# CHAPTER 1
# Extraterritoriality: The U.S. Perspective

Use of the casebook for educational purposes with attribution is available on a royalty-free basis under a Creative Commons Attribution-Share Alike 3.0 United States License, available at http://creativecommons.org/licenses/by-sa/3.0/us/. For all other uses please contact Professor Spencer Weber Waller at swalle1@luc.edu.

Section 1 of the Sherman Act provides that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." A violation of Section 1 is a felony, requiring punishment, upon conviction, by fines not to exceed $100,000,000 for a corporation, "or, if any other person, $1,000,000, or by imprisonment not exceeding ten years, or by both said punishments, in the discretion of the court."

Section 2 of the Sherman Act is directed at monopolies. As with Section 1, "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $ 10,000,000 if a corporation, or, if any other person, $ 350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

This chapter looks at the application and jurisdictional reach of the Sherman Act to foreign actors, as well as conduct that has taken place outside of the United States. The first case does not involve antitrust law, rather, is seeks to answer the general question of whether one country may have jurisdiction over a citizen of another country, for acts committed outside the territory of the country seeking to exert jurisdiction. The court looks at what is allowed under international law generally, Turkish laws, and agreements between the countries involved.

**The S.S. "Lotus" (France v Turkey)**
P.C.I.J., Ser. A, No. 10 (1927) 2 Hudson World Court, Reports 20 (1935)

By a special agreement signed at Geneva on October 12th, 1926, between the Governments of the French and Turkish Republics and filed with the Registry of the Court in accordance with Article 40 of the Statute and Article 35 of the Rules of Court, on January 4th, 1927, by the diplomatic representative at The Hague of the aforesaid Governments, the latter have submitted to the Permanent Court of International Justice the question of jurisdiction which has arisen between them following upon the collision which occurred on August 2nd, 1926, between the steamships *Boz-Kourt* and *Lotus*.
According to the special agreement, the Court has to decide the following questions:

(1) Has Turkey, contrary to Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction, acted in conflict with the principles of international law -- and if so, what principles -- by instituting, following the collision which occurred on August 2nd, 1926, on the high seas between the French steamer *Lotus* and the Turkish steamer *Boz-Kourt* and upon the arrival of the French steamer at Constantinople -- as well as against the captain of the Turkish steamship -- joint criminal proceedings in pursuance of Turkish law against M. Demons, officer of the watch on board the *Lotus* at the time of the collision, in consequence of the loss of the *Boz-Kourt* having involved the death of eight Turkish sailors and passengers?

(2) Should the reply be in the affirmative, wheat pecuniary reparation is due to M. Demons, provided, according to the principles of international law, reparation should be made in similar cases?

On August 2nd, 1926, just before midnight, a collision occurred between the French mail steamer *Lotus*, proceeding to Constantinople, and the Turkish collier *Boz-Kourt*, between five and six nautical miles to the north of Cape Sigri (Mitylene). The *Boz-Kourt*, which was cut in two, sank, and eight Turkish nationals who were on board perished. After having done everything possible to succour the shipwrecked persons, of whom ten were able to be saved, the *Lotus* continued on its course to Constantinople, where it arrived on August 3rd.

At the time of the collision, the officer of the watch on board the *Lotus* was Monsieur Demons, a French citizen, lieutenant in the merchant service and first officer of the ship, whilst the movements of the *Boz-Kourt* were directed by its captain, Hassan Bey, who was one of those saved from the wreck.

On August 5th, Lieutenant Demons was requested by the Turkish authorities to go ashore to give evidence. The examination, the length of which incidentally resulted in delaying the departure of the *Lotus*, led to the placing under arrest of Lieutenant Demons -- without previous notice being given to the French Counsel-General -- and Hassan Bey, amongst others. This arrest, which has been characterized by the Turkish agent as arrest pending trial (*arrestation preventive*), was effected in order to ensure that the criminal prosecution instituted against the two officers, on a charge of manslaughter, by the Public Prosecutor of Stamboul, on the complaint of the families of the victims of the collision should follow its normal course.

The case was first heard by the Criminal Court of Stamboul on August 28th. On that occasion, Lieutenant Demons submitted that the Turkish Courts had no jurisdiction; the Court, however, overruled his objection. When the proceedings were resumed on September 11th, Lieutenant Demons demanded his release on bail; this request was complied with on September 13th, the bail being fixed at 6,000 Turkish pounds.

On September 15th, the Criminal Court delivered its judgment. It sentenced Lieutenant Demons to eighty days' imprisonment and a fine of twenty-two pounds, Hassan Bey being sentenced to a slightly more severe penalty.

The violation, if any, of the principles of international law would have consisted in the taking of criminal proceedings against Lieutenant Demons. It is not therefore a question relating to any particular step in these proceedings -- such as his being put to trial, his arrest, his detention pending trial or the judgment given by the Criminal Court of Stamboul -- but the very fact of the Turkish Courts exercising criminal jurisdiction.

The prosecution was instituted because the loss of the *Boz-Kourt* involved the death of eight Turkish sailors and passengers. It is clear, in the first place, that this result of the collision constitutes a factor essential for the institution of the criminal proceedings in question; secondly, it follows from the statements of the two parties that no criminal intention has been imputed to either of the officers responsible for navigating the two vessels; it is therefore a case of prosecution for involuntary manslaughter. The French Government maintains the breaches of navigation regulations fall exclusively within the jurisdiction of the state under whose flag the vessel sails; but it does not argue that a collision between two vessels cannot also bring into operations the sanctions which apply to criminal law in cases of manslaughter. The precedents cited by it and relating to collision cases all assume the possibility of criminal proceedings with a view to the infliction of such sanctions, the dispute being confined to the question of jurisdiction -- concurrent or exclusive -- which another state might claim in this respect. As has already been observed, the Court has not to consider the lawfulness of the prosecution under Turkish law; questions of criminal law relating to the justification of the prosecution and consequently to the existence of a nexus causalis between the actions of Lieutenant Demons and the loss of eight Turkish nationals are not relevant to the issue so far as the Court is concerned.

Article 6 of the Turkish Penal Code, Law No. 765 of March 1st, 1926 (Official Gazette No. 320 of March 13th, 1926), runs as follows:

[Translation] "Any foreigner who, apart from the cases contemplated by Article 4, commits an offense abroad to the prejudice of Turkey or of a Turkish subject, for which offence Turkish law prescribes a penalty involving loss of freedom for a minimum period of not less than one year, shall be punished in accordance with the Turkish Penal Code provided that he is arrested in Turkey. The penalty shall however be reduced by one third and instead of the death penalty, twenty years of penal servitude shall be awarded.
Nevertheless, in such cases, the prosecution will only be instituted at the request of the Minister of Justice or on the complaint of the injured Party."

Even if the Court must hold that the Turkish authorities had seen fit to base the prosecution of Lieutenant Demons upon the above-mentioned Article 6, the question submitted to the Court is not whether that article is compatible with the principles of

international law; it is more general. The Court is asked to state whether or not the principles of international law prevent Turkey from instituting criminal proceedings against Lieutenant Demons under Turkish law. Neither the conformity of Article 6 in itself with the principles of international law nor the application of that article by the Turkish authorities constitutes the point at issue; it is the very fact of the institution of proceedings which is held by France to be contrary to those principles.

It is Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction, which refers the contracting Parties to the principles of international law as regards the delimitation of their respective jurisdiction.

This clause is as follows: "Subject to the provisions of Article 16, all questions of jurisdiction shall, as between Turkey and the other contracting Powers, be decided in accordance with the principles of international law."

The Court, having to consider whether there are any rules of international law which may have been violated by the prosecution in pursuance of Turkish law of Lieutenant Demons, is confronted in the first place by a question of principle which, in the written and oral arguments of the two Parties, has proved to be a fundamental one. The French Government contends that the Turkish courts, in order to have jurisdiction, should be able to point to some title to jurisdiction recognized by international law in favour of Turkey. On the other hand, the Turkish Government takes the view that Article 15 allows Turkey jurisdiction whenever such jurisdiction does not come into conflict with a principle of international law.

The latter view seems to be conformity with the special agreement itself, No. 1 of which asks the Court to say whether Turkey has acted contrary to the principles of international law and, if so, what principles. According to the special agreement, therefore, it is not a question of stating principles which would permit Turkey to take criminal proceedings, but of formulating the principles, if any, which might have been violated by such proceedings.

This way of stating the question is also dictated by the very nature and existing conditions of international law.

International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of commons aims. Restrictions upon the independence of states cannot therefore be presumed.

Now 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 power in

any form in the territory of another state. In this sense 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.

It does not, however, follow that international law prohibits a state from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to states to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed states do so in certain specific cases. But this is certainly not the case under international law as it stands at present. 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.

In these circumstances, all that can be required of a state is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.

It follows from the foregoing that the contention of the French Government to the effect that Turkey must in each case be able to cite a rule of international law authorizing her to exercise jurisdiction, is opposed to the generally accepted international law to which Article 15 of the Convention of Lausanne refers. Having regard to the terms of Article 15 and to the construction which the Court has just placed upon it, this contention would apply in regard to civil as well as to criminal cases, and would be applicable on conditions of absolute reciprocity as between Turkey and the other contracting Parties; in practice, it would therefore in many cases result in paralyzing the action of the courts, owing to the impossibility of citing a universally accepted rule on which to support the exercise of their jurisdiction.

Nevertheless, it has to be seen whether the foregoing considerations really apply as regards criminal jurisdiction or whether this jurisdiction is governed by a different principle; this might be the outcome of the close connection which for a long time existed between the conception of supreme criminal jurisdiction and that of a state, and also by the especial importance of criminal jurisdiction from the point of view of the individual.

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 action to offenses 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.

This situation may be considered from two different standpoints corresponding to the points of view respectively taken up by the parties. According to one of these standpoints, the principle of freedom, in virtue of which each state may regulate its legislation at its discretion, provided that in so doing it does not come in conflict with a restriction imposed by international law, would also apply as regards law governing the scope of jurisdiction in criminal cases. According to the other standpoint, the exclusively territorial character of law relating to this domain constitutes a principle which, except as otherwise expressly provided, would, ipso facto, prevent states from extending the criminal jurisdiction of their courts beyond their frontiers; the exceptions in question, which include for instance extraterritorial jurisdiction over nationals and over crimes directed against public safety, would therefore rest on special permissive rules forming part of international law.

Adopting, for the purposes of the argument, the standpoint of the latter of these two systems, it must be recognized that, in the absence of a treaty provision, its correctness depends upon whether there is a custom having the force of law establishing it. The same is true as regards the applicability of this system -- assuming it to have been recognized as sound -- in the particular case. It follows that, even from this point of view, before ascertaining whether there may be a rule of international law expressly allowing Turkey to prosecute a foreigner for an offense committed by him outside Turkey, it is necessary to begin by establishing both that the system is well-founded and that it is applicable in the particular case. Now, in order to establish the first of these points, one must, as has just been seen, prove the existence of a principle of international law restricting the discretion of states as regards criminal legislation.

Consequently, whichever of the two systems described above be adopted, the same result will be arrived at in this particular case; the necessity of ascertaining whether or not under international law there is a principle which would have prohibited Turkey, in the circumstances of the case before the Court, from prosecuting Lieutenant Demons. And moreover, on either hypothesis, this must be ascertained by examining precedents offering a close analogy to the case under consideration; for it is only from precedents of this nature that the existence of a general principle applicable to the particular case may appear.

The arguments advanced by the French Government, other than those considered above, are, in substance, the following:

(1) International law does not allow a state to take proceedings with regard to offenses committed by foreigners abroad, simply by reason of the nationality of the victim; and such is the situation in the present case because the offense must be regarded as having been committed on board the French vessel.

As has already been observed, the characteristic features of the situation of fact are as follows: There has been a collision on the high seas between two vessels flying different flags, on one of which was one of the persons alleged to be guilty of the offense, whilst the

victims were on board the other.

This being so, the Court does not think it is necessary to consider the contention that a state cannot punish offenses committed abroad by a foreigner simply by reason of the nationality of the victim. For this contention only relates to the case where 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 offense 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 offenses committed there by foreigners. But no such rule of international law exists. No argument has come to the knowledge of the Court from which it could be deduced that states recognize themselves to be under an obligation towards each other only to have regard to the place where the author of the offense happens to be at the time of the offense. On the contrary, it is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offenses, 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 national territory, if one of the constituent elements of the offense, and more especially its effects, have taken place there. French courts have, in regard to a variety of situations, given decisions sanctioning this way of interpreting the territorial principle. Again, the Court does not know of any cases in which governments have protested against the fact that the criminal law of some country contained a rule to this effect or that the courts of a country construed their criminal law in this sense. Consequently, once it is admitted that the effects of the offense were produced on the Turkish vessel, it becomes impossible to hold that there is a rule of international law which prohibits Turkey from prosecuting Lieutenant Demons because of the fact that the author of the offense was on board the French ship. Since, as has already been observed, the special agreement does not deal with the provision of Turkish law under which the prosecution was instituted, but only with the question whether the prosecution should be regarded as contrary to the principles of international law, there is no reason preventing the Court from confining itself to observing that, in this case, a prosecution may also be justified from the point of view of the so-called territorial principle.

It has been sought to argue that the offense of manslaughter cannot be localized at the spot where the mortal effect is felt; for the effect is not intentional and it cannot be said that there is, in the mind of the delinquent, any culpable intent directed towards the territory where the mortal effect is produced. In reply to this argument it might be observed that the effect is a factor of outstanding importance in offenses such as manslaughter, which are punished precisely in consideration of their effects rather than of the subjective intention of the delinquent. But the Court does not feel called upon to consider this question, which is one of interpretation of Turkish criminal law. It will suffice to observe that no argument has been put forward and nothing has been found from which it would follow that international law

has established a rule imposing on states this reading of the conception of the offense of manslaughter.

The offense for which Lieutenant Demons appears to have been prosecuted was -- an act -- of negligence or imprudence -- having its origin on board the *Lotus,* whilst its effects made themselves felt on board the *Boz-Kourt*. These two elements are, legally, entirely inseparable, so much so that their separation renders the offense non-existent. Neither the exclusive jurisdiction of either state, nor the limitations of the jurisdiction of each to the occurrences which took place on the respective ships would appeal calculated to satisfy the requirements of justice and effectively to protect the interests of the two states. It is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole. It is therefore a case of concurrent jurisdiction.

The Court having arrived at the conclusion that the arguments advanced by the French Government either are irrelevant to the issue or do not establish the existence of a principle of international law precluding Turkey from instituting the prosecution which was in fact brought against Lieutenant Demons, observes that in the fulfillment of its task of itself ascertaining what the international law is, it has not confined itself to a consideration of the arguments put forward, but has included in its researches all precedents, teachings and fact to which it had access and which might possibly have revealed the existence of one of the principles of international law contemplated in the special agreement. The result of these researches has not been to establish the existence of any such principle. It must therefore be held that there is no principle of international law, within the meaning of Article 15 of the Convention of Lausanne of July 24th, 1923, which precludes the institution of the criminal proceedings under consideration. Consequently, Turkey, by instituting, in virtue of the discretion which international law leaves to every sovereign state, the criminal proceedings in question, has not, in the absence of such principles, acted in a manner contrary to the principles of international law within the meaning of the special agreement.

**NOTES**

**1.** The six dissenting judges declared that international law does not permit assertion of jurisdiction based solely upon the nationality of the victim of the crime. Judges Loder and Weiss felt that territorial jurisdiction was limited to the place where the actor was. Any jurisdiction based upon the place where a crime takes effect is only fictional, and should, at the most, be applicable only in case of intentional crimes. Judge Finlay said that as to ships, which are not territory, there should be no jurisdiction based upon the place of effect of the crime. Judges Altamira, Loder, and Weiss stated that by a customary rule of international law only the state of the flag had jurisdiction over ships. Judges Loder and Weiss argued that the Turkish theory of *connexite*' could not amplify

Turkey's jurisdiction under international law. Judges Altamira, Loder, Nyholm, and, apparently, Weiss believed that the court was wrong in saying that a prohibition against the exercise of jurisdiction must be proved. Instead, they urged that the state asserting jurisdiction must prove that international law permits such jurisdiction.

**2.** Many of the questions raised by this case still loom large in cases involving international antitrust issues today. Which is the more desirable viewpoint proffered by Turkey and France: (a) legislate as you will regarding jurisdiction, as long as the legislation does not violate international law, or (b) there is no extraterritorial jurisdiction without express agreement between or amongst countries, except over nationals acting abroad, or over crimes directed against public policy?

**3.** The court initially dismisses as irrelevant France's argument that international law does not allow a state to have jurisdiction over an offense which is committed by a foreigner abroad. Yet, in this case, it was not enough to grant jurisdiction solely to Turkey that the effects of the offense were felt within the territory of Turkey. The court used this separation of elements of the offense (location of intent, and location of effect) to grant concurrent rather than exclusive jurisdiction. Does the granting of jurisdiction to both Turkey and France solve the court's problem with the separation of elements?

**Restatement (Second) of Foreign Relations** American Law Institute (1962)

**§ 18. Jurisdiction to Prescribe with Respect to Effect within Territory**

A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and <u>causes an effect within its territory</u>, if either:

(a) the conduct and its effect are generally recognized as constitutional elements of a crime or tort under the law of states that have reasonably developed legal systems, or

(b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) <u>the effect within the territory is substantial</u>; (iii) <u>it occurs as a direct and foreseeable result of the conduct outside the territory</u>; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

* * * *

Illustration No. 6

X operates a refinery in state A near the border of state B that emits fumes generally known to be injurious to plant life. The fumes pollute the air in B, and Y's trees in B stop bearing fruit as a result, B has jurisdiction to prescribe a civil remedy for damages.

**§ 40. Limitations on Exercise of Enforcement Jurisdiction**

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as

(a) vital national interests of each of the states,

(b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,

(c) the extent to which the required conduct is to take place in the territory of the other state,

(d) the nationality of the person, and

(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

**United States v. Aluminum Co. of America,** 148 F.2d 416 (2d Cir. 1945)

[Alcoa created a new corporate entity called "Limited" to take over most of Alcoa's properties located outside the United States. Despite an overlap of officers between Alcoa and Limited the Court found insufficient evidence to hold Alcoa liable for Limited's participation in an international bauxite cartel. The court also held that there was insufficient evidence that Alcoa directly participated in the formation and operation of the cartel.]

****

Whether 'Limited' itself violated that section depends upon the character of the 'Alliance.' It was a Swiss corporation, created in pursuance of an agreement entered into on July 3, 1931, the signatories to which were a French corporation, two German, one Swiss, a British, and 'Limited.' The original agreement, or 'cartel,' provided for the formation of a corporation in Switzerland which should issue shares, to be taken up by the signatories. This corporation was from time to time to fix a quota of production for each share, and each shareholder was to be limited to the quantity measured by the number of shares it held, but was free to sell at any price it chose. The corporation fixed a price every year at which it would take off any shareholder's hands any part of its quota which it did not sell. No shareholder was to 'buy, borrow, fabricate or sell' aluminum produced by anyone not a shareholder except with the consent of the board of governors, but that must not be 'unreasonably withheld.' Nothing was said as to whether the arrangement extended to sales in the United States; but Article X, known as the 'Conversion Clause,' provided that any shareholder might exceed his quota to the extent that he converted into aluminum in the United States or Canada any ores delivered to him in either of those countries by persons situated in the United States. This was confessedly put in to allow 'Limited' to receive bauxite or alumina from 'Alcoa,' to smelt it into aluminum and to deliver the aluminum to 'Alcoa.' Edward K. Davis gave as an

explanation of this that 'Limited' needed some protection against 'Alcoa's' possible refusal to convey Alcoa Power Company, which 'Alcoa' had never actually bound itself to transfer. Although in 1931 'Alcoa' had all the producing capacity which it seemed likely to need (and so the event proved, for the clause was never invoked), Davis said that he did not know whether in the future the demand might not outrun that capacity, and whether 'Alcoa' might not therefore be tempted to hold onto the Lower Development, unless 'Limited' would smelt its alumina. That does indeed seem a somewhat farfetched reason; but on the other hand it is hard to suppose that 'Alcoa' really feared that it could not meet its future needs and meant to lean upon 'Limited.' The incident may be thought to have a bearing on 'Alcoa's' implication in the 'Alliance'; but its only substantial importance, so far as we can see, is as showing whether the 1931 agreement was intended to cover the United States. That question arose very shortly after the agreement was made, and Edward K. Davis took the position that the United States was included, relying upon absence of any exception in the general language. His interpretation would seem to have been plainly right, not only for the reason he gave, but because otherwise there would have been no occasion for the 'Conversion Clause.' However, the other shareholders overruled him, and until 1936, when the new arrangement was made, imports into the United States were not included in the quotas. The issue turned out to be unimportant anyway, for the annual average of imports during the five years was in the neighborhood of only fifteen million pounds.

The agreement of 1936 abandoned the system of unconditional quotas, and substituted a system of royalties. Each shareholder was to have a fixed free quota for every share it held, but as its production exceeded the sum of its quotas, it was to pay a royalty, graduated progressively in proportion to the excess; and these royalties the 'Alliance' divided among the shareholders in proportion to their shares. This agreement- unlike the first- did not contain an express promise that the 'Alliance' would buy any undisposed of stocks at a fixed price, although perhaps Section 3 of Subdivision A, of Part X may have impliedly recognized such an obligation. Probably, during the two years in which the shareholders operated under this agreement, that question did not arise for the demand for aluminum was very active. Nevertheless, we understand from 'Limited's' answer to an interrogatory that the last price fixed under the agreement of 1931 was understood to remain in force. Although this agreement, like its predecessor, was silent as to imports into the United States, when that question arose during its preparation, as it did, all the shareholders agreed that such imports should be included in the quotas. The German companies were exempted from royalties- for obvious reasons- and that, it would seem, for practical purposes put them out of the 'cartel' for the future, for it was scarcely possible that a German producer would be unable to dispose of all its production, at least within any future period that would be provided for. The shareholders continued this agreement unchanged until the end of March, 1938, by which time it had become plain that, at least for the time being, it was no longer of service to anyone. Nothing was, however, done to end it, although the German shareholders of course became enemies of the French, British and Canadian shareholders in 1939. The 'Alliance' itself has apparently never been dissolved; and indeed it appeared on the 'Proclaimed List of Blocked Nationals' of September 13, 1944.

Did either the agreement of 1931 or that of 1936 violate Section 1 of the Act? The answer does not depend upon whether we shall recognize as a source of liability a liability imposed by another state. On the contrary we are concerned only with whether Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it. That being so, the only question open is whether Congress intended to impose the liability, and whether our own Constitution permitted it to do so: as a court of the United States, we cannot look beyond our own law. Nevertheless, it is quite true that we are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflict of Laws.' We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States. American Banana Co. v. United Fruit Co., 213 U.S. 347, 357. On the other hand, it is settled law- as 'Limited' itself agrees- 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. It may be argued that this Act extends further. Two situations are possible. There may be agreements made beyond our borders not intended to affect imports, which do affect them, or which affect exports. Almost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade between the two. Yet when one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them. Such agreements may on the other hand intend to include imports into the United States, and yet it may appear that they had no effect upon them. That situation might be thought to fall within the doctrine that intent may be a substitute for performance in the case of a contract made within the United States; or it might be thought to fall within the doctrine that a statute should not be interpreted to cover acts abroad which have no consequence here. We shall not choose between these alternatives; but for argument we shall assume that the Act does not cover agreements, even though intended to affect imports or exports, unless its performance is shown actually to have had some effect upon them. Where both conditions are satisfied, the situation certainly falls within such decisions as United States v. Pacific & Artic R. & Navigation Co., 228 U.S. 87; Thomsen v. Cayser, 243 U.S. 66 and United States v. Sisal Sales Corporation, 274 U.S. 268. It is true that in those cases the persons held liable had sent agents into the United States to perform part of the agreement; but an agent is merely an animate means of executing his principal's purposes, and, for the purposes of this case, he does not differ from an inanimate means; besides, only human agents can import and sell ingot.

Both agreements would clearly have been unlawful, had they been made within the United States; and it follows from what we have just said that both were unlawful, though made abroad, if they were intended to affect imports and did affect them. Since the shareholders almost at once agreed that the agreement of 1931 should not cover imports, we may ignore it and confine our discussion to that of 1936: indeed that we should have to do

anyway, since it superseded the earlier agreement. The judge found that it was not the purpose of the agreement to 'suppress or restrain the exportation of aluminum to the United States for sale in competition with 'Alcoa.' By that we understand that he meant that the agreement was not specifically directed to 'Alcoa,' because it only applied generally to the production of the shareholders. If he meant that it was not expected that the general restriction upon production would have an effect upon imports, we cannot agree, for the change made in 1936 was deliberate and was expressly made to accomplish just that. It would have been an idle gesture, unless the shareholders had supposed that it would, or at least might, have that effect. The first of the conditions which we mentioned was therefore satisfied; the intent was to set up a quota system for imports.

The judge also found that the 1936 agreement did not 'materially affect the * * * foreign trade or commerce of the United States'; apparently because the imported ingot was greater in 1936 and 1937 than in earlier years. We cannot accept this finding, based as it was upon the fact that, in 1936, 1937 and the first quarter of 1938, the gross imports of ingot increased. It by no means follows from such an increase that the agreement did not restrict imports; and incidentally it so happens that in those years such inference as is possible at all, leads to the opposite conclusion. It is true that the average imports- including 'Alcoa's'- for the years 1932-1935 inclusive were about 15 million pounds, and that for 1936, 1937 and one-fourth of 1938 they were about 33 million pounds; but the average domestic ingot manufacture in the first period was about 96 million and in the second about 262 million; so that the proportion of imports to domestic ingot was about 15.6 per cent for the first period and about 12.6 per cent for the second. We do not mean to infer from this that the quota system of 1936 did in fact restrain imports, as these figures might suggest; but we do mean that nothing is to be inferred from the gross increase of imports. We shall dispose of the matter therefore upon the assumption that, although the shareholders intended to restrict imports, it does not appear whether in fact they did so. Upon our hypothesis the plaintiff would therefore fail, if it carried the burden of proof upon this issue as upon others. We think, however, that, after the intent to affect imports was proved, the burden of proof shifted to 'Limited.' In the first place a depressant upon production which applies generally may be assumed, certeris paribus, to distribute its effect evenly upon all markets. Again, when the parties took the trouble specifically to make the depressant apply to a given market, there is reason to suppose that they expected that it would have some effect, which it could have only by lessening what would otherwise have been imported. If the motive they introduced was over-balanced in all instances by motives which induced the shareholders to import, if the United States market became so attractive that the royalties did not count at all and their expectations were in fact defeated, they to whom the facts were more accessible than to the plaintiff ought to prove it, for a prima facie case had been made. Moreover, there is an especial propriety in demanding this of 'Limited,' because it was ‘Limited' which procured the inclusion in the agreement of 1936 of imports in the quotas.

****

**NOTES**

**1.** How does the *Alcoa* Court's test for jurisdiction differ from the finding in *S.S. Lotus*? How do we reconcile the lack of intent in *S.S. Lotus* with the requirement for intent in *Alcoa*? What appears to be more important to the *Alcoa* Court, intent or effect?

**2.** The Second Circuit was the court of last resort in the *Alcoa* case. A 1944 amendment to 15 U.S.C.A. § 29 provides for direct appeal to the U.S. Supreme Court from a District Court judgment in civil actions brought under the Sherman Act, when "immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice." The Government appealed to the Court under the amendment in 1942. The appeal resulted in postponement, as four Justices had disqualified themselves from participating in the decision in this case. The Court was unable to make a final disposition of the appeal because of the absence of a quorum of six Justices as prescribed by 28 U.S.C.A. § 321. Proceedings were postponed until such time as a quorum of Justices was qualified to hear the appeal.
One of the options available to the Court under15 U.S.C.A. § 29 is to transfer the appeal to the Court of Appeals. In 1944 there still was not a quorum of six justices qualified to hear the appeal and the Court transferred the appeal to be heard by the Second Circuit.

**3.** For more on *Alcoa*, Spencer Weber Waller, *The Story of Alcoa: The Enduring Questions of Market Power, Conduct, and Remedy in Monopolization Cases* in ANTITRUST STORIES (2007).

**Timberlane Lumber Co. v. Bank of America,** 549 F.2d 597 (9th Cir. 1976)(as amended on denial of rehearing and rehearing en banc, March 3, 1977)

Four separate actions, arising from the same series of events, were dismissed by the same district court and are consolidated here on appeal. The principal action is Timberlane Lumber Co. v. Bank of America (Timberlane action), an antitrust suit alleging violations of sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2) and the Wilson Tariff Act (15 U.S.C. § 8). This action raises important questions concerning the application of American antitrust laws to activities in another country, including actions of foreign government officials. The district court dismissed the Timberlane action under the act of state doctrine and for lack of subject matter jurisdiction. The other three are diversity tort suits brought by employees of one of the Timberlane plaintiffs for individual injuries allegedly suffered in the course of the extended anti-Timberlane drama. Having dismissed the Timberlane action, the district court dismissed these three suits on the ground of forum non conveniens. We vacate the dismissals of all four actions and remand.

## I. The Timberlane Action

The basic allegation of the Timberlane plaintiffs is that officials of the Bank of America and others located in both the United States and Honduras conspired to prevent Timberlane, through its Honduras subsidiaries, from milling lumber in Honduras and exporting it to the United States, thus maintaining control of the Honduran lumber export business in the hands of a few select individuals financed and controlled by the Bank. The intent and result of the conspiracy, they contend, was to interfere with the exportation to the United States, including Puerto Rico, of Honduran lumber for sale or use there by the plaintiffs, thus directly and substantially affecting the foreign commerce of the United States.

****

### Facts as Alleged

The conspiracy sketched by Timberlane actually started before the plaintiffs entered the scene. The Lima family operated a lumber mill in Honduras, competing with Lamas and Casanova, in both of which the Bank had significant financial interests. The Lima enterprise was also indebted to the Bank. By 1971, however, the Lima business was in financial trouble. Timberlane alleges that driving Lima under was the first step in the conspiracy which eventually crippled Timberlane's efforts, but the particulars do not matter for this appeal. What does matter is that various interests in the Lima assets, including its milling plant, passed to Lima's creditors: Casanova, the Bank, and the group of Lima employees who had not been paid the wages and severance pay due them. Under Honduran law, the employees' claim had priority.

Enter Timberlane, with a long history in the lumber business, in search of alternative sources of lumber for delivery to its distribution system on the East Coast of the United States. After study, it decided to try Honduras. In 1971, Danli was formed, tracts of forest land were acquired, plans for a modern log processing plant prepared, and equipment purchased and assembled for shipment from the United States to Danli in Honduras. Timberlane became aware that the Lima plant might be available and began negotiating for its acquisition. Maya was formed, purchased the Lima employees' interest in the machinery and equipment in January 1972, despite opposition from the conspirators, and re-activated the Lima mill.

Realizing that they were faced with better-financed and more-vigorous competition from Timberlane and its Honduran subsidiaries, the defendants and others extended the anti-Lima conspiracy to disrupt Timberlane's efforts. The primary weapons employed by the conspirators were the claim still held by the Bank in the remaining assets of the Lima enterprise under the all-inclusive mortgage Lima had been forced to sign and another claim held by Casanova. Maya made a substantial cash offer for the Bank's interest in an effort to clear its title, but the Bank refused to sell. Instead, the Bank surreptitiously conveyed the mortgage to Casanova for questionable consideration, Casanova paying nothing and agreeing

only to pay the Bank a portion of what it collected. Casanova immediately assigned the Bank's claim and its own on similar terms to Caminals, who promptly set out to disrupt the Timberlane operation.

Caminals is characterized as the "front man" in the campaign to drive Timberlane out of Honduras, with the Bank and other defendants intending and carrying responsibility for his actions. Having acquired the claims of Casanova and the Bank, Caminals went to court to enforce them, ignoring throughout Timberlane's offers to purchase or settle them. Under the laws of Honduras, an "embargo" on property is a court-ordered attachment, registered with the Public Registry, which precludes the sale of that property without a court order. Honduran law provides, upon embargo, that the court appoint a judicial officer, called an "interventor" to ensure against any diminution in the value of the property. In order to paralyze the Timberlane operation, Caminals obtained embargoes against Maya and Danli. Acting through the interventor, since accused of being on the payroll of the Bank, guards and troops were used to cripple and, for a time, completely shut down Timberlane's milling operation. The harassment took other forms as well: the conspirators caused the manager of Timberlane's Honduras operations, Gordon Sloan Smith, to be falsely arrested and imprisoned and were responsible for the publication of several defamatory articles about Timberlane in the Honduran press.

As a result of the conspiracy, Timberlane's complaint claimed damages then estimated in excess of $5,000,000. Plaintiffs also allege that there has been a direct and substantial effect on United States foreign commerce, and that defendants intended the results of the conspiracy, including the impact on United States commerce.

****

Extraterritorial Reach of the United States Antitrust Laws

There is no doubt that American antitrust laws extend over some conduct in other nations.[12] There was language in the first Supreme Court case in point, American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), casting doubt on the extension of the Sherman Act to acts outside United States territory. But subsequent cases have limited American

[12] The subject of extraterritorial jurisdiction of American antitrust laws is one about which there has been a great deal of discussion. The commentaries cited in this opinion represent only a fraction of those discussing the subject. Worthy of special comment are K. Brewster, Antitrust and American Business Abroad (1958), and W. Fugate, Foreign Commerce and the Antitrust Laws (2d ed. 1973). There has, however, been much less action. In actual litigation, jurisdiction has not often been found lacking. Up to May 1973, the Department of Justice filed some 248 foreign trade antitrust cases; not one was lost for want of jurisdiction over the activities claimed to violate the law. W. Fugate, Foreign Commerce and the Antitrust Laws, App. B. at 498 (2d ed. 1973). The instant case is, of course, a private action, but reported dismissals of such cases also appear to be infrequent. The only case lost on appeal on this ground was American Banana Co. v. United Fruit Co., 213 U.S. 347, 29 S. Ct. 511, 53 L. Ed. 826 (1909), a decision which is today considered largely obsolete. Rahl, Foreign Commerce Jurisdiction of the American Antitrust Laws, 43 Antitrust L.J. 521 (1974).

Banana to its particular facts, and the Sherman Act - and with it other antitrust laws - has been applied to extraterritorial conduct. See, e.g., Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); United States v. Sisal Sales Corp., 274 U.S. 268 (1927); United States v. Aluminum Co. of America, 148 F.2d 416, (2d Cir. 1945) (the "Alcoa" case)… The act may encompass the foreign activities of aliens as well as American citizens. Alcoa, supra.

That American law covers some conduct beyond this nation's borders does not mean that it embraces all, however. Extraterritorial application is understandably a matter of concern for the other countries involved. Those nations have sometimes resented and protested, as excessive intrusions into their own spheres, broad assertions of authority by American courts. Our courts have recognized this concern and have, at times, responded to it, even if not always enough to satisfy all the foreign critics. In any event, it is evident that at some point the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction.

What that point is or how it is determined is not defined by international law. Nor does the Sherman Act limit itself. In the domestic field the Sherman Act extends to the full reach of the commerce power. To define it somewhat more modestly in the foreign commerce area courts have generally, and logically, fallen back on a narrower construction of congressional intent, such as expressed in Judge Learned Hand's oft-cited opinion in Alcoa, 148 F.2d at 443:

[T]he only question open is whether Congress intended to impose the liability and whether our own Constitution permitted it to do so: as a court of the United States we cannot look beyond our own law. Nevertheless, it is quite true that we are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the "Conflict of Laws." We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States.

It is the effect on American foreign commerce which is usually cited to support extraterritorial jurisdiction. Alcoa set the course, when Judge Hand declared, id.:

> [I]t is 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…

Despite its description as "settled law," Alcoa's assertion has been roundly disputed by many foreign commentators as being in conflict with international law, comity, and good judgment… Nonetheless, American courts have firmly concluded that there is some extraterritorial jurisdiction under the Sherman Act.

Even among American courts and commentators, however, there is no consensus on how far the jurisdiction should extend. The district court here concluded that a "direct and substantial effect" on United States foreign commerce was a prerequisite, without stating whether other factors were relevant or considered. The same formula was employed, to some extent, by the district courts in the Swiss Watch case, 1963 Trade Cases ¶ 70,600, in United States v. R. P. Oldham Co., 152 F. Supp. 818, 822 (N.D.Cal.1957), and in General Electric, 82 F. Supp. at 891. It has been identified and advocated by several commentators.

Other courts have used different expressions, however. See, e.g., Thomsen v. Cayser, 243 U.S. 66 (1917) ("the combination affected the foreign commerce of this country"); Alcoa, 148 F.2d at 444 ("intended to affect imports and exports [and] . . . is shown actually to have had some effect on them"); United States v. Imperial Chemical Industries, Ltd., 100 F. Supp. 504, 592 (S.D.N.Y.1951) ("a conspiracy . . . which affects American commerce"); United States v. Timken Roller Bearing Co., 83 F. Supp. 284, 309 (N.D.Ohio 1949), modified and affirmed, 341 U.S. 593 (1951) ("a direct and influencing effect on trade").

Different standards have been urged by other commentators. Julian von Kalinowski advocates a "direct or substantial" effect test - "any effect that is not both insubstantial and indirect" should support jurisdiction - a view that was adopted by the district court in Occidental Petroleum v. Buttes Gas & Oil Co., 331 F. Supp. 92, 102-03 (C.D.Cal. 1971), affirmed on other grounds, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950 (1972). James Rahl turns away from a flat requirement of effects by concluding that the Sherman Act should reach a restraint either "(1) if it occurs in the course of foreign commerce, or (2) if it substantially affects either foreign or interstate commerce." Rahl, Foreign Commerce Jurisdiction of the American Antitrust Laws, 43 Antitrust L.J. 521, 523 (1974). In essence, as Dean Rahl observes, "there is no agreed black-letter rule articulating the Sherman Act's commerce coverage" in the international context. Id.

Few cases have discussed the nature of the effect required for jurisdiction, perhaps because most of the litigated cases have involved relatively obvious offenses and rather significant and apparent effects on competition within the United States. It is probably in part because the standard has not often been put to a real test that it seems so poorly defined. William Fugate, who has identified the "direct and substantial" standard as the rule, has described the meaning of that phrase as being "quite broad." What the threshold of significance is, however, has not been identified. Nor is it quite clear what the "direct-indirect" distinction is supposed to mean. It might well be, as was said in the context of transnational securities regulation:

> Although courts have spoken in terms of the *Restatement* and of congressional policy, findings that an American effect was direct, substantial, and foreseeable, or within the scope of congressional intent, have little independent analytic significance. Instead, cases appear to turn on a reconciliation of American and foreign interests in regulating their

respective economies and business affairs.

Implicit in that observation, as it is in several of the cases and commentaries employing the "effects" test, is the suggestion that factors other than simply the effect on the United States are weighed, and rightly so. As former Attorney General (then Professor) Katzenbach observed, the effect on American commerce is not, by itself, sufficient information on which to base a decision that the United States is the nation primarily interested in the activity causing the effect. "Anything that affects the external trade and commerce of the United States also affects the trade and commerce of other nations, and may have far greater consequences for others than for the United States." Katzenbach, Conflicts on an Unruly Horse, 65 Yale L.J. 1087, 1150 (1956).

The effects test by itself is incomplete because it fails to consider other nation's interests. Nor does it expressly take into account the full nature of the relationship between the actors and this country. Whether the alleged offender is an American citizen, for instance, may make a big difference; applying American laws to American citizens raises fewer problems than application to foreigners. As was observed in Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804, 815 (1968), cert. denied, 393 U.S. 1093 (1969):

> If . . . [American antitrust] policy cannot extend to the full sweep of American foreign commerce because of the international complications involved, then surely the test which determines whether United States law is applicable must focus on the nexus between the parties and their practices and the United States, not on the mechanical circumstances of effect on commodity exports or imports.

American courts have, in fact, often displayed a regard for comity and the prerogatives of other nations and considered their interests as well as other parts of the factual circumstances, … even when professing to apply an effects test. To some degree, the requirement for a "substantial" effect may silently incorporate these additional considerations, with "substantial" as a flexible standard that varies with other factors. The intent requirement suggested by Alcoa, 148 F.2d at 443-44, is one example of an attempt to broaden the court's perspective, as is drawing a distinction between American citizens and non-citizens.

The failure to articulate these other elements in addition to the standard effects analysis is costly, however, for it is more likely that they will be overlooked or slighted in interpreting past decisions and reaching new ones. Placing emphasis on the qualification that effects be "substantial" is also risky, for the term has a meaning in the interstate antitrust context which does not encompass all the factors relevant to the foreign trade case.

Indeed, that "substantial effects" element of interstate antitrust analysis may well be responsible for the use of an effects test for foreign commerce. The Sherman Act reaches restraints directly intended to limit the flow of interstate trade or whose sole impact is on interstate commerce, but it also reaches "wholly local business restraints" if the particular

restraint "substantially and adversely affects interstate commerce." Such a test is necessary in the interstate context to separate the restraints which fall within the federal ambit under the interstate commerce clause from those which, as purely intrastate burdens, remain the province of the states. Since, however, no comparable constitutional problem exists in defining the scope of congressional power to regulate foreign commerce, it may be unwise blindly to apply the "substantiality" test to the international setting. Only respect for the role of the executive and for international notions of comity and fairness limit that constitutional grant.

A tripartite analysis seems to be indicated. As acknowledged above, the antitrust laws require in the first instance that there be some effect - actual or intended - on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction under those statutes. Second, a greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil violation of the antitrust laws. Third, there is the additional question which is unique to the international setting of whether the interests of, and links to, the United States - including the magnitude of the effect on American foreign commerce - are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority.

It is this final issue which is both obscured by undue reliance on the "substantiality" test and complicated to resolve. An effect on United States commerce, although necessary to the exercise of jurisdiction under the antitrust laws, is alone not a sufficient basis on which to determine whether American authority should be asserted in a given case as a matter of international comity and fairness. In some cases, the application of the direct and substantial test in the international context might open the door too widely by sanctioning jurisdiction over an action when these considerations would indicate dismissal. At other times, it may fail in the other direction, dismissing a case for which comity and fairness do not require forbearance, thus closing the jurisdictional door too tightly - for the Sherman Act does reach some restraints which do not have both a direct and substantial effect on the foreign commerce of the United States. A more comprehensive inquiry is necessary. We believe that the field of conflict of laws presents the proper approach, as was suggested, if not specifically employed, in Alcoa in expressing the basic limitation on application of American laws:

> [W]e are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the "Conflict of Laws."

148 F.2d at 443. The same idea is reflected in Restatement (Second) of Foreign Relations Law of The United States @ 40:

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is

required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction . . . .[27]

The act of state doctrine discussed earlier demonstrates that the judiciary is sometimes cognizant of the possible foreign implications of its action. Similar awareness should be extended to the general problems of extraterritoriality. Such acuity is especially required in private suits, like this one, for in these cases there is no opportunity for the executive branch to weigh the foreign relations impact, nor any statement implicit in the filing of the suit that that consideration has been out-weighed.

What we prefer is an evaluation and balancing of the relevant considerations in each case - in the words of Kingman Brewster, a "jurisdictional rule of reason." Balancing of the foreign interests involved was the approach taken by the Supreme Court in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962),

[27] This section was obviously fashioned with trade regulation problems in mind, for all five illustrations presented in the comment to this section involve such regulation. It also indicates that "jurisdictional" forbearance in the international setting is more a question of comity and fairness than one of national power.

where the involvement of the Canadian government in the alleged monopolization was held not to require dismissal. The Court stressed that there was no indication that the Canadian authorities approved or would have approved of the monopolization, meaning that the Canadian interest, if any, was slight and was outweighed by the American interest in condemning the restraint. Similarly, see Lauritzen v. Larsen, 345 U.S. 571 (1953), where the Court used a like approach in declining to apply the Jones Act to a Danish seaman, injured in Havana on a Danish ship, although he had signed on to the ship in New York.

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 or 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. A court evaluating these factors should identify the potential degree of conflict if American authority is asserted. A difference in law or policy is one likely sore spot, though one which may not always be present. Nationality is another; though foreign governments may have some concern for the treatment of American citizens and business residing there, they primarily care about their own nationals. Having assessed the conflict, the court should then determine whether in the face of it the contacts and interests of the United States are sufficient to support the exercise of extraterritorial jurisdiction.

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

The Sherman Act is not limited to trade restraints which have both a direct and substantial effect on our foreign commerce. Timberlane has alleged that the complained of activities were intended to, and did, affect the export of lumber from Honduras to the United States - the flow of United States foreign commerce, and as such they are within the jurisdiction of the federal courts under the Sherman Act. Moreover, the magnitude of the effect alleged would appear to be sufficient to state a claim.

The comity question is more complicated. From Timberlane's complaint it is evident that there are grounds for concern as to at least a few of the defendants, for some are identified as foreign citizens: Laureano Gutierrez Falla, Michael Casanova and the Casanova firms, of Honduras, and Patrick Byrne, of Canada. Moreover, it is clear that most of the activity took place in Honduras, though the conspiracy may have been directed from San Francisco, and that the most direct economic effect was probably on Honduras. However, there has been no indication of any conflict with the law or policy of the Honduran government, nor any comprehensive analysis of the relative connections and interests of Honduras and the United States. Under these circumstances, the dismissal by the district court cannot be sustained on jurisdictional grounds.

We, therefore, vacate the dismissal and remand the Timberlane action.

****

**NOTES**

**1.** In *Timberlane II*, 749 F.2d 1378 (9th Cir. 1984), the court affirmed the District Court’s use of the “jurisdictional rule of reason” and dismissal on 12(b)(1) subject matter grounds, stating that such dismissal is appropriate in cases of extraterritorial jurisdiction where the third part of the jurisdictional analysis – international comity and fairness – is the determining factor against the court’s jurisdiction. The Ninth Circuit did not, however, agree with the District Court’s application of the tripartite test. The appellate agreed with the analysis of the first two factors and outcome of the test but emphasized the seven factors under part three, which the district court collapsed into three categories: (1) the degree of conflict with foreign law or policy, (2) the nationality or allegiance of

the parties and the locations of principal places of business of corporations, (3) the extent to which enforcement by either state can be expected to achieve compliance, (4) the relative significance of effects on the United States as compared with those elsewhere, (5) the extent to which there is explicit purpose to harm or affect American commerce, (6) the forseeability of such effect, and (7) the relative importance to the violations charged of conduct within the United States as compared with conduct abroad. The appellate court concluded that all but two of these factors, the nationality of the parties and principal place of business, and the likelihood of enforcement, indicated that the court should refuse to exercise jurisdiction. "The potential for conflict with Honduran economic policy and commercial law is great. The effect on the foreign commerce of the United States is minimal. The evidence of intent to harm American commerce is altogether lacking. The forseeability of the anticompetitive consequences…is slight. Most of the conduct that must be examined occurred abroad."

**2.** Considering the two factors in favor of jurisdiction, Bank America and Timberlane being American corporations, and the enforceability in the United States of a judgment against Bank America, how many, and which other factors would the court have required in this case in order for it to exercise jurisdiction? When you consider the purpose of the third part of the analysis, should all of the factors be given equal weight? If not, which are more important to international comity and fairness?

**3.** The next Restatement incorporated much of the Timberlane decision.

**Restatement (3d) Foreign Relations Law (1987)**

**§ 401. Categories of Jurisdiction**

Under international law, a state is subject to limitations on

(a) jurisdiction to prescribe, *i.e.*, to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court;

(b) jurisdiction to adjudicate, *i.e.*, to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings;

(c) jurisdiction to enforce, *i.e.*, to induce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action.

**§ 402. Bases of Jurisdiction to Prescribe**

Subject to § 403, a state has jurisdiction to prescribe law with respect to

(1) (a) conduct that, wholly or in substantial part takes place within its territory;

(b) the status of persons, or interests in things, present within its territory;
(c) conduct outside its territory that has or is intended to have substantial effect within its territory;

(2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and

(3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

*d. Effects principle.* Jurisdiction with respect to activity outside the state, but having or intended to have substantial effect within the state's territory, is an aspect of jurisdiction based on territoriality, although it is sometimes viewed as a distinct category. The effects principle is not controversial with respect to acts such as shooting or even sending libelous publications across a boundary. It is generally accepted with respect to liability for injury in the state from products made outside the state and introduced into its stream of commerce. Controversy has arisen as a result of economic regulation by the United States and others, particularly through competition laws, on the basis of economic effect in their territory, when the conduct was lawful where carried out. This Restatement takes the position that a state may exercise jurisdiction based on effects in the state, when the effect or intended effect is substantial and the exercise of jurisdiction is reasonable under § 403.

Cases involving intended but unrealized effect are rare, but international law does not preclude jurisdiction in such instances, subject to the principle of reasonableness. When the intent to commit the proscribed act is clear and demonstrated by some activity, and the effect to be produced by the activity is substantial and foreseeable, the fact that a plan or conspiracy was thwarted does not deprive the target state of jurisdiction to make its law applicable. See cases cited in § 403, Reporter's Note 8.

**§ 403. Limitations on Jurisdiction to Prescribe**

(1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.

(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including where appropriate:

(a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

(3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors. Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

*b. Considerations not exhaustive.* The list of considerations in Subsection (2) is not exhaustive. No priority or other significance is implied in the order which the factors are listed.
Not all considerations have the same importance in all situations, the weight to be given to any particular factor or group of factors depends on the circumstances.

*f. Criminal and civil jurisdiction.* The principles governing jurisdiction to prescribe set forth in § 402 and in this section apply to criminal as well as to civil regulation. However, in the case of regulatory statutes that may give rise to both civil and criminal liability, such as United States antitrust and securities laws, the presence of substantial foreign elements will ordinarily weigh against application of criminal law. In such cases, legislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis of express statement of clear implication.

**§ 415. Jurisdiction to Regulate Anti-Competitive Activities**

(1) Any agreement in restraint of United States trade that is made in the United States, and any conduct of agreement in restraint of such trade that is carried out in significant measure in the United States, are subject to the jurisdiction to prescribe of the United States, regardless of the nationality or place of business of the parties to the agreement or of the participants in the conduct.

(2) Any agreement in restraint of United States trade that is made outside of the United States, and any conduct or agreement in restraint of such trade that is carried out predominantly outside of the United States, are subject to the jurisdiction to prescribe of the United States, if a principal purpose of the conduct or agreement is to interfere with the commerce of the United States, and the agreement or conduct has some effect on that commerce.

(3) Other agreements or conduct in restraint of United States trade are subject to the jurisdiction to prescribe of the United States if such agreements or conduct have substantial effect on the commerce of the United States and the exercise of jurisdiction is not unreasonable.

**NOTE**

**1.** How much of an improvement is the *Timberlane*/Restatement (Third) over *Alcoa*? Is it more or less helpful for the courts?

**Hartford Fire Insurance Co. v. California,** 509 U.S. 764 (1993)

JUSTICE SOUTER announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II-A, III, and IV, and an opinion concurring in the judgment with respect to Part II-B. *

* JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE STEVENS join this opinion in its entirety, and THE CHIEF JUSTICE joins Parts I, II-A, III, and IV.

The Sherman Act makes every contract, combination, or conspiracy in unreasonable restraint of interstate or foreign commerce illegal. 26 Stat. 209, as amended, *15 U.S.C. § 1.* These consolidated cases present questions about the application of that Act to the insurance industry, both here and abroad. The plaintiffs (respondents here) allege that both domestic and foreign defendants (petitioners here) violated the Sherman Act by engaging in various conspiracies to affect the American insurance market. A group of domestic defendants argues that the McCarran-Ferguson Act, 59 Stat. 33, as amended, *15 U.S.C. § 1011* et seq., precludes application of the Sherman Act to the conduct alleged; a group of foreign defendants argues that the principle of international comity requires the District Court to refrain from exercising jurisdiction over certain claims against it. We hold that most of the domestic defendants' alleged conduct is not immunized from antitrust liability by the McCarran-Ferguson Act, and that, even assuming it applies, the principle of international comity does not preclude District Court jurisdiction over the foreign conduct alleged.

I

The two petitions before us stem from consolidated litigation comprising the complaints of 19 States and many private plaintiffs alleging that the defendants, members of the insurance industry, conspired in violation of § 1 of the Sherman Act to restrict the terms of coverage of commercial general liability (CGL) insurance available in the United States. Because the cases come to us on motions to dismiss, we take the allegations of the complaints as true.

A

According to the complaints, the object of the conspiracies was to force certain primary insurers (insurers who sell insurance directly to consumers) to change the terms of their

standard CGL insurance policies to conform with the policies the defendant insurers wanted to sell. The defendants wanted four changes.

First, CGL insurance has traditionally been sold in the United States on an "occurrence" basis, through a policy obligating the insurer "to pay or defend claims, whenever made, resulting from an accident or 'injurious exposure to conditions' that occurred during the [specific time] period the policy was in effect." In place of this traditional "occurrence" trigger of coverage, the defendants wanted a "claims-made" trigger, obligating the insurer to pay or defend only those claims made during the policy period. Such a policy has the distinct advantage for the insurer that when the policy period ends without a claim having been made, the insurer can be certain that the policy will not expose it to any further liability. Second, the defendants wanted the "claims-made" policy to have a "retroactive date" provision, which would further restrict coverage to claims based on incidents that occurred after a certain date. Such a provision eliminates the risk that an insurer, by issuing a claims-made policy, would assume liability arising from incidents that occurred before the policy's effective date, but remained undiscovered or caused no immediate harm. Third, CGL insurance has traditionally covered "sudden and accidental" pollution; the defendants wanted to eliminate that coverage. Finally, CGL insurance has traditionally provided that the insurer would bear the legal costs of defending covered claims against the insured without regard to the policy's stated limits of coverage; the defendants wanted legal defense costs to be counted against the stated limits (providing a "legal defense cost cap").

To understand how the defendants are alleged to have pressured the targeted primary insurers to make these changes, one must be aware of two important features of the insurance industry. First, most primary insurers rely on certain outside support services for the type of insurance coverage they wish to sell. Defendant Insurance Services Office, Inc. (ISO), an association of approximately 1,400 domestic property and casualty insurers (including the primary insurer defendants, Hartford Fire Insurance Company, Allstate Insurance Company, CIGNA Corporation, and Aetna Casualty and Surety Company), is the almost exclusive source of support services in this country for CGL insurance. ISO develops standard policy forms and files or lodges them with each State's insurance regulators; most CGL insurance written in the United States is written on these forms. All of the "traditional" features of CGL insurance relevant to this litigation were embodied in the ISO standard CGL insurance form that had been in use since 1973 (1973 ISO CGL form). For each of its standard policy forms, ISO also supplies actuarial and rating information: it collects, aggregates, interprets, and distributes data on the premiums charged, claims filed and paid, and defense costs expended with respect to each form, and on the basis of these data it predicts future loss trends and calculates advisory premium rates. Most ISO members cannot afford to continue to use a form if ISO withdraws these support services.

Second, primary insurers themselves usually purchase insurance to cover a portion of the risk they assume from the consumer. This so-called "reinsurance" may serve at least two purposes, protecting the primary insurer from catastrophic loss, and allowing the primary insurer to sell more insurance than its own financial capacity might otherwise permit. Thus,

"the availability of reinsurance affects the ability and willingness of primary insurers to provide insurance to their customers." Insurers who sell reinsurance themselves often purchase insurance to cover part of the risk they assume from the primary insurer; such "retrocessional reinsurance" does for reinsurers what reinsurance does for primary insurers. Many of the defendants here are reinsurers or reinsurance brokers, or play some other specialized role in the reinsurance business; defendant Reinsurance Association of America (RAA) is a trade association of domestic reinsurers.

***

III

Finally, we take up the question whether certain claims against the London reinsurers should have been dismissed as improper applications of the Sherman Act to foreign conduct. The Fifth Claim for Relief in the California Complaint alleges a violation of § 1 of the Sherman Act by certain London reinsurers who conspired to coerce primary insurers in the United States to offer CGL coverage on a claims-made basis, thereby making "occurrence CGL coverage . . . unavailable in the State of California for many risks." The Sixth Claim for Relief in the California Complaint alleges that the London reinsurers violated § 1 by a conspiracy to limit coverage of pollution risks in North America, thereby rendering "pollution liability coverage . . . almost entirely unavailable for the vast majority of casualty insurance purchasers in the State of California." The Eighth Claim for Relief in the California Complaint alleges a further § 1 violation by the London reinsurers who, along with domestic retrocessional reinsurers, conspired to limit coverage of seepage, pollution, and property contamination risks in North America, thereby eliminating such coverage in the State of California.

At the outset, we note that the District Court undoubtedly had jurisdiction of these Sherman Act claims, as the London reinsurers apparently concede. See Tr. of Oral Arg. 37 ("Our position is not that the Sherman Act does not apply in the sense that a minimal basis for the exercise of jurisdiction doesn't exist here. Our position is that there are certain circumstances, and that this is one of them, in which the interests of another State are sufficient that the exercise of that jurisdiction should be restrained"). Although the proposition was perhaps not always free from doubt, see *American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909),* it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States. See *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 582, n. 6 (1986); United States v. Aluminum Co. of America, 148 F.2d 416, 444 (CA2 1945)* (L. Hand, J.); Restatement (Third) of Foreign Relations Law of the United States § 415, and Reporters' Note 3 (1987) (hereinafter Restatement (Third) Foreign Relations Law); 1 P. Areeda & D. Turner, Antitrust Law P236 (1978). Such is the conduct alleged here: that the London reinsurers engaged in unlawful conspiracies to affect the market for insurance in the United States and that their conduct in fact produced substantial effect.

According to the London reinsurers, the District Court should have declined to exercise

such jurisdiction under the principle of international comity.[24] The Court of Appeals agreed that courts should look to that principle in deciding whether to exercise jurisdiction under the Sherman Act. This availed the London reinsurers nothing, however. To be sure, the Court of Appeals believed that "application of [American] antitrust laws to the London reinsurance market 'would lead to significant conflict with English law and policy,'" and that "[s]uch a conflict, unless out-weighed by other factors, would by itself be reason to decline exercise of jurisdiction." But other factors, in the court's view, including the London reinsurers' express purpose to affect United States commerce and the substantial nature of the effect produced, out-weighed the supposed conflict and required the exercise of jurisdiction in this litigation.

When it enacted the FTAIA, Congress expressed no view on the question whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity. See H. R. Rep. No. 97-686, p. 13 (1982) ("If a court determines that the requirements for subject matter jurisdiction are met, [the FTAIA] would have no effect on the court['s] ability to employ notions of comity . . . or otherwise to take account of the international character of the transaction") (citing Timberlane). We need not decide that question here, however, for even assuming that in a proper case a court may decline to exercise Sherman Act jurisdiction over foreign conduct (or, as JUSTICE SCALIA would put it, may conclude by the employment of comity analysis in the first instance that there is no jurisdiction), international comity would not counsel against exercising jurisdiction in the circumstances alleged here. The only substantial question in this litigation is whether "there is in fact a true conflict between domestic and foreign law." *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for Southern Dist. of Iowa, 482 U.S. 522, 555, 96 L. Ed. 2d 461, 107 S. Ct. 2542 (1987)* (BLACKMUN, J., concurring in part and dissenting in part). The London reinsurers contend that applying the Act to their conduct would conflict significantly with British law, and the British Government, appearing before us as amicus curiae, concurs. They assert that Parliament has established a comprehensive regulatory regime over the London reinsurance market and that the conduct alleged here was perfectly consistent with British law and policy. But this is not to state a conflict. "The fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws," even where the foreign state has a strong policy to permit or encourage such conduct. Restatement (Third) Foreign Relations Law § 415, Comment j. No conflict exists, for these purposes, "where a person subject to regulation by two states can comply with the laws of both." Restatement (Third) Foreign Relations Law § 403, Comment e. Since the London reinsurers do not argue that British law requires them to act in some fashion prohibited by the law of the United States, or claim that their compliance with the laws of both countries is otherwise impossible, we see no conflict with British law. See Restatement (Third) Foreign Relations Law § 403, Comment e, § 415, Comment j. We have no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity.

---

[24] JUSTICE SCALIA contends that comity concerns figure into the prior analysis whether jurisdiction exists

under the Sherman Act. Post, at 817-818. This contention is inconsistent with the general understanding that the Sherman Act covers foreign conduct producing a substantial intended effect in the United States, and that concerns of comity come into play, if at all, only after a court has determined that the acts complained of are subject to Sherman Act jurisdiction. See *United States v. Aluminum Co. of America, 148 F.2d 416, 444 (CA2 1945)* ("It follows from what we have . . . said that [the agreements at issue] were unlawful [under the Sherman Act], though made abroad, if they were intended to affect imports and did affect them"); *Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1294 (CA3 1979)* (once court determines that jurisdiction exists under the Sherman Act, question remains whether comity precludes its exercise); H. R. Rep. No. 97-686, supra, at 13. But cf. *Timberlane Lumber Co. v. Bank of America, N. T. & S. A., 549 F.2d 597, 613 (CA9 1976);* 1 J. Atwood & K. Brewster, Antitrust and American Business Abroad 166 (1981). In any event, the parties conceded jurisdiction at oral argument, see supra, at 795, and we see no need to address this contention here.

IV

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the cases are remanded for further proceedings consistent with this opinion.

DISSENT: SCALIA, J., delivered a dissenting opinion with respect to Part II, in which O'CONNOR, KENNEDY, and THOMAS, JJ., joined.

II

Petitioners, various British corporations and other British subjects, argue that certain of the claims against them constitute an inappropriate extraterritorial application of the Sherman Act. n8 It is important to distinguish two distinct questions raised by this petition: whether the District Court had jurisdiction, and whether the Sherman Act reaches the extraterritorial conduct alleged here. On the first question, I believe that the District Court had subject-matter jurisdiction over the Sherman Act claims against all the defendants (personal jurisdiction is not contested). Respondents asserted nonfrivolous claims under the Sherman Act, and *28 U.S.C. § 1331* vests district courts with subject-matter jurisdiction over cases "arising under" federal statutes. As precedents such as *Lauritzen v. Larsen, 345 U.S. 571 (1953),* make clear, that is sufficient to establish the District Court's jurisdiction over these claims. Lauritzen involved a Jones Act claim brought by a foreign sailor against a foreign shipowner. The shipowner contested the District Court's jurisdiction, apparently on the grounds that the Jones Act did not govern the dispute between the foreign parties to the action. Though ultimately agreeing with the shipowner that the Jones Act did not apply, the Court held that the District Court had jurisdiction.

"As frequently happens, a contention that there is some barrier to granting plaintiff's claim is cast in terms of an exception to jurisdiction of subject matter. A cause of action under our law was asserted here, and the court had power to determine whether it was or was not well founded in law and in fact." *345 U.S. at 575.*

The second question -- the extraterritorial reach of the Sherman Act -- has nothing to do with the jurisdiction of the courts. It is a question of substantive law turning on whether, in enacting the Sherman Act, Congress asserted regulatory power over the challenged conduct. See *EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991)* (Aramco) ("It is our task to

determine whether Congress intended the protections of Title VII to apply to United States citizens employed by American employers outside of the United States"). If a plaintiff fails to prevail on this issue, the court does not dismiss the claim for want of subject-matter jurisdiction -- want of power to adjudicate; rather, it decides the claim, ruling on the merits that the plaintiff has failed to state a cause of action under the relevant statute. See *Romero, supra, at 384* (holding no claim available under the Jones Act); *American Banana Co. v. United Fruit Co., 213 U.S. 347, 359, 53 L. Ed. 826, 29 S. Ct. 511 (1909)* (holding that complaint based upon foreign conduct "alleges no case under the [Sherman Act]").

There is, however, a type of "jurisdiction" relevant to determining the extraterritorial reach of a statute; it is known as "legislative jurisdiction," Restatement (First) Conflict of Laws § 60 (1934), or "jurisdiction to prescribe," 1 Restatement (Third) of Foreign Relations Law of the United States 235 (1987) (hereinafter Restatement (Third)). This refers to "the authority of a state to make its law applicable to persons or activities," and is quite a separate matter from "jurisdiction to adjudicate," see id., at 231. There is no doubt, of course, that Congress possesses legislative jurisdiction over the acts alleged in this complaint: Congress has broad power under Article I, § 8, cl. 3, "to regulate Commerce with foreign Nations," and this Court has repeatedly upheld its power to make laws applicable to persons or activities beyond our territorial boundaries where United States interests are affected. But the question in this litigation is whether, and to what extent, Congress has exercised that undoubted legislative jurisdiction in enacting the Sherman Act.

Two canons of statutory construction are relevant in this inquiry. The first is the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" Aramco, supra, at 248. Applying that canon in Aramco, we held that the version of Title VII of the Civil Rights Act of 1964 then in force, did not extend outside the territory of the United States even though the statute contained broad provisions extending its prohibitions to, for example, "'any activity, business, or industry in commerce.'" Id., at 249. We held such "boilerplate language" to be an insufficient indication to override the presumption against extraterritoriality. The Sherman Act contains similar "boilerplate language," and if the question were not governed by precedent, it would be worth considering whether that presumption controls the outcome here. We have, however, found the presumption to be overcome with respect to our antitrust laws; it is now well established that the Sherman Act applies extraterritorially. See *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 582, n. 6 (1986); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704 (1962);* see also *United States v. Aluminum Co. of America, 148 F.2d 416 (CA2 1945).*

But if the presumption against extraterritoriality has been overcome or is otherwise inapplicable, a second canon of statutory construction becomes relevant: "An act of congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy, 6 U.S. 64 (1804)* (Marshall, C.J.). This canon is "wholly independent" of the presumption against extraterritoriality. It is relevant to determining the substantive reach of a statute because "the law of nations," or customary

international law, includes limitations on a nation's exercise of its jurisdiction to prescribe. See Restatement (Third) §§ 401-416. Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe.

Consistent with that presumption, this and other courts have frequently recognized that, even where the presumption against extraterritoriality does not apply, statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law. For example, in *Romero v. International Terminal Operating Co., 358 U.S. 354 (1959),* the plaintiff, a Spanish sailor who had been injured while working aboard a Spanish-flag and Spanish-owned vessel, filed a Jones Act claim against his Spanish employer. The presumption against extraterritorial application of federal statutes was inapplicable to the case, as the actionable tort had occurred in American waters. The Court nonetheless stated that, "in the absence of a contrary congressional direction," it would apply "principles of choice of law that are consonant with the needs of a general federal maritime law and with due recognition of our self-regarding respect for the relevant interests of foreign nations in the regulation of maritime commerce as part of the legitimate concern of the international community." *Id., at 382-383.* "The controlling considerations" in this choice-of-law analysis were "the interacting interests of the United States and of foreign countries." *Id., at 383.*

Romero referred to, and followed, the choice-of-law analysis set forth in *Lauritzen v. Larsen, 345 U.S. 571 (1953).* As previously mentioned, Lauritzen also involved a Jones Act claim brought by a foreign sailor against a foreign employer. The Lauritzen Court recognized the basic problem: "If [the Jones Act were] read literally, Congress has conferred an American right of action which requires nothing more than that plaintiff be 'any seaman who shall suffer personal injury in the course of his employment.'" *Id., at 576.* The solution it adopted was to construe the statute "to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law." *Id., at 577* (emphasis added). To support application of international law to limit the facial breadth of the statute, the Court relied upon -- of course -- Chief Justice Marshall's statement in Schooner Charming Betsy, quoted supra, at 814-815. It then set forth "several factors which, alone or in combination, are generally conceded to influence choice of law to govern a tort claim."

Lauritzen, Romero, and McCulloch were maritime cases, but we have recognized the principle that the scope of generally worded statutes must be construed in light of international law in other areas as well. More specifically, the principle was expressed in *United States v. Aluminum Co. of America, 148 F.2d 416 (CA2 1945),* the decision that established the extraterritorial reach of the Sherman Act. In his opinion for the court, Judge Learned Hand cautioned "we are not to read general words, such as those in [the Sherman] Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflict of Laws.'" *Id., at 443.*

More recent lower court precedent has also tempered the extraterritorial application of the Sherman Act with considerations of "international comity." See *Timberlane Lumber Co. v. Bank of America, N. T. & S. A., 549 F.2d 597, 608-615 (CA9 1976); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1294-1298 (CA3 1979); Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864, 869-871 (CA10 1981); Laker Airways Limited v. Sabena, Belgian World Airlines, 731 F.2d 909, 938 and n. 109 (D.C. Cir. 1984).* The "comity" they refer to is not the comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere, but rather what might be termed "prescriptive comity": the respect sovereign nations afford each other by limiting the reach of their laws. That comity is exercised by legislatures when they enact laws, and courts assume it has been exercised when they come to interpreting the scope of laws their legislatures have enacted. It is a traditional component of choice-of-law theory. See J. Story, Commentaries on the Conflict of Laws § 38 (1834) (distinguishing between the "comity of the courts" and the "comity of nations," and defining the latter as "the true foundation and extent of the obligation of the laws of one nation within the territories of another"). Comity in this sense includes the choice-of-law principles that, "in the absence of contrary congressional direction," are assumed to be incorporated into our substantive laws having extraterritorial reach. Considering comity in this way is just part of determining whether the Sherman Act prohibits the conduct at issue.

In sum, the practice of using international law to limit the extraterritorial reach of statutes is firmly established in our jurisprudence. In proceeding to apply that practice to the present cases, I shall rely on the Restatement (Third) for the relevant principles of international law. Its standards appear fairly supported in the decisions of this Court construing international choice-of-law principles and in the decisions of other federal courts, especially Timberlane. Whether the Restatement precisely reflects international law in every detail matters little here, as I believe this litigation would be resolved the same way under virtually any conceivable test that takes account of foreign regulatory interests.

Under the Restatement, a nation having some "basis" for jurisdiction to prescribe law should nonetheless refrain from exercising that jurisdiction "with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." Restatement (Third) § 403(1). The "reasonableness" inquiry turns on a number of factors including, but not limited to: "the extent to which the activity takes place within the territory [of the regulating state]," id., § 403(2)(a); "the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated," id., § 403(2)(b); "the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted," id., § 403(2)(c); "the extent to which another state may have an interest in regulating the activity," id., § 403(2)(g); and "the likelihood of conflict with regulation by another state," id., § 403(2)(h). Rarely would these factors point more clearly against application of United States law. The activity relevant to the counts at issue here took place primarily in the United Kingdom, and the defendants in these counts are

British corporations and British subjects having their principal place of business or residence outside the United States. Great Britain has established a comprehensive regulatory scheme governing the London reinsurance markets, and clearly has a heavy "interest in regulating the activity," id., § 403(2)(g). Finally, § 2(b) of the McCarran-Ferguson Act allows state regulatory statutes to override the Sherman Act in the insurance field, subject only to the narrow "boycott" exception set forth in § 3(b) -- suggesting that "the importance of regulation to the [United States]," Restatement (Third) § 403(2)(c), is slight. Considering these factors, I think it unimaginable that an assertion of legislative jurisdiction by the United States would be considered reasonable, and therefore it is inappropriate to assume, in the absence of statutory indication to the contrary, that Congress has made such an assertion. It is evident from what I have said that the Court's comity analysis, which proceeds as though the issue is whether the courts should "decline to exercise . . . jurisdiction," rather than whether the Sherman Act covers this conduct, is simply misdirected. I do not at all agree, moreover, with the Court's conclusion that the issue of the substantive scope of the Sherman Act is not in the cases. To be sure, the parties did not make a clear distinction between adjudicative jurisdiction and the scope of the statute. Parties often do not, as we have observed (and have declined to punish with procedural default) before. It is not realistic, and also not helpful, to pretend that the only really relevant issue in this litigation is not before us. In any event, if one erroneously chooses, as the Court does, to make adjudicative jurisdiction (or, more precisely, abstention) the vehicle for taking account of the needs of prescriptive comity, the Court still gets it wrong. It concludes that no "true conflict" counseling nonapplication of United States law (or rather, as it thinks, United States judicial jurisdiction) exists unless compliance with United States law would constitute a violation of another country's law. That breathtakingly broad proposition, which contradicts the many cases discussed earlier, will bring the Sherman Act and other laws into sharp and unnecessary conflict with the legitimate interests of other countries -- particularly our closest trading partners.

In the sense in which the term "conflict" was used in *Lauritzen,* and is generally understood in the field of conflicts of laws, there is clearly a conflict in this litigation. The petitioners here, like the defendant in Lauritzen, were not compelled by any foreign law to take their allegedly wrongful actions, but that no more precludes a conflict-of-laws analysis here than it did there. Where applicable foreign and domestic law provide different substantive rules of decision to govern the parties' dispute, a conflict-of-laws analysis is necessary.

Literally the only support that the Court adduces for its position is § 403 of the Restatement (Third) -- or more precisely Comment e to that provision, which states:

> "Subsection (3) [which says that a State should defer to another state if that State's interest is clearly greater] applies only when one state requires what another prohibits, or where compliance with the regulations of two states exercising jurisdiction consistently with this section is otherwise impossible. It does not apply where a person subject to regulation by two states can comply with the laws of both . . . ."

The Court has completely misinterpreted this provision. Subsection (3) of § 403 (requiring one State to defer to another in the limited circumstances just described) comes into play only after subsection (1) of § 403 has been complied with -- i.e., after it has been determined that the exercise of jurisdiction by both of the two States is not "unreasonable." That prior question is answered by applying the factors (inter alia) set forth in subsection (2) of § 403, that is, precisely the factors that I have discussed in text and that the Court rejects.[11]

I would reverse the judgment of the Court of Appeals on this issue, and remand to the District Court with instructions to dismiss for failure to state a claim on the three counts at issue.

****

[11] The Court skips directly to subsection (3) of § 403, apparently on the authority of Comment j to § 415 of the Restatement (Third). See ante, at 799. But the preceding commentary to § 415 makes clear that "any exercise of [legislative] jurisdiction under this section is subject to the requirement of reasonableness" set forth in § 403(2). Restatement (Third) § 415, Comment a. Comment j refers back to the conflict analysis set forth in § 403(3), which, as noted above, comes after the reasonableness analysis of § 403(2).

## NOTES

**1.** The Court stated that there is no conflict of laws issue where the laws of both countries can be complied with. Conflict according to Hartford Fire occurs when the laws of one country *require* behavior that is prohibited by the laws of another country. Could the defendant in Timberlane have complied with the laws of both Honduras and the United States? Why did the court not address this issue in Timberlane?

**2.** Justice Scalia argues that comity is part of determining subject matter jurisdiction and that Congress must clearly indicate that specific legislation must clearly express exterritorial application. When he considers “legislative jurisdiction” he makes no mention of the FTAIA, but relies solely on the “boiler plate” language of the Sherman Act. Is the FTAIA a sufficient expression of the extraterritoriality of the Sherman Act?

**3.** What, if anything, is left of comity in the *Timberlane* sense after *Hartford Fire Insurance*?

**United States of America v. Nippon Paper Industries Co., Ltd.,** 109 F. 3d 1 (1st Cir. 1997)

OPINION: SELYA, Circuit Judge. This case raises an important, hitherto unanswered question. In it, the United States attempts to convict a foreign corporation under the Sherman Act, a federal antitrust statute, alleging [**2] that price-fixing activities which took place entirely in Japan are prosecutable because they were intended to have, and did in fact have, substantial effects in this country. The district court, declaring that a criminal antitrust prosecution could not be based on wholly extraterritorial conduct, dismissed the indictment. See *United States v. Nippon Paper Indus. Co., 944 F. Supp. 55 (D. Mass. 1996).* We reverse.

I. JUST THE FAX

Since the district court granted the defendant's motion to dismiss for failure to state a prosecutable offense, we draw our account of the pertinent events from the well-pleaded facts in the indictment itself.

In 1995, a federal grand jury handed up an indictment naming as a defendant Nippon Paper Industries Co., Ltd. (NPI), a Japanese manufacturer of facsimile paper. The indictment alleges that in 1990 NPI and certain unnamed coconspirators held a number of meetings in Japan which culminated in an agreement to fix the price of thermal fax paper throughout North America. NPI and other manufacturers who were privy to the scheme purportedly accomplished their objective by selling the paper in Japan to unaffiliated trading houses on condition that the latter charge specified (inflated) prices for the paper when they resold it in North America. The trading houses then shipped and sold the paper to their subsidiaries in the United States who in turn sold it to American consumers at swollen prices. The indictment further relates that, in 1990 alone, NPI sold thermal fax paper worth approximately $6,100,000 for eventual import into the United States; and that in order to ensure the success of the venture, NPI monitored the paper trail and confirmed that the prices charged to end users were those that it had arranged. These activities, the indictment posits, had a substantial adverse effect on commerce in the United States and unreasonably restrained trade in violation of Section One of the Sherman Act.

NPI moved to dismiss because, inter alia, if the conduct attributed to NPI occurred at all, it took place entirely in Japan, and, thus, the indictment failed to limn an offense under Section One of the Sherman Act. The government opposed this initiative on two grounds. First, it claimed that the law deserved a less grudging reading and that, properly read, Section One of the Sherman Act applied criminally to wholly foreign conduct as long as that conduct produced substantial and intended effects within the United States. Second, it claimed that the indictment, too, deserved a less grudging reading and that, properly read, the bill alleged a vertical conspiracy in restraint of trade that involved overt acts by certain coconspirators within the United States. Accepting a restrictive reading of both the statute and the

indictment, the district court dismissed the case.

II. ANALYSIS

We begin -- and end -- with the overriding legal question. Because this question is one of statutory construction, we review de novo the holding that Section One of the Sherman Act does not cover wholly extraterritorial conduct in the criminal context. See *United States v. Gifford, 17 F.3d 462, 471-72 (1st Cir. 1994).*

Inasmuch as we hold that activities committed abroad which have a substantial and intended effect within the United States may form the basis for a criminal prosecution under Section One of the Sherman Act, we need not address the government's alternative argument that the indictment in this case alleges that some overt acts in furtherance of the conspiracy were perpetrated in the United States.

We first present the historical context in which this important question arises. We move next to the specifics of the case.

A. An Historical Perspective.

Our law has long presumed that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." In this context, the Supreme Court has charged inquiring courts with determining whether Congress has clearly expressed an affirmative desire to apply particular laws to conduct that occurs beyond the borders of the United States.

The earliest Supreme Court case which undertook a comparable task in respect to Section One of the Sherman Act determined that the presumption against extraterritoriality had not been overcome. In *American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909),* the Court considered the application of the Sherman Act in a civil action concerning conduct which occurred entirely in Central America and which had no discernible effect on imports to the United States. Starting with what Justice Holmes termed "the general and almost universal rule" holding "that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done," *id. at 356,* and the ancillary proposition that, in cases of doubt, a statute should be "confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power," *id. at 357,* the Court held that the defendant's actions abroad were not proscribed by the Sherman Act.

Our jurisprudence is precedent-based, but it is not static. By 1945, a different court saw a very similar problem in a somewhat softer light. In *United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945)* (Alcoa), the Second Circuit, sitting as a court of last resort, mulled a civil action brought under Section One against a Canadian corporation for acts committed entirely abroad which, the government averred, had produced substantial

anticompetitive effects within the United States. The Alcoa court read American Banana narrowly; that case, Judge Learned Hand wrote, stood only for the principle that "we should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States." *148 F.2d at 443.* But a sovereign ordinarily can impose liability for conduct outside its borders that produces consequences within them, and while considerations of comity argue against applying Section One to situations in which no effect within the United States has been shown -- the American Banana scenario -- the statute, properly interpreted, does proscribe extraterritorial acts which were "intended to affect imports [to the United States] and did affect them." *Id. at 444.* On the facts of Alcoa, therefore, the presumption against extraterritoriality had been overcome, and the Sherman Act had been violated. See *id. at 444-45.*

Any perceived tension between American Banana and Alcoa was eased by the Supreme Court's most recent exploration of the Sherman Act's extraterritorial reach. In *Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993),* the Justices endorsed Alcoa's core holding, permitting civil antitrust claims under Section One to go forward despite the fact that the actions which allegedly violated Section One occurred entirely on British soil. While noting American Banana's initial disagreement with this proposition, the Hartford Fire Court deemed it "well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *509 U.S. at 796* The conduct alleged, a London-based conspiracy to alter the American insurance market, met that benchmark.[3]

---

[3] As NPI reminds us, four Justices dissented in Hartford Fire. This is cold comfort, however, for the dissenters expressed complete agreement with the majority's view on extraterritoriality. See *Hartford Fire, 509 U.S. at 814* (Scalia, J., dissenting). By the same token, NPI's attempt to distinguish Hartford Fire on the ground that the

To sum up, the case law now conclusively establishes that civil antitrust actions predicated on wholly foreign conduct which has an intended and substantial effect in the United States come within Section One's jurisdictional reach. In arriving at this conclusion, we take no view of the government's asseveration that the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), *15 U.S.C. § 6a* (1994), makes manifest Congress' intent to apply the Sherman Act extraterritorially. The FTAIA is inelegantly phrased and the court in Hartford Fire declined to place any weight on it. See *Hartford Fire, 509 U.S. at 796 n.23.* We emulate this example and do not rest our ultimate conclusion about Section One's scope upon the FTAIA.

B. The Merits.

Were this a civil case, our journey would be complete. But here the United States essays a criminal prosecution for solely extraterritorial conduct rather than a civil action. This is largely uncharted terrain; we are aware of no authority directly on point, and the parties have

cited none.

Be that as it may, one datum sticks out like a sore thumb: in both criminal and civil cases, the claim that Section One applies extraterritorially is based on the same language in the same section of the same statute: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1.* Words may sometimes be chameleons, possessing different shades of meaning in different contexts, but common sense suggests that courts should interpret the same language in the same section of the same statute uniformly, regardless of whether the impetus for interpretation is criminal or civil.

Common sense is usually a good barometer of statutory meaning. Here, however, we need not rely on common sense alone; accepted canons of statutory construction point in the same direction. It is a fundamental interpretive principle that identical words or terms used in different parts of the same act are intended to have the same meaning. This principle -- which the Court recently called "the basic canon of statutory construction,"

---

defendants there conceded the United States' jurisdiction over their conduct fails for two reasons.

In the first place, the assertion is no more than a play on words. The majority opinion in Hartford Fire stated that the district court "undoubtedly" had jurisdiction over the civil claims, "as the London reinsurers apparently concede." *Id. at 795.* It is obvious, therefore, that jurisdiction did not depend on the concession; to the contrary, jurisdiction would "undoubtedly" have existed in any event. In the second place, one of the London defendants did not join in this apparent concession, but the Court nonetheless held that defendant's foreign conduct to be within the Sherman Act's proscriptive ambit because it was part of a scheme which "was intended to and did in fact produce a substantial effect on the American insurance market." *Id. at 795 n.21.*

operates not only when particular phrases appear in different sections of the same act, but also when they appear in different paragraphs or sentences of a single section. See *Russo v. Texaco, Inc., 808 F.2d 221, 227 (2d Cir. 1986)* ("It is a settled principle of statutory construction that when the same word or phrase is used in the same section of an act more than once, and the meaning is clear as used in one place, it will be construed to have the same meaning in the next place.") (citations and internal quotation marks omitted); *United States v. Gertz, 249 F.2d 662, 665 (9th Cir. 1957)* (similar). It follows, therefore, that if the language upon which the indictment rests were the same as the language upon which civil liability rests but appeared in a different section of the Sherman Act, or in a different part of the same section, we would be under great pressure to follow the lead of the Hartford Fire Court and construe the two iterations of the language identically. Where, as here, the tie binds more tightly -- that is, the text under consideration is not merely a duplicate appearing somewhere else in the statute, but is the original phrase in the original setting -- the pressure escalates and the case for reading the language in a manner consonant with a prior Supreme Court interpretation is irresistible.

The Supreme Court confronted an analogous situation in *Ratzlaf v. United States, 510 U.S. 135 (1994).* There, the court dealt with a single criminal penalty clause, contained in *31 U.S.C. § 5322*(a) (1994), which authorized punishment for individuals "willfully violating" a

number of separate statutory provisions. The defendant was charged under one of these provisions. After noting that identical terms appearing at multiple places within a single statute customarily have a consistent meaning, the Court said: "We have even stronger cause to construe a single formulation, here § 5322(a), the same way each time it is called into play." *Id. at 143.* The Ratzlaf Court proceeded to interpret the phrase "willfully violating" to incorporate the same mens rea requirement that had been read into the phrase when section 5322(a) was applied in other contexts. *510 U.S. at 136-37, 141.* In so doing the Court quoted with approval our statement in *United States v. Aversa, 984 F.2d 493, 498 (1st Cir. 1993)* (en banc): "Ascribing various meanings to a single iteration . . . -- reading the word differently for each code section to which it applies -- would open Pandora's jar. If courts can render meaning so malleable, the usefulness of a single penalty provision for a group of related code sections will be eviscerated."

Ratzlaf is not our only teaching aid. This court recently confronted a situation that, putting together its successive stages, throws light upon the problem at hand. Having found an ambiguity in the phrase "cost of producing self-employment income," *7 U.S.C. § 2014*(d)(9) (1994), we deferred to a reasonable administrative regulation interpreting it. In a subsequent suit involving the same parties, we debunked the plaintiffs' contention, advanced in a somewhat different context and in connection with a neoteric legal theory, that the phrase in question had a plain meaning. We explained: "Statutory ambiguity does not flash on and off like a bank of strobe lights at a discotheque, shining brightly at the time of one lawsuit and then vanishing mysteriously in the interlude before the next suit appears." Read in the ensemble, the Strickland opinions stand for the proposition that the same phrase, appearing in the same portion of the same statute, cannot bear divergent interpretations in different litigation contexts.

The shared rationale of the Ratzlaf and Strickland cases reinforces the basic canon of construction and gives us confidence that we should follow the canon here. The words of Section One have not changed since the Hartford Fire Court found that they clearly evince Congress' intent to apply the Sherman Act extraterritorially in civil actions, and it would be disingenuous for us to pretend that the words had lost their clarity simply because this is a criminal proceeding. Thus, unless some special circumstance obtains in this case, there is no principled way in which we can uphold the order of dismissal.

NPI and its amicus, the Government of Japan, urge that special reasons exist for measuring Section One's reach differently in a criminal context. We have reviewed their exhortations and found them hollow. We discuss the five most promising theses below. The rest do not require comment.

1. Lack of Precedent. NPI and its amicus make much of the fact that this appears to be the first criminal case in which the United States endeavors to extend Section One to wholly foreign conduct. We are not impressed. There is a first time for everything, and the absence of earlier criminal actions is probably more a demonstration of the increasingly global nature of our economy than proof that Section One cannot cover wholly foreign conduct in the

criminal milieu.

Moreover, this argument overstates the lack of precedent. There is, for example, solid authority for applying a state's criminal statute to conduct occurring entirely outside the state's borders. See *Strassheim v. Daily, 221 U.S. 280 (1911)* (Holmes, J.) ("Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power."). It is not much of a stretch to apply this same principle internationally, especially in a shrinking world.

2. Difference in Strength of Presumption. The lower court and NPI both cite *United States v. Bowman, 260 U.S. 94 (1922),* for the proposition that the presumption against extraterritoriality operates with greater force in the criminal arena than in civil litigation. This misreads the opinion. To be sure, the Bowman Court, dealing with a charged conspiracy to defraud, warned that if the criminal law "is to be extended to include those [crimes] committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard." But this pronouncement merely restated the presumption against extraterritoriality previously established in civil cases like *American Banana, 213 U.S. at 357.* The Bowman Court nowhere suggested that a different, more resilient presumption arises in criminal cases.[4]

Nor does *United States v. United States Gypsum Co., 438 U.S. 422 (1978),* offer aid and succor to NPI. Recognizing that "the behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct," *id. at 440-41,* the Gypsum Court held that criminal intent generally is required to convict under the Act. See *id. at 443.* Although this distinguishes some civil antitrust cases (in which intent need not be proven) from their criminal counterparts, the Gypsum Court made it plain that intent need not be shown to prosecute criminally "conduct regarded as per se illegal because of its unquestionably anticompetitive effects." *Id. at 440.* This means, of course, that defendants can be convicted of participation in price-fixing conspiracies without any demonstration of a specific criminal intent to violate the antitrust laws. Because the instant case falls within that rubric, Gypsum does not help NPI.

We add that even if Gypsum had differentiated between civil and criminal price-fixing cases, NPI's reliance on it would still be problematic. Reduced to bare essence, Gypsum focuses on mens rea, noting that centuries of Anglo-American legal tradition instruct that criminal liability ordinarily should be premised on malevolent intent, whereas civil liability, to which less stigma and milder consequences commonly attach, often requires a lesser showing of intent. There is simply no comparable tradition or rationale for drawing a criminal/civil distinction with regard to extraterritoriality, and neither NPI nor its amicus have alluded to any case which does so.

[4] Indeed, the Bowman Court stated that it regarded American Banana as an appropriate analogy because the antitrust statute "is criminal as well as civil." *260 U.S. at 98.* This seems to support the notion that the presumption is the same in both instances and leaves little room to argue that the Bowman Court was attempting to craft a special, more rigorous rule for criminal proceedings.

3. The Restatement. NPI and the district court both sing the praises of the Restatement (Third) of Foreign Relations Law (1987), claiming that it supports a distinction between civil and criminal cases on the issue of extraterritoriality. The passage to which they pin their hopes states:

> " In the case of regulatory statutes that may give rise to both civil and criminal liability, such as the United States antitrust and securities laws, the presence of substantial foreign elements will ordinarily weigh against application of criminal law. In such cases, legislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis of express statement or clear implication."

Id. at § 403 cmt. f. We believe that this statement merely reaffirms the classic presumption against extraterritoriality -- no more, no less. After all, nothing in the text of the Restatement proper contradicts the government's interpretation of Section One. See, e.g., id. at § 402(1)(c) (explaining that, subject only to a general requirement of reasonableness, a state has jurisdiction to proscribe "conduct outside its territory that has or is intended to have substantial effect within its territory"); [5] id. at § 415(2) ("Any agreement in restraint of United States trade that is made outside of the United States . . . [is] subject to the jurisdiction to prescribe of the United States, if a principal purpose of the conduct or agreement is to interfere with the commerce of the United States, and the agreement or conduct has some effect on that commerce."). What is more, other comments indicate that a country's decision to prosecute wholly foreign conduct is discretionary. See, e.g., id. at § 403 rep. n.8.

***

5. Comity. International comity is a doctrine that counsels voluntary forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law. Comity is more an aspiration than a fixed rule, more a matter of grace than a matter of obligation. In all events, its growth in the antitrust sphere has been stunted by Hartford Fire, in which the Court suggested that comity concerns would operate to defeat the exercise of jurisdiction only in those few cases in which the law of the foreign sovereign required a defendant to act in a manner incompatible with the Sherman Act or in which full compliance with both statutory schemes was impossible.

[5] We note in passing that, by their use of the disjunctive in this section, the drafters of the Restatement seem to suggest a more permissive standard then we, and other American courts, see, e.g., *Alcoa, 148 F.2d at 444,* would deem meet.

Accordingly, the Hartford Fire Court gave short shrift to the defendants' entreaty that the conduct leading to antitrust liability was perfectly legal in the United Kingdom.

In this case the defendant's comity-based argument is even more attenuated. The conduct with which NPI is charged is illegal under both Japanese and American laws, thereby alleviating any founded concern about NPI being whipsawed between separate sovereigns. And, moreover, to the extent that comity is informed by general principles of reasonableness, see Restatement (Third) of Foreign Relations Law § 403, the indictment lodged against NPI is well within the pale. In it, the government charges that the defendant orchestrated a conspiracy with the object of rigging prices in the United States. If the government can prove these charges, we see no tenable reason why principles of comity should shield NPI from prosecution. We live in an age of international commerce, where decisions reached in one corner of the world can reverberate around the globe in less time than it takes to tell the tale. Thus, a ruling in NPI's favor would create perverse incentives for those who would use nefarious means to influence markets in the United States, rewarding them for erecting as many territorial firewalls as possible between cause and effect.

We need go no further. Hartford Fire definitively establishes that Section One of the Sherman Act applies to wholly foreign conduct which has an intended and substantial effect in the United States. We are bound to accept that holding. Under settled principles of statutory construction, we also are bound to apply it by interpreting Section One the same way in a criminal case. The combined force of these commitments requires that we accept the government's cardinal argument, reverse the order of the district court, reinstate the indictment, and remand for further proceedings.

Reversed and remanded.

**NOTES**

**1.** Are the differences persuasive at all for not prosecuting criminally, a defendant who has never step foot in U.S. territory?

**2.** For a recent DOJ speech summarizing recent international cartel prosecutions, and cooperation of foreign governments regarding U.S. jail sentences to be served by foreign executives, see http://www.usdoj.gov/atr/public/speeches/214861.htm.

## PROBLEM 1

You represent a Swiss watch manufacturer ("Swatchco"). Swatchco is a member of the Swiss Watch Council, a Swiss trade association which consists of ninety percent of the watch industry in Switzerland. Because of the importance of the watch industry in Switzerland, an official of the Swiss government always attends the meetings of the Swiss Watch Council. At one meeting, the Swiss government official makes a presentation pointing out how excessive price competition has hurt the Swiss watch industry. The government official points out that as a result of this excessive price cutting several Swiss companies have gone out of businesses, others are barely profitable, and others have laid off a significant number of workers. The government official strongly encourages the Swiss Watch Council to adopt a minimum price list. The official passes out a draft price list which had been prepared by the Swiss Ministry of International Trade. All of these meetings take place in Geneva, Switzerland. All of the individuals are Swiss citizens.

At the next meeting, the government official asks that the Council vote on adopting the minimum price list. The Council votes overwhelmingly in favor of the minimum price list and requires all members to adhere to the new minimum prices for all sales. The members of the Council raise prices on average over 25% as a result of adhering to the new price list.

The price list is used for all watch sales by Council members including exports to the United States. Most of the Council members sell to the United States through export trading companies and other intermediaries. Like most of the Swiss watch makers, Swatchco has no offices or factories in the United States. Swatchco employees travel to the United States from time to time to meet with dealers and exhibit at trade fairs. Swatchco sells about 60% of its watches to the United States.

Swatchco and the other members of the Swiss Watch Council have been charged by the Justice Department with a criminal violation of Section 1 of the Sherman Act of the United States antitrust laws. Swatchco has also been sued by a group of United States watch dealers for a civil violation of Section 1 of the Sherman Act. The private suit seeks treble damages for the overcharges Swatchco has allegedly charged its American customers.

The defendants have filed a motion to dismiss the indictment and the private civil litigation alleging that the United States lack jurisdiction to prescribe (sometimes referred to subject matter jurisdiction) over the activities of the Swiss Watch Council and its members which took place outside of the United States. Your client wants to know the likely outcome of the motions and how the role of the Swiss government official may affect the court's decision. Your client also would like your advice on how to proceed in the litigation if the motions to dismiss are denied.