EXTRATERRITORIAL REACH OF UNITED STATES ANTI-TRUST LEGISLATION: THE INTERNATIONAL LAW IMPLICATIONS OF THE WESTINGHOUSE ALLEGATIONS OF A URANIUM PRODUCERS' CARTEL

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[*The imposition and enforcement of liability for infringement of United States trade practices law upon foreign nationals in respect of conduct engaged in outside United States territory but producing economic effects within it has for many years been a bone of contention on the international plane. The issue has assumed new urgency of late, particularly from Australia's point of view, as proceedings relating to an alleged international cartel in the supply of uranium take their course through the courts of the United States and a number of other jurisdictions. In this article Ms Triggs examines the various international law bases on which municipal jurisdiction has in the past been validly founded and puts the case against the legality at international law of the United States approach. She investigates a number of other possible ways of resolving the conflict of state interests which gives rise to the problem, and pursues a number of the ramifications of the issue in the specific context of Australia's exploitation of its uranium resources, in particular the application of the sovereign immunity and act of state defences.*]

In a recent ministerial statement, Mr Anthony, the Minister for Trade and Resources, announced measures for the orderly development of Australia's mineral resources.[1] He stressed that these measures 'should not give rise to any questions under the anti-trust laws of other countries'.[2] While implying that the Australian government's position is that other countries ought not to apply their anti-trust laws extraterritorially without due regard to Australia's national interests, he urged producers not to resort to arrangements which might be jeopardized under these laws.

The United Nations, through U.N.C.T.A.D. and a newly created Commission on Transnational Enterprises, is attempting to establish an international code of principles curtailing international restrictive business practices.[3] At present however monopolistic activities by multinationals or foreign governments through state-owned enterprises are subject only to spasmodic regulation by states applying national restrictive trade practices legislation.

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[1] 'Uranium Export Policy: Ministerial Statement' in Australia, *Parliamentary Debates*, House of Representatives, 1 June 1978, 2907 ff.

[2] *Ibid.* 2909.

[3] United Nations Commission on Transnational Corporations, 'Intergovernmental Working Group Report on the Formulation of a Code of Conduct' (1977) 16 *International Legal Materials* 709.

In a number of highly controversial cases[4] the United States courts and Justice Department have applied the Sherman and Clayton anti-trust legislation to foreign companies engaging in restrictive business practices which have an 'effect' on the United States domestic economy. A recent example, and one of particular interest to Australia, concerns the Westinghouse Corporation's allegations of a uranium cartel comprising foreign companies from Australia, Canada, France, South Africa and the United Kingdom.[5] Importantly, these foreign companies include in some instances their respective state governments as major shareholders.[6]

United States attempts to apply its anti-trust laws to the activities abroad of foreign nationals have led to strong diplomatic protests[7] and to the enactment of legislation to prohibit the discovery of documents or examination of witnesses for the purposes of United States grand jury or Justice Department investigations.[8] The Westinghouse allegations prompted the Australian Parliament to act with remarkable speed in passing the Foreign Proceedings (Prohibition of Certain Evidence) Act 1976,[9] authorizing the Commonwealth Attorney-General to prohibit the production of evidence or documents in Australia for a foreign tribunal. More recently, and in view of the possibility of the Westinghouse damages claim of seven billion dollars succeeding as against Australian companies, the Commonwealth passed the Foreign Anti-trust Judgments (Restriction of Enforcement) Act 1979. This legislation empowers the Attorney-General to declare that certain foreign judgments should not be recognized or enforced by Australian courts.

In 1978 the House of Lords refused a request by a United States District Court for evidence in the *Westinghouse* litigation.[10] As is apparent, the threat to international comity resulting from the application of domestic trade practices legislation against foreign companies and governments in the absence of international regulation is considerable.

The critical question is whether international law permits the legislation

[4] See *e.g. United States v. Bechtel Corporation* (1972) Civ. No. C-76-99 (N.D. Calif.); for final judgment see (1977) 16 *International Legal Materials* 95; *In re Investigation of World Arrangements with Relation to the Production, Transportation, Refining and Distribution of Petroleum* (1957) 13 F.R.D. 280 (D.D.C.); *United States v. Bayer Co.* (1955) 135 F. Supp. 65 (S.D.N.Y.).

[5] *In re Westinghouse Electric Corporation Uranium Contract Litigation* [1978] A.C. 547 (C.A.; H.L. (E.)).

[6] *E.g.* the Australian Atomic Energy Commission has a 41.6 per cent share in Mary Kathleen Uranium Pty Ltd and until recently a 72 per cent share in Ranger Uranium Mines Pty Ltd.

[7] In *United States v. Watchmakers of Switzerland Information Center, Inc.* (1955) 133 F. Supp. 40 (S.D.N.Y.) the Swiss government threatened to bring the matter before the International Court of Justice. See Rahl J. (ed.), *Common Market and American Anti-trust: Overlap and Conflict* (1970) 334.

[8] *E.g.* Shipping Contracts and Commercial Documents Act 1964 (U.K.); Business Records Protection Act 1947 (Canada); Economic Competition Act 1958 (Netherlands).

[9] Assented to and commenced 19 November 1976.

[10] [1978] A.C. 547 (H.L. (E.)).

of one state to invalidate the commercial activities of nationals of another state where these activities take place abroad but have an effect upon the legislating state. The purposes of this article are to examine the limits set by international law upon the extraterritorial application of domestic trade practices legislation and to consider the special problems which arise where states purport to apply this legislation to foreign sovereigns and their trading agencies. It may be possible to supplement the traditional principles of jurisdiction established by public international law by applying private international law rules in order to balance conflicting state interests and to determine where state jurisdictional power ought fairly to lie. This article examines the 'conflict of laws' approach to the problem of jurisdictional overlap between states and assesses its usefulness where fundamental state interests are threatened.

State jurisdictional competence

The limits on state jurisdictional power to control the rights of persons by legislation, executive decree or court order are established by international law.[11] It is not easy to define these limits with any precision, partly because state practice varies considerably and partly because there is a dearth of international case law on the subject. One principle of international law which may be stated with relative certainty is that of non-intervention by one state in the political independence and territorial integrity of another.[12] The Permanent Court of International Justice confirms that

> the first and foremost restriction imposed by international law upon a State is that — failing the existence of a permissive rule to the contrary — [it] may not exercise its powers in any form in the territory of another State.[13]

A corollary of this principle and of the classic view of state jurisdictional competence is that a state has exclusive sovereignty over all persons, citizens or resident aliens, and all property, real and personal, within its own territory.[14] 'In this sense', the Permanent Court stated,

> jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.[15]

The territorial theory of jurisdiction has the advantages of simplicity and clarity and avoids potential conflicts if a state claims exclusive or concurrent jurisdictional competence over aliens, property or events in another state's territory. Nonetheless, the territorial theory must be qualified by the practical difficulties presented by modern technical, social

[11] Mann F. A., 'The Doctrine of Jurisdiction in International Law' (1964) 111 *Recueil des Cours de l'Académie de Droit International (Hague Recueil)* 9, 11; Beale J. H., 'The Jurisdiction of a Sovereign State' (1923) 36 *Harvard Law Review* 241.
[12] United Nations General Assembly Resolution 2131 (XX) (1965).
[13] *S.S. Lotus* (1927) P.C.I.J. Reports, Series A, No. 9, 18.
[14] Mann, *op. cit.*; Beale, *op. cit.*
[15] *S.S. Lotus* (1927) P.C.I.J. Reports, Series A, No. 9, 18.

and economic conditions of assessing whether an act or event occurred within or outside the territory. A problem may arise, for example, with telex and telephone communications where it is necessary to decide where a contract was concluded or a tort took place.[16] Further, while a state may control aliens within its territory, there are limits to this competence. International law will not, for example, permit a state to subject temporarily resident aliens to compulsory military service.[17]

The paramountcy of the territorial theory of jurisdiction is not an entirely satisfactory description of the jurisdiction claimed by states in practice and has been criticised frequently by academic scholars.[18] The inadequacies of the theory are demonstrated by an examination of the other bases upon which municipal courts have founded jurisdiction. The first of these, and a generally recognized theory of jurisdiction, is based on the nationality of the citizen.[19] A state has jurisdiction over its own citizens wherever they may be in the world. Common law states have not in fact relied heavily on the nationality principle, preferring to found jurisdiction on a territorial link.[20] It should be remembered that there is an important difference between the jurisdictional right to proscribe conduct of nationals abroad and the power to enforce this law in the territory of another state. The proscribing state must generally wait to exercise jurisdiction until the national has returned to that state's territory.

A second basis of jurisdiction is the universality principle.[21] This permits the exercise of jurisdiction in respect of criminal acts abroad by foreigners against foreigners. The criminal conduct might be described broadly as of common concern to all mankind. It will include piracy, slave trading, drug trafficking and, more recently, war crimes against humanity and international terrorism.

[16] *Diamond v. Bank of London and Montreal Ltd* [1979] Q.B. 333 (C.A.); see also Mann, *op. cit.* 37.

[17] O'Connell D. P., *International Law* (1970) Volume 2, 703 f.

[18] See *e.g.* Mann, *op. cit.* 11; Glanville Williams (ed.), *Salmond on Jurisprudence* (11th ed. 1957); Jennings R. Y., 'Extraterritorial Jurisdiction and the United States Antitrust Laws' (1957) 33 *British Yearbook of International Law* 146.

[19] American Law Institute, *Restatement of the Law, Second: Foreign Relations Law of the United States* (1965) (hereafter cited as *Restatement of Foreign Relations Law*):

30(1) A state has jurisdiction to prescribe a rule of law
  (a) attaching legal consequences to conduct of a national of the state wherever the conduct occurs or
  (b) as to the status of a national or as to an interest of a national, wherever the thing or other subject-matter to which the interest relates is located.
(2) A state does not have jurisdiction to prescribe a rule of law attaching legal consequences to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals.

Mann criticises this statement as going further than is indicated by the judgment of the Permanent Court in *S.S. Lotus: op. cit.* 41.

[20] Jennings, *op. cit.* 153.

[21] Jurisdiction is based here upon the accused's attack on the international order as a whole. See Mann, *op. cit.* 95; *Restatement of Foreign Relations Law*, §§ 34 and 35; Geneva Red Cross Conventions of 1949; *Attorney-General of the Government of Israel v. Eichmann* (1961) 36 I.L.R. 5.

A third basis of jurisdiction is the passive personality or protective principle, under which a state asserts the right to punish aliens for offences committed outside its territory but which injure one of its nationals.[22] In the notorious *Cutting*[23] incident, a United States citizen and temporary resident in Mexico was prosecuted and convicted in a Mexican court for a libel against a Mexican national published in a Texan newspaper. With the exception of this case the protective principle is not reflected in state practice[24] and it is the most dubious of grounds upon which to assert an extraterritorial jurisdiction over aliens.

State practice confirms a fourth basis of extraterritorial jurisdiction where aliens act against national security. The Harvard Research in International Law states the protective principle as follows:

> A State has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence of that State, provided that the act or commission which constitutes the crime was not committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed.[25]

This concept has not received support from the Anglo-American courts, mainly because they have relied on other jurisdictional grounds, particularly the territorial principle.[26] The national security theory is open to the criticism that there are no objective tests to ascertain when a particular act violates security. Each state judges for itself where its interests are at risk. As Professor D. P. O'Connell has pointed out,[27] if this jurisdictional base is to be valid at international law it should be applied conservatively and strictly within the limits of the Harvard Draft.

A substantial inadequacy lies in a strictly territorial approach to jurisdiction where a crime is committed within the state but consummated abroad, or where a crime is commenced outside the state but consummated within its territory. Municipal courts responded to this problem by extending the territorial theory to permit criminal jurisdiction in both instances. The jurisdictional grounds are known respectively as the subjective and objective principles.[28] This extension of the traditional

[22] This basis of jurisdiction is not included in the *Restatement of Foreign Relations Law*, and while claimed by some states, such as Turkey in the *S.S. Lotus*, it is 'more strongly contested than any other type of competence': Harvard Research in International Law, 'Commentary to the Draft Convention on Jurisdiction with Respect to Crime' (1935) 29 *American Journal of International Law* (Supplement) 435, 579.

[23] Moore J. B., *A Digest of International Law* (1906) Volume 2, 228-42. For a summary of the incident see Bishop W. W., *International Law: Cases and Materials* (2nd ed. 1962) 459 f.

[24] See the dissenting opinion of Judge Moore in *S.S. Lotus* (1927) P.C.I.J. Reports, Series A, No. 9, 92.

[25] Harvard Research in International Law, *op. cit.* 435, 543.

[26] O'Connell points out the similarity in practice between the protective principle and the 'effects' extension of the objective principle by United States courts: *op. cit.* Volume 2, 830.

[27] *Ibid.* 831.

[28] Harvard Research in International Law, *op. cit.* 435, 484-94; adopted into general jurisprudence as expressed in Art. 3 of the Draft Convention itself (*ibid.* 480):

> A state has jurisdiction with respect to any crime committed in whole or in part within its territory.

territorial principle is necessary to encompass the inevitable situations where an offence straddles the jurisdictional boundaries of two or more states, and it has been generally accepted in municipal practice. As John Bassett Moore states:

> [T]he principle that a man outside of a country who wilfully puts into motion a force to take effect in it is answerable at the place where the evil is done, is recognized in the criminal jurisprudence of all countries.[29]

Central to the idea of territorial competence is that a state may not control the conduct of foreigners in a foreign country. States have, in fact, adopted the flexible objective territorial principle to extend radically their extraterritorial criminal jurisdiction. Support for this extension was prompted in 1927 by the decision of the Permanent Court of International Justice in the *S.S. Lotus*.[30] A French steamship, the *Lotus*, collided on the high seas with a Turkish collier, the *Boz-Kourt*. The latter vessel sank and eight Turkish crew members died. After rescuing survivors, the *Lotus* proceeded to Constantinople. Here the French officer of the watch and one other crew member were arrested and convicted of manslaughter. The form in which the legal issue was presented to the Permanent Court, as a consequence of a special agreement between the parties, had a decisive role in the final conclusions. The Court was asked to decide whether international law prevented Turkey from instituting criminal proceedings against a French citizen with regard to events occurring on the high seas. The Court was not asked whether there was any positive rule of law authorizing Turkey to take the proceedings. It was not therefore a question of stating principles permitting Turkish jurisdiction, but of formulating a principle, if any existed, which might have been violated by the Turkish proceedings.

The Court began its deliberations with a reminder that '[r]estrictions upon the independence of States cannot . . . be presumed'.[31] The Court declined to decide whether a state can punish offences committed abroad by a foreigner simply by reason of the nationality of the victim, as in the protective principle mentioned earlier,[32] since there was another criterion on which criminal jurisdiction could be founded. This was the objective territorial principle. The Court reasoned that as the Turkish ship was a place assimilated to Turkish territory the offence was committed within Turkish jurisdiction.

It has been argued[33] that the *S.S. Lotus* supports the passive personality

This jurisdiction extends to:
(a) any participation outside its territory in a crime committed in whole or in part within its territory; and
(b) any attempt outside its territory to commit a crime in whole or in part within its territory.

[29] *Op. cit.* Volume 2, 244.
[30] (1927) P.C.I.J. Reports, Series A, No. 9, 18.
[31] *Ibid.*
[32] *Supra* 254.
[33] *E.g.* by O'Connell, *op. cit.* Volume 2, 829.

principle, because the notion of the 'ship as territory' is fictitious, and because jurisdiction rested on the injuries to the Turkish nationals. While it is true that courts no longer consider ships as territory, that fact does not avoid the apparent intention of the Permanent Court to found jurisdiction on the territorial rather than the passive personality principle.[34]

On an examination of state practice the Permanent Court held that there was no rule of international law prohibiting Turkish jurisdiction in these circumstances. It emphasized the objective territorial principle in the following passage:

> [I]t is certain that the courts of many countries, even countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, *if one of the constituent elements of the offence, and more specifically its effects, have taken place there.*[35]

The troubling aspects of the decision arise from various *obiter dicta.* The Court appears to doubt the territorial principle and suggests that there are few restrictions on the discretion of states to claim jurisdiction. The Court said:

> Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their actions to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty.[36]

And further:

> Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.[37]

These statements are not as far-reaching as has been thought. Firstly, the decision emphasized that the effects of the crime meant those which are a constituent element of the offence. Secondly, the Court warned that states 'should not overstep the limits which international law places upon [their] jurisdiction; within these limits, [their] title to exercise jurisdiction rests in [their] sovereignty'.[38]

[34] (1927) P.C.I.J. Reports, Series A, No. 9, 22 f.:
[T]he Court does not think it necessary to consider the contention that a State cannot punish offences committed abroad by a foreigner simply by reason of the nationality of the victim. For this contention only relates to the case where the nationality of the victim is the only criterion on which the criminal jurisdiction of the State is based. Even if that argument were correct generally speaking — and in regard to this the Court reserves its opinion — it could only be used in the present case if international law forbade Turkey to take into consideration the fact that the offence produced its effects on the Turkish vessel and consequently in a place assimilated to Turkish territory, in which the application of Turkish criminal law cannot be challenged, even in regard to offences committed there by foreigners. But no such rule of international law exists.

[35] *Ibid.* 23 (emphasis supplied).

[36] *Ibid.* 20.

[37] *Ibid.* 19.

[38] *Ibid.*

Despite this analysis, the objective territorial principle in general and the *S.S. Lotus* decision in particular have facilitated the expansion of state jurisdictional competence to less tangible consequences so as to include remote consequential damage resulting from extraterritorial acts. The extraterritorial expansion of the objective principle is subject to further analysis.[39] For the present, the following is a list of generally recognized international law principles of jurisdictional competence, to the extent that they can be formulated with any certainty:

(1) A state may not exercise its power in the territory of another state.

(2) A state generally has exclusive legislative, judicial and executive competence over all of its nationals and resident aliens, all real and personal property within its territory, and all acts and events taking place in its territory.

(3) A state has jurisdiction over its own nationals wherever they may be, subject to the practical inability to enforce its laws in the territory of another state.

(4) A state has jurisdiction over certain crimes against international order, the suppression of which is in the common interest of all mankind.

(5) A state may be limited in its general power to control aliens residing within its territory.

(6) A state has jurisdiction over the criminal acts of aliens which are committed abroad but which injure that state's vital security interests.

(7) A state has jurisdiction over crimes and torts which are commenced within a state but consummated abroad, or which are commenced abroad but where constituent elements of the offence take place within the state.

State jurisdiction over restrictive trade practices

By the 1970s most western states and some developing states had adopted restrictive trade practices legislation to curb national anti-competitive practices.[40] Since the Second World War there has been a demand for the application of these laws and principles to the international activities of multinational enterprises. Modern international trade is a complex network of public and private business organizations which rarely operate in the territory of only one state. Where monopolistic trading activities are carried out partly within a legislating state, that state may bring its domestic legislation into operation. The more difficult legal problem arises where restrictive practices take place in one or several states which have an effect in yet another state.

[39] *Infra* 259 ff.

[40] *E.g.* Treaty of Rome 1957, Arts. 85 and 86; Act Against Restraints of Competition 1957 (Federal Republic of Germany); Monopolies Act 1965 (U.K.); *cf.* the Andean Community, Latin-American Free Trade Association and the Central American Common Market, where this problem is not addressed.

For example, the manufacturers of widgets, X and Y, citizens of Utopia, enter into an agreement with each other whereby they make exclusive allocations to each other of specified portions of territory in Australia for the sale there of their product. The agreement is lawful under Utopian law. It is given effect to in Australia through restrictions included in sales contracts made in Utopia between X and Y respectively and Australian purchasers. The restrictions have a substantial effect on the usual competitive sale of widgets in Australia and keep the price unnaturally high. Does Australia have jurisdiction at international law to commence proceedings against the Utopian manufacturers under the trade practices legislation?[41]

Attempts have been made and continue to be made to create a framework of law to regulate international restrictive trade practices. In 1948 the Havana Charter for International Trade Organisation came close to achieving a legal regime to maintain free international trade.[42] The I.T.O. Charter did not enter into force, and there remains no formal international regulatory system of control over monopolistic trade practices. The United States and a score of other states are parties to Friendship, Commerce and Navigation Treaties which typically contain anti-trust articles.[43] These have not been used by the parties in practice.[44]

The United Nations, through U.N.C.T.A.D., has embarked upon a programme to develop international anti-trust law as it relates to the sale of goods and the transfer of technology.[45] While an attempt has been made to outline the principles for a model anti-trust law for developing countries, it became apparent at the recent conference in Nairobi that some states see restrictive trade practices as an important means of achieving goals other than those of free competition. The Organisation for Economic Co-operation and Development has achieved some progress by the adoption of a consultative procedure between states where restrictive business practices affect international trade.[46]

It remains doubtful whether any positive international restrictive trade practices law will come into force in the foreseeable future. In this environment it is not surprising that individual states have resorted to domestic legislation to control the monopolistic activities of transnational

[41] Trade Practices Act 1974 (Cth). S. 5 extends to 'the engaging in conduct outside Australia by persons in relation to the supply by those persons of goods or services to persons within Australia'.

[42] See United States Department of State, *Havana Charter for International Trade Organization* (1948) 23-140; Draft Restrictive Business Practices Convention 1953 reproduced in Metzger S. D., *Law of International Trade* (1966) Volume 2, 1500 ff.

[43] United States Treaty of Friendship, Commerce and Navigation with Japan (2 April 1953; proclaimed 4 November 1953) 4 U.S.T., Part 2, 2063.

[44] See Metzger S. D., 'Cartels, Combines, Commodity Agreements and International Law' (1976) 11 *Texas International Law Journal* 527, 531.

[45] U.N.C.T.A.D., *Report of the Second Ad Hoc Group of Experts on Restrictive Business Practices* (U.N. Doc. TD/B c.2/AC 5/61976) 37.

[46] O.E.C.D., *Report of the Committee of Experts on Restrictive Business Practices* (1977) Annex 2 (adopted 3 July 1973).

trading organizations where these practices have an effect on the domestic economy. The critical issue is whether international law permits the extension of local restrictive trade practices legislation to the business practices of foreign nationals which take place in foreign states but where these practices have an unlawful effect on the domestic economy.

As in any analysis of international law in the absence of a treaty, an examination of municipal legislative, executive and judicial practice must be made. The present examination begins with and revolves around the 1945 decision in *United States v. Aluminum Co. of America*,[47] known as *Alcoa.* The United States government alleged that a Swiss company, Alliance, entered into an agreement with its shareholders, companies incorporated in France, Germany, Switzerland, Britain and Canada, setting a quota for the production of aluminium in violation of the Sherman Anti-trust Act.[48] Where any shareholder exceeded the quota it was to pay progressive royalties to Alliance. The agreement was intended to include exports to the United States, and if made in the United States it would clearly have been unlawful. Alcoa, a United States corporation, was a co-defendant in the action, but while benefiting from the agreement was not a party to it. The question for the Court was whether the Sherman Act extended to attach liability to the conduct of foreign nationals outside the United States.[49]

Judge Learned Hand, delivering the opinion of the Court, concluded that it was settled law that

> any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.[50]

The Court envisaged three situations:

(1) Agreements made beyond United States borders which are not intended to affect imports or exports in the United States but which do so. Here the Court held that mere effect was not sufficient ground for the exercise of jurisdiction.

(2) Agreements which are intended to affect United States imports and exports but which do not achieve this result. The Court considered this an insufficient basis of jurisdiction.

[47] (1945) 148 F. 2d 416 (S.D.N.Y.).

[48] 2 July 1890, Ch. 647, 26 Stat. 209; 15 U.S.C.A. §§ 1-7. § 1 declares illegal every contract, combination or conspiracy in restraint of trade or commerce among the several states or with foreign nations. §2 provides that every person who monopolizes or attempts to monopolize, or combines or conspires with any other person to monopolize any part of the trade or commerce among the several states or with foreign nations will be deemed guilty of a misdemeanour.

[49] The Clayton Act; 15 October 1914, Ch. 323, 38 Stat. 730; 15 U.S.C.A. §§ 12-27, supplements the Sherman Act by describing certain restrictive practices as unlawful, including exclusive dealing arrangements and price discrimination among purchasers. The legislation may be enforced by a federal government action for an injunction to restrain further violation, by criminal proceedings, or by private actions for treble damages.

[50] (1945) 148 F. 2d 416, 443.

(3) Where both elements are established, that is, where the agreement is both intended to affect imports and exports in the United States and is shown actually to have had some effect upon them, the Sherman Act will apply.

While the facts of the case indicated that the shareholders intended to restrict exports to the United States there did not appear to be evidence that they had done so in fact. Nonetheless, the Court employed the device of a shifting burden of proof to put the defendants to the task of showing that no effect was achieved. As the defendants could not do so, the United States government action succeeded.

The 'effects' doctrine of jurisdiction as articulated in *Alcoa* was adopted by the *Restatement of Foreign Relations Law*[51] with the following qualifications:

(1) The conduct and its effect must be generally recognized as constituent elements of a crime or tort under the laws of states with reasonably developed legal systems, or
(2) the consequences within the territory must be substantial and occur as a direct and foreseeable result of the conduct outside the territory, and
(3) the law prescribing the effect must not be inconsistent with the principles of justice generally recognized by states with reasonably developed legal systems.

On these conditions one might conclude that the *Alcoa* decision was in excess of jurisdiction. There was no evidence of a substantial effect on the domestic economy nor could it be asserted that anti-competitive activities are crimes or torts within the laws of states with reasonably developed legal systems.[52] Nonetheless, the decision has been influential in stimulating a series of United States anti-trust prosecutions against foreign defendants in relation to their activities abroad.[53] The question remains whether the 'effects' doctrine conforms to the principles of jurisdictional competence established at international law.

Of the five theories of jurisdiction discussed above only the objective territorial principle has relevance in the context of anti-trust prosecutions

[51] § 18.

[52] While most western states now have some form of trade practices legislation, this was not true in 1945. Developing states and some developed states continue to resist such legislation, and it is arguably not generally accepted in the customary international law sense.

[53] See *e.g. United States v. National Lead Co.* (1945) 63 F. Supp. 513 (S.D.N.Y.); *United States v. Timken Roller Bearing Co.* (1949) 83 F. Supp. 284 (N.D. Ohio); *United States v. General Electric Co.* (1949) 82 F. Supp. 753 (D.N.J.); *United States v. Imperial Chemical Industries Ltd* (1951) 100 F. Supp. 504 (S.D.N.Y.); *United States v. DeBeers Indus. Diamond Div. Ltd* (1974) Cr. No. 74-1151 (S.D.N.Y.); *United States v. Norman Morris Corporation* (1976) Civ. No. 76-495 (S.D.N.Y.); *United States v. N.V. Nederlandsche* (1968) Cr. No. 68-870 (S.D.N.Y.); *F.T.C. v. British Oxygen* (1974) Civ. No. 74-31 (D. Delaware). For a discussion of the jurisdictional problems with foreign defendants see [1972-74] *Trade Cases* (C.C.H.) para. 75,434 at para. 98,459.

against foreigners in relation to their activities abroad. Clearly the nationality principle will not apply. There is no suggestion that the protective or universality principles apply. The passive personality principle is a doubtful basis of jurisdiction and has not been relied upon by the United States courts to justify anti-trust jurisdiction.

The objective territorial principle supports the exercise of jurisdiction by a state where a constituent element of the offence has taken place within that state's territory. As Jennings points out,[54] to move away from direct physical consequences to the *Alcoa* 'effects' formula is 'to enter upon a very slippery slope'. The effects may include remote consequential damage or, as Learned Hand J. in *Alcoa*[55] pointed out, almost any limitation on the supply of goods. The term 'effects' has been given minimal judicial interpretation by United States courts, and has been limited to linguistic variations such as 'impact within the United States upon its foreign trade'.[56] The Justice Department's Anti-trust Guide[57] states that the effect must be substantial and foreseeable. Substantial effect requires more than a mere colourable interstate or foreign commerce aspect,[58] but once the effect is shown no specific quantum of commerce lessened by the restraint need be shown. The essential factor in a Sherman Act violation is that the violators deprived consumers of the advantages they would normally have derived from free competition.

There is little support in international state practice for the extension of the objective territorial principle to mere effects which do not form a constituent element of an offence. Further, if the territoriality principle were not limited in this way there would be almost no restriction upon state jurisdictional competence over matters which, in the state's opinion, had some impact within its territory.

While the 'effects' doctrine of jurisdiction has frequently been implemented by United States courts there is no consensus in international state practice. There is some support for the theory among western states which have enacted restrictive trade practice legislation. The Federal Republic of Germany provides the best example, applying its Act Against Restraints of Competition 1957 to 'all restraints of competition effective in the area of applicability of this law, even if they result from acts done outside such area'.[59] The Swiss Cartel Act[60] of 1964 extends jurisdiction to foreign firms producing unlawful economic effects in Switzerland by acts or

[54] *Op. cit.* 159.
[55] (1945) 148 F. 2d 416, 443.
[56] *Goldfarb v. Virginia State Bar* (1975) 421 U.S. 773, 785; 44 L. Ed. 2d 572, 583 f.
[57] United States Department of Justice, Anti-trust Division, *Anti-trust Guide for International Operations* (1977) 6.
[58] *Fry v. United States* (1975) 421 U.S. 542, 547; 44 L. Ed. 2d 363, 368 f.
[59] S. 98(2).
[60] S. 7(2)(b). The Swiss Federal Court has held that
although the statute . . . contains no express provisions on its scope internationally, it applies equally to restrictions on competition effected abroad and having their effects in Switzerland: *Bundesgerichtsentscheidungen* 93 (1967) II 92.

practices performed abroad. The Netherlands' legislation[61] applies to conduct abroad by both Dutch and foreign firms where Dutch public interest is affected. This may include effects upon domestic markets and agreements which affect Dutch exports or imports and infringe the public interest. The extent of French anti-trust laws[62] is unclear, though it is possible that a foreign national could not be prosecuted criminally for its acts abroad which merely have an effect in France. The Australian Trade Practices Act 1974 extends to 'the engaging in conduct outside Australia by persons in relation to the supply by those persons of goods or services to persons within Australia'.[63]

The Court of Justice for the European Economic Community has held that Article 85(1) of the Treaty of Rome will apply to non-members of the Community where their anti-competitive practices have economic effects within the Community. In *I.C.I. v. E.E.C.*[64] the Court upheld a decision of the Commission against three non-members, I.C.I. of Great Britain and Sandoz and Geigy of Switzerland, for participation with member companies in a concerted practice to increase the price of dye-stuffs. Jurisdiction lay in the anti-competitive effects taking place within the Common Market. The Court was careful to emphasize that I.C.I. carried out its illegal activities through its subsidiary within the European Economic Community. Hence the decision does not provide strong support for the effects doctrine, for it can be rationalized on the ground that a constituent element of the offence occurred within the territory. The case is nonetheless interesting as an example of the ease with which the Court swept aside the subsidiary as a distinct legal person to reveal the close practical relationship between it and the parent British company.[65]

While the Court did not give detailed reasons for its decision, the Advocate-General lodged a full discussion of the extraterritorial scope of the Community's restrictive trade practices legislation in support of the

[61] Economic Competition Act 1956, s. 1. Note that the Danish trade practices legislation applies to enterprises and associations within trades in which competition is restricted in Denmark. Registration is required for any agreement or enterprise that may exert a substantial influence on Danish markets. Spanish law forbids arrangements that restrict competition on the domestic market.

[62] Price Ordinance of 30 June 1945 (as amended), Arts. 61, 37 and 59. There are no decisions on the point and academic writers disagree. Compare Plaisant R., 'Restrictive Trade Practices in France' in International Law Association, *52nd Conference Report* (1966) 89 with Riessenfeld in hearings on international aspects of anti-trust before the Subcommittee on Anti-trust and Monopoly of the Senate Committee on the Judiciary ((1966) 89th Congress, 2nd Session, 496-511) 403.

[63] S. 5.

[64] [1972] C.M.L.R. 557. See also *Béguelin Import Co. v. G.L. Import Export S.A.* [1972] C.M.L.R. 81 and *Re the Franco-Japanese Ballbearings Agreement* [1975] 1 C.M.L.R. D8.

[65] [1972] C.M.L.R. 557, 629:

> When the subsidiary does not enjoy any real autonomy in the determination of its course of action on the market, the prohibition imposed by Article 85(1) may be considered inapplicable in the relations between the subsidiary and the parent company, with which it then forms one economic unit. In view of the unity of the group thus formed, the activities of the subsidiaries may, in certain circumstances, be imputed to the parent company.

Commission's decision. He argued[66] that the effects criterion prevailed over the *S.S. Lotus* 'constituent element of the offence' criterion. He supported the *Restatement of Foreign Relations Law* limiting the effects doctrine to a direct and immediate impact on the Community market which is reasonably foreseeable and of substantive character.[67] Despite his view of the paramountcy of the effects doctrine he argued that in any event the economic impact within the Community was one of the constituent elements of the offence if not *the* essential one.[68]

The Advocate conceded the crucial point that it was difficult to satisfy the *Restatement of Foreign Relations Law* requirement that the offence must be one recognized as reprehensible under the laws of states with reasonably developed legal systems. Certainly most developed states have enacted some form of restrictive trade practices legislation in response to growing concern about market domination. But there are considerable variations in the underlying theories and in their practical scope.[69] Japan and Switzerland, for example, rely heavily on cartelized export industries. The developing or third world states are not ideologically committed to a 'free economy'. The cartelization of resources is often seen as the most efficient means of redressing trade imbalances with highly industrialized states. Agreements regarded as criminal in states which see competition as a virtue may be regarded as beneficial by other states.

While the United States, the Federal Republic of Germany, the European Economic Community and some other states have adopted the 'effects' doctrine to expand the reach of their restrictive trade practices legislation, the doctrine has not received support in the general practice of the international community. The fact that, in some instances,[70] states have moved to legislate against United States attempts to enforce the Sherman and Clayton Acts extraterritorially suggests that the reverse is true.

A final objection to the 'effects' doctrine lies in the practical difficulty of deciding whether the consequences of an act were intentional, accidental or negligent. This distinction is notoriously difficult to make in criminal law in the domestic sphere. It will be impossible to impute intention to multinational enterprises in the international sphere. The precondition of intention has, in fact, been rendered meaningless in subsequent United States decisions. In *Fleischmann Distilling Corporation v. Distillers Company Ltd*,[71] for example, intent was established where the defendant was presumed to intend the natural consequences of his act. Where the acts of

[66] *Ibid.* 604.
[67] *Ibid.*
[68] *Ibid.* 606.
[69] See Rahl, *op. cit.*; Edwards C. D., *Control of Cartels and Monopolies: an International Comparison* (1967).
[70] See the discussion of this legislation *infra* 264 ff.
[71] (1975) 395 F. Supp. 221 (S.D.N.Y.).

foreigners abroad have an illegal effect on United States commerce intention will be presumed as a natural consequence. The commentary accompanying the *Restatement of Foreign Relations Law* notes that intent in the subjective sense is not required, but that intent will be established where 'those responsible for the conduct had reason to foresee that the effect within the territory would result from the conduct outside'.[72]

In summary, the practice of states demonstrates the continuing validity, though not exclusivity, of the territorial theory of jurisdictional competence. A state may punish all offences which occur within its territory. States have an objective territorial jurisdiction to punish conduct where a constituent element of the offence occurs within that state's territory, even though the defendant is a foreign national and other elements of the offence occurred in another state. State jurisdiction does not extend to the unlawful conduct abroad of foreign nationals where their conduct has an intended effect on domestic commerce unless a constituent element of that conduct occurred within the state's territory. Hence, to return to the example posed, Australia would not have jurisdiction at international law to prosecute the nationals of Utopia for the economic effects of their restrictive agreements, unless it can be established that constituent elements of the unlawful practice took place within Australia.

Extraterritorial enforcement of United States anti-trust legislation

While the effects doctrine as a basis for jurisdictional competence is an unwarranted extension of the territorial principle, states have typically confined their diplomatic objections to the enforcement procedures adopted by United States courts when applying anti-trust provisions against foreign defendants abroad. The far-reaching potential for international discord is demonstrated in two frequently discussed cases. The first is *United States v. Imperial Chemical Industries*[73] in 1951. Here the United States government alleged violation of the Sherman Act by I.C.I., a British company with a New York subsidiary, and du Pont, a United States company. The court found a conspiracy to restrain trade by dividing the world markets in chemical products. The conspiracy was achieved through an agreement that United States patented products would not enter British markets and *vice versa*. Judge Ryan found it 'crystal clear'[74] that the conspiracy affected United States commerce and hence violated the Sherman Act. He attempted to strike at the root of the problem by ordering cancellation of an assignment of British nylon patents by du Pont to I.C.I. and by ordering I.C.I. not to assert these patent rights which might be used to bar du Pont exports to Britain. Judge Ryan argued that as the Court had *in personam* jurisdiction over I.C.I. it was entitled to

[72] *Restatement of Foreign Relations Law*, 50.
[73] (1951) 100 F. Supp. 504 (S.D.N.Y.).
[74] *Ibid.* 592.

make these orders, 'since the enforcement of those rights will serve to continue the effects of wrongful acts it has committed within the United States affecting foreign trade in the United States'.[75]

The patent rights had by the time of these orders been granted by I.C.I. to British Nylon Spinners. British Nylon Spinners then tested the validity of the United States court direction in an action to restrain I.C.I. from complying.[76] The English Court of Appeal confirmed its own right to order specific performance of a contract between I.C.I. and B.N.S.[77] Lord Evershed M.R. denied Judge Ryan's assertion that the United States court order was not an attempt to assert an extraterritorial jurisdiction over the authority of a foreign sovereign.

He noted an important distinction between the present case and those cases where a court with *in personam* jurisdiction may make orders validly against foreign defendants. Here British Nylon Spinners was not subject to the jurisdiction of the United States court. Hence the United States court purported to affect the property rights of a British national over whom it had no jurisdiction. Lord Evershed found the direction was

> an assertion of an extraterritorial jurisdiction which we do not recognize for the American courts to make orders which would destroy or qualify those statutory rights belonging to an English national who is not subject to the jurisdiction of the American courts.[78]

The Court of Appeal then affirmed the decision of Upjohn J. granting an injunction restraining I.C.I. from assigning the patent rights it had acquired from du Pont back to du Pont.

The decision of the English Court of Appeal might appear to have presented I.C.I. with a dilemma. The English court was prepared to order specific performance of the assignment to British Nylon Spinners, while the United States court had ordered that the patent rights should be reconveyed by I.C.I. to du Pont. Judge Ryan had, with some foresight, included a savings clause under which his judgment would not operate against I.C.I. where it was complying with the law of a foreign state to which it was subject. This 'sovereign compulsion'[79] clause avoided a collision between the opposing court decrees. The assignment could go forward between I.C.I. and British Nylon Spinners, and I.C.I. avoided

[75] (1951) 100 F. Supp. 504 (decision); (1952) 105 F. Supp. 215 (final decree) (S.D.N.Y.).

[76] *British Nylon Spinners Ltd v. Imperial Chemical Industries Ltd* [1953] Ch. 19 (C.A.).

[77] For the trial at which specific performance was ultimately granted see [1955] Ch. 37.

[78] [1953] Ch. 19, 26.

[79] The sovereign compulsion defence operates to avoid liability where the defendant's activities abroad are *required* by foreign law. See *Continental Ore Co. v. Union Carbide and Carbon Corporation* (1962) 370 U.S. 690; 8 L. Ed. 2d 777. The foreign law must however compel the conduct concerned rather than merely permit it. See *Linseman v. World Hockey Association* (1977) 439 F. Supp. 1315 (D. Conn.). Note that in *Holophane Co. v. United States* (1956) 352 U.S. 903; 1 L. Ed. 2d 114, civil liability in a foreign state was not sufficient to raise the defence.

penalty for its failure to comply with Judge Ryan's order to reconvey the patent rights to du Pont. While conflict was thereby prevented, the United States decision impliedly assumes that, in the absence of foreign domestic law to the contrary, United States anti-trust law is to be applied in the territory of the foreign state.

A second example of extraterritorial enforcement arose in *United States v. The Watchmakers of Switzerland Information Center, Inc.*,[80] in 1963. Here Swiss watch manufacturers entered into a Convention with the approval and assistance of the Swiss government and under Swiss law, to regulate the sale of watches, watch parts and machinery. These manufacturers agreed not to conduct business with any foreign watch company which dealt with persons not party to the Convention. Sales contracts were made with United States companies, which were bound to restrict their own watch production in exchange for Swiss watches and parts. The United States District Court found that the Convention and the contracts made under it violated the Sherman Act because they were intended to and did affect domestic markets. The Court noted that the United States was the single largest importer of Swiss watches, 95 per cent of production being exported. The Court ordered termination of the Convention and export contracts where these affected world trade with the United States. It warned that if the Swiss watch industry failed to conform to the Sherman Act its representatives visiting the United States would be imprisoned or fined, and the industry's property in the United States would be taken over.[81] Once again a United States court was attempting to regulate the conduct of a foreign defendant in his own country through *in personam* jurisdiction over the defendant's property and representatives in the United States. While the United States does not have the power to enforce its orders directly in the territory of another state it attempted to do so indirectly by making orders in its own territory which were to take effect abroad.

Certainly some European states have relied upon the effects doctrine to impose trade practices legislation on the conduct abroad of foreign defendants.[82] The United States is alone in attempting to enforce its anti-trust laws in the territory of another state. Such an extraterritorial enforcement of domestic legislation is an excess of jurisdiction and threatens the stability of international relations.

Documents

The international community has made its most forcible protests against the extraterritorial reach of United States anti-trust legislation where

[80] [1963] *Trade Cases* (C.C.H.) 77.
[81] After the intervention of the Swiss government the original decree was modified to affect only Swiss agreements with United States distributors. See Rahl, *op. cit.* 334.
[82] See the discussion of this point *supra* 261 f.

courts have ordered the production of foreign documents. United States courts have adopted the rule that once a court has personal jurisdiction over a party it may order the production of all documents in that party's possession wherever they may be, providing that the party does not infringe the law of the state in which the documents are present.[83] International law permits the requirement of relevant documents situate abroad where the court has personal jurisdiction.[84] It will not do so where the court's subpoena extends to issues which are beyond the court's substantive jurisdiction and amounts to little more than a 'fishing expedition'.[85] In other words, the fact that a state has personal jurisdiction over a defendant will not allow it to require production of foreign documents relating to substantive issues over which the court does not already have jurisdictional competence at international law.

On a number of occasions United States courts have attempted to subpoena the production of foreign documents pursuant to anti-trust or Federal Maritime Commission investigations. These include subpoenas to obtain documents relating to the international oil industry,[86] foreign shipping conferences,[87] the Canadian pulp and paper industry,[88] and the Dutch incandescent lamp industry.[89] Each instance provoked strong displomatic protests that the requests were beyond United States jurisdiction and were an infringement of the foreign state's jurisdiction. The states concerned have consolidated their protests with legislation prohibiting compliance with any foreign tribunal's direction to produce documents situate in the legislating state.[90]

The most recent example of an attempt to obtain documents abroad arose in the *Westinghouse Electric Corporation Uranium Contract* case in 1976.[91] This litigation is one of three related proceedings. The first arises

[83] Mann, *op. cit.* 154. The issue arose for the first time in the *Anglo-Iranian Oil Co.* case (1952).

[84] See the discussion by O'Connell, *op. cit.* Volume 2, 822 f. Note the Hague Convention on Taking of Evidence Abroad in Civil and Commercial Matters, ratified by, *inter alia*, the United Kingdom (Cmnd 6727) and the United States.

[85] *Radio Corporation of America v. Rauland Corporation* [1956] 1 Q.B. 618, 620 (D.C.), where Lord Goddard C.J. described the request for documents as a 'fishing' expedition never allowed in an English court.

[86] United States investigation into alleged world-wide arrangements in the international oil industry: the United States issued subpoenas to obtain documents in the United Kingdom: *Anglo-Iranian Oil Co.* case (1952). This led to strong diplomatic protests from the United Kingdom, the Netherlands and Belgium. See Whitney F. A., *The U.S. Government and the Alleged International Oil Cartel* (1953).

[87] In an investigation by the United States of 150 United Kingdom shipping companies.

[88] The United States issued subpoenas against 50 Canadian pulp and paper companies to produce records for a grand jury investigation into the industry: *In re Grand Jury Subpoenas Duces Tecum Addressed to Canadian International Paper Co.* (1947) 72 F. Supp. 1013 (S.D.N.Y.).

[89] *United States v. General Electric Co.* (1949) 82 F. Supp. 753 (D.N.J.).

[90] Shipping Contracts and Commercial Documents Act 1964 (U.K.); Business Records Protection Act 1947 (Canada); Economic Competition Act 1958 (Netherlands).

[91] *In re Westinghouse Electric Corporation Uranium Contract Litigation* [1978] A.C. 547 (H.L. (E.)).

from contracts between several United States utility companies and Westinghouse Electric Corporation for the supply of uranium by Westinghouse. Westinghouse failed to deliver the uranium as contracted and the utility companies sued, alleging breach of contract and claiming substantial damages. Westinghouse has relied upon the defence of 'commercial impracticability' under § 2-615 of the United States Uniform Commercial Code. The company alleges that the impracticability arises from a uranium producers' cartel which forced the price of uranium to commercially prohibitive levels.[92]

In its turn Westinghouse commenced a second civil proceeding against Rio Tinto Zinc Corporation and others for breach of anti-trust laws by members of the alleged cartel, for treble damages under the Sherman Act. The 29 United States and foreign defendants include companies from Australia, France, United Kingdom, Canada and South Africa.[93]

The United States Justice Department began its own investigations into the cartel allegations with the intention of instituting criminal proceedings under the Sherman and Clayton Acts. In June 1976 a grand jury was impanelled to pursue this investigation and to initiate any criminal proceedings which might be warranted. Attempts have been made to subpoena executives of companies concerned to require their appearance before the grand jury to assist in its investigation. Letters of request had been made, for example, to the New South Wales Supreme Court in 1976 seeking evidence from persons in Australia, and from documents situated in Australia. Australian companies have responded by forbidding their representatives to enter the United States so as to avoid subjection to United States *in personam* jurisdiction. The Australian government has followed the practice of other states[94] in prohibiting the production of Australian documents, or the giving of evidence relating to these documents, before a foreign tribunal. The Foreign Proceedings (Prohibition of Certain Evidence) Act 1976 authorizes the Commonwealth Attorney-

[92] Westinghouse agreed to supply 79 million pounds of uranium up to 1994. The contracts were at a fixed price subject to cost of living increases. By 1976 the price of uranium had risen from six dollars per pound in 1973 to about $41 per pound. Westinghouse gave notice to the utility companies that it was unable to supply uranium at the contract price. These companies then filed a consolidated suit for $2,000 million.

The companies alleged to be involved in a cartel are Uranex, French C.E.A., Nufcor, Rio Tinto Zinc Corporation, Rossing and Palabora, Electrolytic Zinc Co. of Australia Ltd, E.Z. Co., Peko-Wallsend, U.C.A.N., Denison, Rio Algom, Eldorado Nuclear, Gulf Minerals Canada Ltd and U.C.L.

For 'Uranium Cartel Rules for Orderly Marketing of Uranium' presented to a producers' meeting in Johannesburg on 4 March 1974 see (1977) 16 *International Legal Materials* 988.

[93] *The Guardian* (Manchester) 8 January 1979 reported that Rio Tinto Zinc and the other eight non-appearing defendants had lost the civil suit brought by Westinghouse in the United States District Court of Illinois. The defendants do not accept the jurisdiction of the Court. Damages were to be determined at a later date.

[94] Shipping Contracts and Commercial Documents Act 1964 (U.K.); Business Records Protection Act 1947 (Canada); Economic Competition Act 1958 (Netherlands).

General to prohibit the production of documents situated in Australia for the purposes of a foreign tribunal, or the giving of evidence relating to these documents by any Australian citizen or resident to such a tribunal. He may exercise these powers only when he is satisfied that a foreign tribunal is attempting to exercise jurisdiction contrary to international law or comity, or where a prohibition is in the national interest and relates to matters of Commonwealth power.

The House of Lords considered the problem of foreign state requests for documents situated in England in the *Westinghouse* case. Letters rogatory were issued out of the United States District Court for the Eastern District of Virginia, Richmond Division, at the instance of Westinghouse to support its defence of 'commercial impracticability'. The letters were addressed to the High Court of Justice, Queen's Bench Division, and sought examination of nine present or former directors or employees of Rio Tinto Zinc Corporation Ltd and R.T.Z. Services Ltd, both British companies, and the production of documents alleged to be possessed by them. The High Court gave effect to these requests. The R.T.Z. companies appealed to the House of Lords against the decision of the Court of Appeal[95] upholding the High Court order relating to the production of the documents.

The House of Lords considered whether effect should be given to the letters rogatory in light of the views of the United Kingdom government presented by the Attorney-General as follows:

> 1. Her Majesty's Government considers that the wide investigatory procedures under the United States anti-trust legislation against persons outside the United States who are not United States citizens constitute an infringement of the proper jurisdiction and sovereignty of the United Kingdom.
> 2. That the grand jury have issued a subpoena to Westinghouse requiring that company to produce to the grand jury documents and testimony obtained in discovery in the Virginia proceedings. Therefore evidence given in pursuance of the letters rogatory will be available to the United States Government for use against a United Kingdom company and United Kingdom nationals in relation to activities occurring outside United States territory in anti-trust proceedings of a penal character.
> 3. That the intervention of the United States Government followed by the grant of the order and immunity of July 18, 1977, shows that the execution of the letters rogatory is being sought for the purposes of the exercise by the United States courts of extra-territorial jurisdiction in penal matters which in the view of Her Majesty's Government is prejudicial to the sovereignty of the United Kingdom.[96]

The Attorney-General's intervention was accorded considerable weight by their Lordships, partly because it concerned possible prejudice to the sovereignty of the United Kingdom, partly because 'a conflict is not to be contemplated between the courts and the Executive on such a matter',[97] and finally because

> over a number of years and in a number of cases, the policy of Her Majesty's

[95] [1978] A.C. 547 (C.A.).
[96] [1978] A.C. 547, 616 f. (H.L. (E.)).
[97] *Ibid.* 651, *per* Lord Fraser of Tullybelton.

> Government has been against recognition of United States investigatory jurisdiction extraterritorially against United Kingdom companies.[98]

Under section one of the Evidence (Proceedings in Other Jurisdictions) Act 1975 the High Court had the power to order the production of evidence and documents for foreign civil proceedings which had been instituted. The situation in the present case was altered radically by the information that any evidence produced through letters rogatory would be available for use in anti-trust criminal proceedings which had yet to be started. Lord Wilberforce said that in reality the evidence was sought for the purposes of anti-trust investigations into the activities of British companies not subject to United States jurisdiction.[99] In these circumstances he considered that the request should be refused as an attempt to extend the grand jury investigation extraterritorially and as an infringement of United Kingdom sovereignty. Lord Diplock agreed, referring to the

> long standing controversy between Her Majesty's Government and the Government of the United States as to the claim of the latter to have jurisdiction to enforce its own anti-trust laws against British companies not carrying on business in the United States in respect of acts done by them outside the territory of the United States.[1]

The House of Lords denied implementation of the letters rogatory. It did so not on the specific ground that the Act did not give a court power to comply but on the broader ground that the extraterritorial reach of United States anti-trust legislation was contrary to international law. Their Lordships did not discuss the limits of jurisdictional competence set by international law. It was apparently sufficient that in the circumstances of this case the limits had been passed. As Lord Wilberforce remarked, '[i]t is axiomatic that in anti-trust matters the policy of one state may be to defend what it is the policy of another state to attack'.[2]

In personam *jurisdiction*

While discussion is centred upon the limits of substantive or subject-matter jurisdiction, the means by which these limits are translated into domestic law are of practical significance. A court may well have jurisdiction at international law to proceed against an alien for civil or criminal acts taking place within the state, but it cannot exercise that jurisdiction unless the accused is 'found' within the state. In other words, the accused must be subject to the *in personam* jurisdiction of a court. Civil jurisdiction is typically founded on the defendant's territorial links with the state established by his residence or domicile.[3] In England and the United States the defendant's presence in the state (or, in the case of a company, 'carrying on business') will be a sufficient ground for the service of

[98] *Ibid.* 617, *per* Lord Wilberforce.
[99] *Ibid.* 615 f.
[1] *Ibid.* 639.
[2] *Ibid.* 617.
[3] See Mann, *op. cit.* 73 ff.

process. Jurisdiction may be based on the subject matter of the claim if it has a sufficiently close connection with the state. Where, for example, the tort is committed or the contract is broken in the state, it may assert jurisdiction. Jurisdiction may also be founded on the assets of the defendant situate within the forum. Criminal jurisdiction exists where the crime is committed within state territory, where a constituent element of the crime is committed there, where the offender is a national, or on the basis of the protective or universality principles.[4]

The rules of *in personam* jurisdiction in United States anti-trust cases are broad and far reaching, as illustrated in *United States v. Scophony Corporation of America.*[5] Here personal jurisdiction over a British company was established where a director lived in New York and acted as president of a United States subsidiary. United States courts have been quick to draw aside the corporate veil to reveal close company relationships. In the *Swiss Watchmakers* case the court asserted *in personam* jurisdiction over two Swiss companies by attributing to them the activities of their United States affiliates. The affiliates were considered subject to the restrictive dominance of the Swiss watchmaking industry, and hence the Swiss companies were held sufficiently 'present' within United States territory. A similar ruling was made in the *I.C.I.* case, where the court founded its jurisdiction over British I.C.I. on the lack of precise separation between I.C.I. and its New York subsidiary.

In summary, it is extremely difficult to avoid the assertion of United States *in personam* jurisdiction. Wherever an alien enters the United States or has property within them, either he personally or the company he represents may be subject to the jurisdiction of the United States courts.

Conflicts of laws approach to jurisdictional overlap

While the extraterritorial application and enforcement of anti-trust laws is contrary to interstate practice, it remains likely, as Mr Bell, the United States Attorney-General, warns,[6] that his department's criminal investigations into the international uranium industry will continue. He stresses that this is a matter of fundamental United States interest and that so long as foreign cartels have the purpose and effect of causing significant economic harm in the United States in violation of anti-trust legislation his department is obliged to do all that it can to prosecute offenders.

Mr Bell acknowledges the inevitable clashes of jurisdiction and interests between states but urges other states to adopt the principles of comity. The concept of comity is difficult to define. Mr Bell explains it as a way of saying 'fair play'. Professor D. P. O'Connell uses the term to describe the

[4] See the discussion *supra* 252 ff.
[5] (1948) 333 U.S. 795; 92 L. Ed. 1091.
[6] Bell G., 'International Comity and the Extra-territorial Application of Anti-trust Laws' (1977) 51 *Australian Law Journal* 801.

ex gratia behaviour of states based on 'politeness, friendliness and good manners'.[7] Comity, he says, may lead to the creation of law but is not itself binding as such. Mr Bell argues that by a process of balancing the interests of states in order to decide which are paramount, comity can provide a more suitable answer to the jurisdictional problem than the traditional principle of territoriality. As it is likely that each state will view its own interests as superior to those of another state, Mr Bell rightly concludes that jurisdictional conflicts provide a test for each state's sense of comity and of its diplomatic skills. It is perhaps not unduly cynical to suggest that a state's sense of comity is inversely proportional to its appreciation of vital state interests.

A further difficulty with reliance upon comity to resolve jurisdictional clashes lies in the fact that the most wise and objective of Solomons may be unable to choose between relative state interests. In both the *I.C.I.* and *Swiss Watchmakers* cases it is difficult to decide whether the United States' interests in free business competition outweigh the British and Swiss interests in the development and management of the domestic nylon and watchmaking industries. Finally, if jurisdictional overlaps are to be resolved through the principles of comity it is essential that the concept be articulated in more precise detail so that states will be able to predict with some certainty when their nationals and state interests might be subject to United States jurisdiction.

Some solution to the problem of jurisdictional overlap between states must nonetheless be found. It is unrealistic to expect the United States to ignore the deliberate and severely adverse effects of monopolistic activity upon its economy where these are undertaken by aliens abroad. Further, a strictly territorial approach to the jurisdictional problem does not always provide an apt resolution of conflicting state interests. Several academic writers[8] have suggested that a conflict of laws approach might be implemented to provide an answer to the international law question of jurisdictional competence. Mann[9] emphasizes the historical and doctrinal links between public international law and the law of conflicts. Both areas of law are concerned to delimit the jurisdictional competence of states. International law defines the permissible scope of municipal legislation. The conflicts rule decrees which of the several laws within these limits will be recognized by the state.

[7] O'Connell, *op. cit.* Volume 1, 20. See also *Hilton v. Guyot* (1895) 159 U.S. 113, 163; 40 L. Ed. 95, 108, *per* Gray J.; Trautman D. T., 'The Role of Conflicts Thinking in Defining the International Reach of American Regulatory Legislation' (1961) 22 *Ohio State Law Journal* 586; *American Law Institute Restatement of the Law, Second: Conflict of Laws* (1971) §§ 6, 10, 42 and 50.

[8] Mann, *op. cit.* 11; Rosenfield B. A., 'Extraterritorial Application of U.S. Laws: A Conflict of Laws Approach' (1976) 28 *Stanford Law Review* 1005; Backer J. R., 'Sherman Act Jurisdiction and the Acts of Foreign Sovereigns' (1977) 77 *Colorado Law Review* 1245; Ongman J. W., 'Be No Longer A Chaos: Constructing a Normative Theory of the Sherman Act's Extraterritorial Jurisdictional Scope' (1976) 71 *Northwestern University Law Review* 733.

[9] *Op. cit.* 19.

Conflicts law has evolved a system of rules whereby the governing law in any situation may be discovered.[10] Public international law has not yet developed such precise rules. Conflicts rules involve the search for the 'closest real connection' with the subject-matter, for the 'centre of gravity', the 'seat of the legal relationship' or for the 'nature of the thing'. These tests are a means of demarcation between one legal system and another allocating judicial competence where it is most appropriate or fair. For the purposes of public international law a court might ask, not whether the facts have a sufficient territorial connection, but rather whether they 'belong' to one jurisdiction or another.

Professor K. Brewster[11] has formulated a list of variables which might be considered by a court when deciding the jurisdictional reach of United States anti-trust legislation in any particular case. These are as follows:

(1) the relative significance to the violations charged of conduct within the United States as compared with conduct abroad;
(2) the extent to which there is explicit purpose to harm or affect American consumers or American business opportunities;
(3) the relative seriousness of effects on the United States compared with those abroad;
(4) the nationality or allegiance of the parties or, in the case of business associations, their corporate location, and the fairness of applying our laws to them;
(5) the degree of conflict with foreign laws and policies;
(6) the extent to which conflict can be avoided without serious impairment of the interests of the United States or the foreign country.

Very similar tests were proposed by the *Restatement of Foreign Relations Law*.[12] Both the Brewster and *Restatement* approaches were adopted by the United States Court of Appeals in *Timberlane Lumber Co. v. Bank of America*.[13] The decision suggests that the United States courts may move towards a conflict of interest or balancing approach to jurisdictional overlaps between states. The case concerned an attempt by Timberlane Lumber, a United States timber importer, to develop a new source in Honduras. The company alleged that the Bank of America, a Californian corporation, and its subsidiary operating a branch in Honduras conspired to gain monopolistic control of the Honduran timber trade. The District Court dismissed the action on the grounds, *inter alia*, that the Sherman Act would not apply where the allegations concerned foreign citizens, where most of the activity took place in Honduras, and where the most

[10] American Law Institute, *Restatement of the Law, Second: Conflict of Laws* (1971). See the discussion by Mann, *op. cit.* 17-22, and also North P. M. (ed.), *Cheshire's Private International Law* (9th ed. 1974).
[11] *Anti-trust and American Business Abroad* (1958) 446.
[12] § 40.
[13] (1976) 549 F. 2d 597.

direct economic effect was probably on Honduras. The Court of Appeals considered that the District Court had not made a comprehensive analysis of the relative connection and interests of both the United States and Honduras and had received no evidence of a conflict of law or policy with the Honduran government. The Court of Appeals remanded the case back to the District Court for reconsideration of the jurisdictional issue according to a 'jurisdictional rule of reason' formulated by the court as follows:

> The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or 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.[14]

While the Court of Appeals did not wish to prejudge the issue, it noted, presumably for the benefit of the District Court, that the foreign companies involved were conducting some commercial activities in the United States and that these purposeful and deliberate activities had in fact affected the plaintiff's business. The Court articulated for the first time a detailed formula for resolving jurisdictional conflicts. It should be noticed, however, that the effect of the decision was to overrule a lower court finding that jurisdiction did not lie with a United States court and to provide further grounds on which that lower court might reconsider its decision and, possibly, assert jurisdiction over the matter.

The balance of interests approach, while providing relatively precise rules, is in essence an application of the comity principles of forbearance and toleration between states. It is subject to the same objections. The balancing tests overcome the inflexibility and occasional inaptness of the territorial principle by emphasizing the connection between the facts and the jurisdiction and by considering the interests of the international community. It remains open to the argument that courts will not apply these rules objectively and will invariably judge their own state interests as paramount. An examination of United States practice where jurisdictional conflicts arise does not provide a clear indication of how a court will judge the relative balance of interests between the United States and a foreign state. With the exception of *Alcoa* and *Timberlane*, and a subsequent decision of the Court of Appeals in *Wells Fargo and Co. v. Wells Fargo Export Co.*,[15] there have been no other anti-trust cases in which a United States court has articulated a balance of interests approach. There are, however, several decisions in the areas of labour, trademark and securities law which provide some guidance.

In *Bersch v. Drexel Firestone, Inc.*[16] Judge Friendly of the United States Court of Appeals applied a balancing test in the following terms:

[14] *Ibid.* 614.
[15] (1977) 556 F. 2d 406.
[16] (1975) 519 F. 2d 974.

> Where . . . a court is confronted with transactions that on any view are predominantly foreign, it must seek to determine whether Congress would have wished the precious resources of the United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries.[17]

The Court ruled that it had jurisdiction over alleged violations of anti-fraud securities law by a Canadian corporation where the sale of stock was to United States residents in the United States, and to United States residents abroad where the fraudulent acts occurred in the United States and contributed significantly to their losses. Jurisdiction did not extend to protect the interests of foreign share purchasers where the acts in the United States did not cause their losses directly.

Similar restraint was demonstrated in *Scherk v. Alberto-Culver Co.* where the United States Supreme Court declined to assert jurisdiction under the Securities Exchange Act of 1934 over an agreement by a United States company to purchase a German citizen's cosmetic enterprise and trademark rights. Stewart J. gave precedence to other state interests, saying that the agreement was a

> truly international agreement. . . . Alberto-Culver is an American corporation . . . while Scherk is a citizen of Germany whose companies were organized under the laws of Germany and Liechtenstein. The negotiations leading to the signing of the contract in Austria, and to the closing in Switzerland took place in the United States, England and Germany. . . . Finally, and most significantly, the subject matter of the contract concerned the sale of the business enterprises organized under the laws of and primarily situated in European countries, and whose activities were largely, if not entirely, directed to European markets.[18]

Again in *Lauritzen v. Larsen*[19] the Supreme Court declined to apply the Jones Act[20] to a Danish seaman injured in Havana on a Danish ship, although he had signed onto the ship in New York.

The Supreme Court balanced the relative interests of Canada and the United States in *Continental Ore Co. v. Union Carbide and Carbon Corporation*[21] and concluded that since the Canadian government had not approved or disapproved of an alleged monopoly in vanadium, this indicated a slight Canadian interest which was outweighed by the United States interest in condemning the restraint of trade.

In *United States v. First National City Bank*[22] it was held that the United States interest in documents relating to anti-trust investigations was higher than that of the Federal Republic of Germany in maintaining bank security. Again in *Leasco Data Processing Equipment Corporation v. Maxwell*[23] jurisdiction was asserted under the Securities Exchange Act of 1934[24] over an alleged misrepresentation of the value of stocks. The Court

[17] *Ibid.* 985.
[18] (1974) 417 U.S. 506, 515; 41 L. Ed. 2d 270, 278 f.
[19] (1953) 345 U.S. 571; 97 L. Ed. 1254.
[20] Merchant Marine Act, 1920; 5 June 1920, Ch. 250, 41 Stat. 988; 46 U.S.C.A. *passim.*
[21] (1962) 370 U.S. 690; 8 L. Ed. 2d 277.
[22] (1968) 396 F. 2d 897.
[23] (1972) 468 F. 2d 1326.
[24] 6 June 1934, Ch. 404, 48 Stat. 881; 15 U.S.C.A. §§ 77b ff.

ruled that where substantial misrepresentations occurred in the United States as well as in Britain international law permitted the displacement of foreign law by United States law.

As is apparent, there are few decisions from which to conclude that a United States court will invariably find that its own interests outweigh those of another state. In light of the anti-trust decisions in *Alcoa, I.C.I.* and *Timberlane*, the most recent Justice Department investigations in the *Westinghouse* case and Attorney-General Bell's recent warnings, it is probable that where fundamental United States interests are at risk a United States court will assert jurisdiction in the event of a conflict.

For this reason Professor Ryan has concluded that where matters of national importance are involved 'it is not feasible for a court by applying judicial techniques to balance the disparate interests of two states'.[25] He suggests that resolution of such jurisdictional disputes is best left to diplomatic negotiation rather than court adjudication. It is generally true that wherever fundamental state interests are threatened international law is most likely to be at its weakest. There are, indeed, few viable alternatives for states or parties objecting to the extraterritorial reach of anti-trust legislation. Diplomatic protests have not been effective. While Switzerland threatened to bring the United States before the International Court of Justice in the *Swiss Watchmakers* case, adjudication before the World Court or other arbitral body is not an option generally sought by states for the resolution of their disputes. One solution is for international companies and state trading agencies to discontinue trade with the United States and to keep their representatives and property out of United States territory. This is clearly not an alternative given that most international trading entities rely heavily on United States trade. If judicial restraint on conflict of laws or comity principles is not likely to be a reliable, predictable or reasonable solution to problems of jurisdictional overlap, diplomatic negotiation may be the only way to accommodate varying state interests.

The United States government has in fact shown concern for the potential risk to interstate relations posed by its extraterritorial enforcement of anti-trust law and is presently discussing the problem with the English, Canadian and Australian governments. It may be that where the traditional theories of territorial jurisdiction, international comity and conflicts rules have failed to accommodate conflicting state interests, direct consultation and negotiation will succeed.

International law defences: the sovereign immunity and act of state doctrines

Discussion has proceeded in the absence of the significant fact that state governments or, more usually, their trading agencies and instrumentalities

[25] 'International Application of U.S. Anti-trust Legislation', a paper presented at

are major participants in international trade. More specifically, states now play a dominant role in the development and marketing of their national resources — often a monopolistic one. The most obvious example is the O.P.E.C. oil cartel, and the most recent is the alleged international uranium conspiracy. Since World War II state governments have sought a more direct role in the rational management and exploitation of their natural resources, motivated by the need to maximize the gains from exports, to protect consumer interests, and to safeguard future resource needs.[26] To achieve these goals state governments have encouraged co-operation with other resource exporting states. Through groups such as C.I.P.E.C., the Association of Iron Ore Exporting Countries and the International Bauxite Producers Association states have been able to reduce price variations between specific resources and to increase the revenues earned from them.

Australia is a member of a number of international commodity organizations and, historically, the government has had a dominant role in the development of the uranium industry. Since 1972, the government has become a direct participant in resource management along with public companies, through, for example, the Joint Coal Board, the Australian Atomic Energy Commission and the Pipeline Authority.

In light of these international developments it is not surprising that states, through their trading agencies, have been brought before municipal courts for adjudication of international trade disputes.[27] Nor is it likely that states can avoid implication in anti-trust or restrictive trade prosecutions where they are participants in monopolistic practices.

The close relationship between state governments and international trade raises a number of problems at international law which have special bearing on prosecutions in respect of anti-trust activities under the United States Sherman and Clayton Acts. Firstly, states as independent and equal sovereigns have traditionally relied upon the international law defence of absolute sovereign immunity.[28] The defence operates to prevent a state court from exercising judicial power over a foreign sovereign or its property. Where a foreign state is made a party to an anti-trust action it may plead the defence of immunity from the jurisdiction. Secondly, the United States courts have developed a conflict of laws rule known as the 'act of state' doctrine, under which all executive, legislative and judicial acts of a foreign state are immune from judicial scrutiny and will be

the International Trade Law Seminar of the Attorney-General's Department, Canberra, June 1978, 41.

[26] See Roberts M. (Legal Adviser, Santos Ltd), 'Government Participation in the Mineral Industry', a paper presented at the National Convention of the Australian Mining and Petroleum Association, Brisbane, May 1978.

[27] See Delaume G. D., *Transnational Contracts* (1975) Volumes 1 and 2.

[28] See *The Schooner Exchange v. McFaddon* (1812) 7 Cranch 114; 3 L. Ed. 287, *per* Marshall C.J.; O'Connell, *op. cit.* Volume 2, 842 ff.; Sucharitkul S., *State Immunities and Trading Activities in International Law* (1959); Triggs G., 'Restrictive Sovereign Immunity; The State as International Trader' (1979) 53 *Australian Law Journal* 244 and 296.

recognized.[29] Recently, however, each of these principles has been reduced in scope.

In 1976 the United States Congress adopted a restrictive doctrine of immunity in the Foreign Sovereign Immunities Act.[30] The act reiterates the general rule that a 'foreign state shall be immune from the jurisdiction of the courts of the United States'.[31] It then provides that a foreign state will not be immune where an action is based upon

(1) a commercial activity carried on in the United States by a foreign state;
(2) an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or
(3) 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.

A 'foreign state' includes any 'agency or instrumentality' of the foreign state which is

(1) a separate legal person, corporate or otherwise;
(2) an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof; and
(3) which is neither a citizen of a state of the United States nor created under the laws of any third country.[32]

The success of an immunity defence will depend upon the interpretation of the crucial term 'commercial activity'. The legislation states that the commercial character of an activity is to be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.[33] While the activity must have a substantial contact with the United States it need not take place solely within the United States providing that at least some part of the activity occurs there. The legislation does not define the term further. The analysis which accompanied the proposed legislation,[34] assists by describing certain circumstances which will amount to a commercial activity, including enterprises such as mineral extraction. It is likely that the immunity defence will not be available to any government or its instrumentalities which may be charged with anti-trust violations in relation to foreign restrictive trade practices.

[29] For the classic formulation of the doctrine see *Underhill v. Hernandez* (1897) 168 U.S. 250, 252; 42 L. Ed. 456, 457.
[30] 21 October 1976, Pub.L. 94-583, 90 Stat. 2891; 28 U.S.C.A. §§ 1602-11.
[31] 28 U.S.C.A. § 1604.
[32] 28 U.S.C.A. §§ 1603 and 1605.
[33] 28 U.S.C.A. § 1603(d).
[34] 'Foreign Sovereign Immunities Act of 1975 [*sic*]: Section-by-Section Analysis' (1976) 15 *International Legal Materials* 102.

Further, where an immunity defence fails the defendant's property in the United States which has been used for a commercial purpose will not be immune from attachment in aid of execution once judgment has been entered against the state.[35]

Since the United States Supreme Court decision in *Alfred Dunhill of London, Inc. v. Republic of Cuba*,[36] the act of state defence seems likely to fail for exactly the same reasons as an immunity defence will fail. That is, where the act of state is essentially commercial in nature a United States court will no longer refrain from judicial cognizance over an issue. In *Dunhill* the act of state defence was raised by the Republic of Cuba in a civil suit by Cuban cigar manufacturers for recovery of a debt mistakenly paid by Dunhill to the Republic. It was argued that the Cuban government's refusal to pay the money to Dunhill was an act of state not subject to question by a United States court. The Supreme Court rejected this defence on the grounds that there was no proof of an act of state. Four of the Supreme Court judges went further to conclude that the defence should not operate in any event to allow the 'repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities'.[37] White J. said:

> 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 defence to a claim arising out of purely commercial acts by foreign sovereigns is no more effective if given the label 'act of state' than if is given the label 'sovereign immunity'.[38]

The passing of the Foreign Sovereign Immunities Act logically requires that the act of state doctrine should be restricted to acts of a governmental as distinct from a commercial nature. In view of the United States government's determination to prosecute international cartels having a substantial effect on the United States economy, it is unlikely that the act of state defence will be available to states or their agencies unless their acts are defined as essentially governmental in nature. Such an interpretation is improbable, at least in relation to the international marketing of resources such as uranium or oil.

Australian government participation in the uranium industry

The Australian government has announced its intention to establish a uranium marketing authority to be known as the Australian Uranium Export Authority, once the 'legal implications of foreign anti-trust laws have been fully examined'.[39] Mr Anthony stressed that, with Australian

[35] 28 U.S.C.A. § 1610(a)(3).
[36] (1976) 425 U.S. 682; 48 L. Ed. 2d 301.
[37] (1976) 425 U.S. 682, 705; 48 L. Ed. 2d 301, 318.
[38] *Ibid.*
[39] The Rt. Hon. J. D. Anthony, 'Uranium Export Policy: Ministerial Statement' in Australia, *Parliamentary Debates*, House of Representatives, 1 June 1978, 2907 ff. The export of uranium is presently controlled under the Customs (Prohibited Exports) Regulations 1958 of the Customs Act 1901 (Cth).

national interests as the first priority, the Minister for Trade and Resources will exercise control over the quantities of uranium exported, the terms and conditions for nuclear safeguards to be included in contracts between Australian uranium producers and overseas buyers, the price payable and currency in which it is to be paid, and the ultimate use to which the uranium will be put.

Mr Anthony announced that both Mary Kathleen Uranium Pty Ltd and the Australian Atomic Energy Commission (A.A.E.C.) will be granted permission to export uranium, the latter from the Ranger deposit.[40] The A.A.E.C. has a 41.6 per cent share in Mary Kathleen Uranium Ltd and until recently had a 72 per cent share in Ranger Uranium Mines Pty Ltd. Mr Anthony urged producers not to resort to restrictive trade practices in their marketing operations with overseas buyers and hence to avoid United States anti-trust prosecutions. As a major participant in the development and marketing of uranium, the Australian government appears to be in the best position to ensure that it and the companies with which it operates do not engage in a conspiracy in restraint of trade which violates the Sherman or Clayton Acts. It is plain that the Australian government is concerned to avoid conflict with the United States over its sales of uranium. It is equally plain that the government asserts the right to market its uranium in the nation's interests and in accord with its policy to impose nuclear safeguards and to gain the best possible revenue. The Australian government and other uranium producers are in an invidious position. Either they ensure compliance with the United States anti-trust legislation, implying acquiescence in an assertion of jurisdiction not supported by international law, or they export uranium in accordance with perceived national interests and risk the probability of United States prosecution where their export practices violate anti-trust provisions.

Through the Foreign Proceedings (Prohibition of Certain Evidence) Act 1976 the Australian government has ensured that documents situated in Australia and evidence in relation to them may not be produced before United States tribunals for the purposes of the *Westinghouse* litigation. The government cannot, however, prevent the United States courts or Justice Department from proceeding against Australian companies on the basis of evidence they already have before them. The threat of treble damages has prompted the enactment of further legislation, the Foreign Anti-trust Judgments (Restriction of Enforcement) Act 1979. This empowers the Commonwealth Attorney-General to declare that certain foreign judgments gained in anti-trust proceedings should not be recognized or enforced by Australian courts. As with the Foreign Proceedings Act, the Attorney-General may so declare only if he is satisfied as to at least one of two conditions:

[40] Arrangements made between the Whitlam government and Peko Mines Ltd and the Electrolytic Zinc Co. of Australia Ltd will be honoured.

(1) (a) that the judgment is inconsistent with international law and comity and
    (b) recognition and enforcement of that judgment may affect
        (i) trade or commerce with other states,
        (ii) trading operations of Australian companies, or
        (iii) matters with respect to which the Parliament may make laws, or the executive has power.

OR

(2) that it is desirable in the national interest in relation to
    (a) trade or commerce with other states,
    (b) trading operations of Australian companies, or
    (c) matters with respect to do which the Parliament may make laws, or the executive has power.

While the second alternative is a matter for government policy, the first requires a finding that the judgment is contrary to international law. It seems likely that where United States jurisdiction is sought to be founded on the domestic effects of activities by Australian nationals in Australia or otherwise outside the United States, the Attorney-General will declare the judgment to be beyond the jurisdictional limits set by international law.

The legislation is at best a temporary solution. It may affect the willingness of United States companies to buy Australian uranium, or any other commodity, in the future. The legislation cannot affect the arrest and prosecution of Australian company officials who enter the United States. Quite apart from the fact that trade with the United States may be crucial to Australian companies, some, such as Pan Continental, are majority owned by United States corporations and must maintain frequent contact with them. Finally, the legislation cannot prevent the execution of judgments against any assets Australian defendants may have within the United States.

Conclusion

International law does not sanction the application and enforcement of United States anti-trust laws against foreign citizens for their activities in other states on the jurisdictional ground that their acts have an economic effect within the United States. It must be recognized however that no state is likely to remain inactive where monopolistic practices of foreign corporations and state trading agencies are intended to and do have a deleterious impact on its domestic economy. While there is a trend in the developed world towards curbing restrictive business practices, there is no customary or treaty-based international law which prohibits the monopolistic exploitation of resources by governments or private enterprises. It has remained for individual states to implement their own restrictive trade practices legislation to prevent, as far as possible, anti-competitive repercussions within the domestic economy.

The United Nations has not contributed responsibly to resolution of the problem. In 1972 the General Assembly resolved to prohibit the use of economic measures to coerce another state 'in order to obtain from it the subordination of the exercise of its sovereign rights'.[41] In 1974 the Assembly 'adopted and solemnly proclaimed' the Charter of Economic Rights and Duties of States. This asserts that states have the right of paramount sovereignty over their natural resources and imposes upon other states the duty 'to respect that right by refraining from applying economic or political measures that would limit it'.[42] Article 5 of the Charter goes on to assert that all states have the right to associate in organizations of primary commodity producers in order to develop their national economies. The state has potentially conflicting rights and duties. It has a sovereign right to deal with its natural resources as it sees fit, but is bound not to violate the sovereign rights of other states by economic coercion when selling these resources on the best possible terms.

It is in the interests of the international community in general and of resource exporting and importing states in particular that some resolution be found to monopolistic practices which, while they may take place elsewhere, have a direct and substantial effect on the economies of other states. While the prospects of an international treaty regulating international trading practices seem dim and adjudication by an international or arbitral tribunal unlikely, diplomatic resolution and judicial restraint provide the only likely means of resolution. The task of accommodating the reasonable interests of the United States in curbing cartel practices having a substantial domestic effect and the equally reasonable interests of Australia and other uranium producers in marketing their products on the most favourable terms is not likely to be an easy one. The balance of interests and comity approaches, suggested by the United States Attorney-General and academic writers, may provide useful tools in negotiation and guidance to a court. It remains difficult to predict when the United States government would advise the Justice Department against proceeding with the prosecution and enforcement of an anti-trust suit, or when a court will decline jurisdiction.

It may be possible through negotiations to establish conflict rules by which courts and state government departments may arrive at reasonable, predictable and just jurisdictional decisions. It is crucial that any such rules be accepted by the international community as a fair means of allocating jurisdiction. It is intolerable that one state, without reference to international standards, should decide where its national interests outweigh those of another state.

A further, and potentially explosive, diplomatic problem arises where a foreign government or agency is a party to an alleged anti-trust violation.

[41] General Assembly Resolution 2625 (XXV) (1970).
[42] For the text of the Charter see (1975) 14 *International Legal Materials* 251.

The restriction of the traditional sovereign immunity and act of state defences leaves a state open to prosecution, along with private companies and individuals, for participation in monopolistic trade practices. This possibility renders the search for a solution to jurisdictional conflicts imperative.