsuperscript{76} Still, the potential effect triggered judicial scrutiny. The court applied Section 7 of Clayton in Schlitz, but there are numerous routes to pursue in attacking a corporate acquisition or merger. The jurisdictional language of the statutes differ significantly, but, when construed collectively with case law, there is no reprieve from strict judicial supervision for the multinational.

\section*{VII. Conclusion}

Despite the myriad of approaches and inherent confusion of broad statutory language, the United States historically has insisted on its power to apply antitrust law internationally. However, does not Timberlane's extension of the "substantial effects" test and emphasis on international considerations create inherent conflict in international policy? Do not broad statutory and case law provisions act deferentially by failing to establish consistent standards? The foregoing analysis and implications of Timberlane as well as recent Justice Department Antitrust Guidelines\textsuperscript{77} provide dispositive evidence of modern antitrust trends. While enforcement always has been a consideration of United States antitrust policy-makers, it appears to be receiving much more attention.

Basically, United States enforcement policy is aimed at two fundamental purposes. The protection of a competitive market to benefit American consumers is the overriding goal. Secondly, antitrust law is designed to protect broad economic opportunities for business in deference to private, highly concentrated economic domination.\textsuperscript{78} The essential problem of this underlying enforcement policy is conflicts of interests on an international scale. The potential ramifications of the United States antitrust rationales are endless. Every facet of international relations is bound to be affected given the extent of today's economic interdependency. Is a possible side effect of this approach the alienation of foreign governments as businesses

\textsuperscript{75} The objective of Schlitz was to prevent the United States corporation from gaining constructive control of a United States based subsidiary. The company acquired by Schlitz owned controlling interest in a California brewery. Besides the direct competition between the two United States companies, the potential competition between the acquiring company and the acquired was emphasized in analyzing the impact on United States markets. See generally Fugate § 10.11, 10.12.

\textsuperscript{76} United States v. National Lead, 63 F. Supp. 513 (S.D.N.Y. 1945), mod. & aff'd., 332 U.S. 319 (1947), and United States v. Imperial Chemical Industries, Ltd., 100 F. Supp. 506 (S.D.N.Y. 1951), are exemplary of most early antitrust cases in that such actions were predominantly aimed at broad based monopolistic patterns and conspiracies.


\textsuperscript{78} Id. at E-2.
take sides internationally for economic gains? Can multinationals alienate governments and essentially avoid controls by pitting one government against another? An additional complication is the fact that United States antitrust policy is fundamentally different from that of the European community.79 Does not Timberlane's approach, which balances the effects of extensive reach, foreign relations and enforcement problems, provide a better avenue of pursuit for all concerned?

Richard D. Allred

79. See notes 6, 7 supra.