Erik Nerep

Extraterritorial Control of Competition under International Law

With Special Regard to US Antitrust Law

NORSTEDTS

Extraterritorial Control of Competition under International Law

With Special Regard to United States Antitrust Law

Doctoral Dissertation to be publicly examined in Room 4, Building B at the University of Stockholm, Frescati, on Thursday, June 2, 1983, at 10.00 a.m. for the Degree of Doctor of Laws

Akademisk avhandling som för avläggande av juris doktorsexamen vid Stockholms Universitet offentligen försvaras i hörsal 4, hus B, Frescati, torsdagen den 2 juni, 1983, kl. 10.00.

By

Erik Nerep

Jur. kand., University of Stockholm
Master of Comparative Jurisprudence,
New University School of Law

Juridiska Institutionen
106 91 Stockholm

Stockholm 1983
744 s. ISBN 91-1-8377102-7

Abstract

This study sets out to define the limits of jurisdiction under national and international law. The study is divided into two parts. In the first part, the author examines the jurisdictional limits under United States antitrust law and securities regulation from two different angles: jurisdiction over the person (personal jurisdiction) and jurisdiction over the subject matter. For the purposes of comparison, the author also gives a brief account of the jurisdictional rules of Common Market competition law and under the Swedish Competition Act. All through the first part of the book the author thoroughly analyzes the case law and the commentaries in the different fields pertaining there to.

Apart from a chapter on Conflict of Law aspects surrounding the concept of international antitrust law, the second part of the study is wholly devoted to the question of jurisdictional limits from an international law perspective. The author first discusses the general and classical international law problems, such as the relation between international and national law, the question of the exclusive domain of national law, lacuna in international law and the presumtion for or against the freedom of the states. In the following chapters, the author examines the concepts of Govereignty, independence, equality and fundamental rights and the understanding of these in international law. However, the author finds that these concepts do not contribute to the settlement of the question of jurisdictional limits under international law. In chapter XV and XVI, which can be characterized as the essence of the whole study, the author therefore proceeds in search of specific principles of international law delimiting national jurisdiction, particularly the extraterritorial enforcement and the intraterritorial exercise of jurisdiction with extraterritorial effects. The jurisdictional principles of international criminal law and the principle of non-internvention are analyzed, and the question is put whether they can be transferred to the field of international antitrust. The study ultimately leads to a weighing – of – interests standard, which is defined, refined and elaborated for the purposes of international antitrust law.

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PA Norstedt & Söners förlag
Stockholm

To my wife Wiweka

ISBN 91-1-8377102-7

Omslag: Rolf Hernegran
Studentlitteratur
Lund 1983

Preface

This work on the question of extraterritorial control of competition under international law constitutes my dissertation submitted for the doctoral degree in law at the University of Stockholm. For the accomplishment of the study I acknowledge my indebtness to all those who have come to my assistance both in Sweden and abroad.

My thanks go particularly to Professor Ulf Bernitz at the University of Stockholm, for his constructive and stimulating suggestions, attentive supervision and immeasurable encouragement throughout my research. I also wish to express my sincere gratitude and appreciation to Professor Jacob Sundberg, also at the University of Stockholm, for his inspiration, encouragement and advice in all matters pertaining to the work.

I further wish to acknowledge the generosity of the New York University School of Law, Institute of Comparative Law, where I had the opportunity to study in 1976—77; to the Max Planck Institut in Hamburg (also in Heidelberg and Munich) which has been my true center for studies during longer periods and the staff of which, scholars as well as librarians, always provided valuable assistance to me in connection with my work; to the Institute for Intellectual and Industrial Property and Market Law at the University of Stockholm (Institutet för immaterial- och marknadsrätt) under whose auspices many beneficial seminars and discussions have taken place; to the Institute for Public and International Law (Institutet för offentlig och internationell rätt) Stockholm, the library of which was generously placed at my disposal; to the Law Faculty of the University of Stockholm for the inspiring seminars under the leadership of Professor Jan Hellner and Professor Gustaf Lindencrona; and to the Emil Heijne Foundation, whose generous support has made the publishing of this book possible.

I also wish to express my sincere gratitude to my wife, Wiweka, whose assistance, encouragement, and tender care and support throughout my work, all while she was carrying out legal research in another area, enabled me to complete this study. I am also deeply indebted to Mrs Siv Warnling, my mother-in-law, for her invaluable help in the finalization of this work.

Since the English language is not my native tongue, a number of people have undertaken the task of correcting my English. I am grateful to them all.

Finally, I wish to inform the readers that this study has incorporated developments until October 1982.

Djursholm, April 1983
Erik Nerep

Contents

Part Two
THE INTERNATIONAL LAW PERSPECTIVE AND ASPECTS OF CONFLICT OF LAWS (Chap V—XVII)

Some abbreviations

ABA J. — American Bar Association Journal
Am. J. Comp. L. — American Journal of Comparative Law
Am. J. Int. L. — American Journal of International Law
Antitrust Bull. — Antitrust Bulletin
ArchVR — Archiv für Völkerrecht
AWD — Aussenwirtschaftsdienst des Betriebsberaters
BB — Der Betriebsberater
B. C. Int. & Comp. L. Rev. — Boston College International and Comparative Law Review
B. Y. Int. L. — British Yearbook of International Law
Calif. L. Rev. — California Law Review
Calif. Western L. Rev. — California Western Law Review
Can. B. Rev. — Canadian Bar Review
CCH — Commerce Clearing House
CCH Trade Cases — Commerce Clearing House, Trade Cases
CCH Trade Reg. Rep. — Commerce Clearing House, Trade Regulation Reporter
Cir. — United States Circuit Court of Appeals
C. M. L. Rev. — Common Market Law Review
Co. — Company
Colum. J. Transnat. L. — Columbia Journal of Transnational Law
Colum. L. Rev. — Columbia Law Review
Conn. L. Rev. — Connecticut Law Review
Cornell Int. L. J. — Cornell International Law Journal
Crim. L. J. — Criminal Law Journal
Crim. L. Q. — Criminal Law Quarterly
DB — Der Betrieb
D. C. — United States District Court
D. C. D. C. — United States District Court, District of Columbia
Dick. L. Rev. — Dickinson Law Review
D. Mass. — United States District Court, District of Massachusetts
D. N. J. — United States District Court, District of New Jersey
Doc. — Document
EFTA — European Free Trade Association

EuR — Europarecht
Fam. R. Z. — Zeitschrift für das gesamte Familienrecht
F. R. D. — Federal Rules Decisions
F. 2d. — Federal Reporter, Second Series, Cases Argued and Determined in the United States Court of Appeals for the District of Columbia, United States Court of Appeals and the United States Court of Customs and Patent Appeals, United States Emergency Court of Appeals
F. Supp. — Federal Supplement, Cases Argued and Determined in the United States District Courts and the United States Court of Claims
F. T. C. — Federal Trade Commission
Ga. J. Int. & Comp. L. — Georgia Journal of International & Comparative Law
Ga. L. Rev. — Georgia Law Review
GATT — General Agreement on Tariffs and Trade
GRUR — Gewerblicher Rechtsschutz und Urheberrecht
Harv. Int. L. J. — Harvard International Law Journal
Harv. L. Rev. — Harvard Law Review
I. C. J. — International Court of Justice
ILA — International Law Association
Ind. L. J. — Indiana Law Journal
Int. & Comp. L. Q. — International & Comparative Law Quarterly
Int. Law. — The International Lawyer
Int. Trade L. J. — International Trade Law Journal
J. Contemp. L. — Journal of Contemporary Law
J. Int. Law. & Econ. — Journal of International Law & Economics
Jurid. Rev. — Juridicial Review
Ky. L. J. — Kentucky Law Journal
L. & Contemp. Prob. — Law and Contemporary Problems
L. & Pol. Int. Bus. — Law and Policy in International Business
Mich. L. Rev. — Michigan Law Review
Mod. L. Rev. — Modern Law Review
N. C. J. Int. L. & Com. Reg. — North Carolina Journal of International Law and Commercial Regulation
N. C. L. Rev. — North Carolina Law Review
NJW — Neue Juristische Wochenschrift
Nord. Tids. I. R. — Nordisk Tidskrift för International Ret
Notre Dame Law. — Notre Dame Lawyer
Nw. J. Int. L. & Bus. — Northwestern Journal of International Law & Business
Nw. U. L. Rev. — Northwestern University Law Review

N. Y. L. S. L. Rev. — New York Law School Law Review
N. Y. U. J. Int. L. & Pol. — New York University Journal of International Law & Politics
N. Y. U. L. Rev. — New York University Law Review
OECD — Organization for Economic Co-operation and Development
Rab. Z. — Rabels Zeitschrift für ausländisches und internationales Privatrecht
Recueil des Cours — Académie de Droit International, Recueil des Cours
Schw. Jb. I. R. — Schweizerisches Jahrbuch für Internationales Recht
S. D. N. Y. — United States District Court, Southern District of New York
SJZ — Schweizerische Juristenzeitung
Stan. J. Int. L. — Stanford Journal of International Law
Stan. L. Rev. — Stanford Law Review
Sv. J. T. — Svensk Juristtidning
Tex. Int. L. J. — Texas International Law Journal
Tex. L. Rev. — Texas Law Review
U. N. T. S. — United Nations Treaty Series
U. Chi. L. Rev. — University of Chicago Law Review
U. Cin. L. Rev. — University of Cincinnati Law Review
U. Ill. L. Rev. — University of Illinois Law Review
U. Miami L. Rev. — University of Miami Law Review
U. Pa. L. Rev. — University of Pennsylvania Law Review
U. Pitt. L. Rev. — University of Pittsburgh Law Review
U. S. C. — United States Code
Va. J. Int. L. — Virginia Journal of International Law
Va. L. Rev. — Virginia Law Review
Vand. J. Transnat. L. — Vanderbilt Journal of Transnational Law
Vand. L. Rev. — Vanderbilt Law Review
Wash. L. Rev. — Washington Law Review
Wash. U. L. Q. — Washington University Law Quarterly
Wayne L. Rev. — Wayne Law Review
W. U. W. — Wirtschaft und Wettbewerb
Yale L. J. — Yale Law Journal
Z. a. ö. R. V. — Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZHR — Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht
Z. I. R. — Niemeyers Zeitschrift für Internationales Recht
ZSR — Zeitschrift für Schweizerisches Recht
Z. vgl. Rw. — Zeitschrift für vergleichende Rechtswissenschaft
Z. VölkR. — Zeitschrift für Völkerrecht

Introduction

Do the antitrust laws of the United States apply to anticompetitive practices carried out by non-Americans? Do they apply to anticompetitive practices carried out outside the United States? In what way is the applicability of the American antitrust laws limited as regards anticompetitive activities involving foreign elements? What restrictions are imposed by the legislator within the realm of the laws themselves? What restrictions are imposed by national (United States) law in general, particularly constitutional law? What restrictions are imposed by international law? In other words, what power (jurisdiction) is conferred upon national (municipal) courts to decide antitrust cases with foreign elements?

In 1945, the *Alcoa* case,[1] the *cause cèlébre* of the international antitrust law, was decided. One of the defendants in this United States case, a Canadian corporation, was found to have violated the American antitrust laws for anticompetitive contracts entered into abroad with a number of European enterprises. In construing the antitrust provision at issue, Judge Hand, speaking for the court, expounded:

"Did either [of] the agreement[s] ... violate § I 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'."[2]

The agreements, the court eventually concluded, were covered by the antitrust laws of the United States, because they were intended to, and did actually affect the foreign commerce of the United States.

In many respects the *Alcoa* case constituted the beginning of a new development, a new era, in international antitrust law. The case did not only become leading in American antitrust law, but it also, at least indirectly, served as model for other states. Moreover, the case has exerted a substan-

tial influence on other areas of law, particularly the United States securities legislation.

At the same time, however, it is evident that the case raised more questions than it answered. It gave rise to a lively international debate still in progress, and the words of Judge Hand just quoted became perhaps the most quoted in the literature of international antitrust law. The principal questions raised was: To what extent can an American court apply the antitrust laws of the United States to acts performed, contracts concluded or enterprises seated — wholly or partly — outside the United States? Which are the limits set by national (here: United States) law; which are the limits set by international law.

The present study is yet another contribution to the proceeding international discussion in this area. It is written primarily because the questions indicated, it is submitted, are still open. The main theme of this study can be summarized in one word: jurisdiction. "Jurisdiction" connotes power (or competence), the power of a court or any other state organ to act within a state, or the power of a state to act through its organs on the international arena. Since the power to act is believed to be governed by rules and principles of jurisdiction, the topic of this study is the *legal* power of states and state organs to act. Sought to be defined herein are thus the jurisdictional rules and principles of national and international law.

The subject-matter of this study is commonly referred to as the "extraterritorial application" of laws. In fact, the concept "extraterritorial application" is so frequently used in the literature of international antitrust law, that one may safely consider it as generally accepted. In the analysis that follows, however, the concept will be used only very rarely. This should not be understood as an attempt to discard the concept. The reason for the sparse use of the concept herein is, rather, that although the concept serves a function of a general indicator of a particular area of problems, it is of less or no value when attempting to give exact legal definitions; for the purposes of exact legal definitions the concept is much too vague. That laws are "extraterritorially applied" could either imply that the laws of state A are applied by the courts (or other authorities) of state B, within B, or that these laws are applied by the courts (or other authorities) of state A, within state B, or, finally that the same laws are applied by the courts (or other authorities) of state A, within A, but somehow affecting persons or property outside A.

Even if we choose the latter situation as a basis for the definition of the concept — and this is commonly done — we would still not know much about the meaning of the term "extraterritoriality". The best definition

that can be offered, it seems, is that laws are "extraterritorially applied" in the specific case when that case contains *foreign elements*. But then again, the concept "foreign elements" defies a general definition. All that can be supplied is examples: acts wholly or partly performed, contracts wholly or partly concluded, enterprises wholly or partly seated (or doing business), persons residing or domiciled, property wholly or partly situated, etc., *outside* the forum state. Still not defined would be the term "outside"; when is, for instance, an act performed outside the forum state.

The present study is composed of two parts. In the first part the jurisdictional rules and principles of national law origin are analyzed. The attempt is made to establish, as precisely as possible, the jurisdictional law as it is — that is, *de lege lata*. Analyzed are mainly the jurisdictional rules and principles in American antitrust law and securities regulation (Chap. I and II). The competition law of the Common Market (Chap. III) is examined primarily for the purposes of comparison. The short study of the new Swedish Competition Act should be regarded as an informative appendix. As the statutory provisions regulating jurisdiction, to the extent they exist at all, convey very little of substance, the analysis of the national rules and principles of jurisdiction rests basically on the court practice and the comments of the legal writers. Thus, an extensive study of the American case law in the antitrust field and in the field of securities regulation, supplemented by the views of the commentators (and, of course, the views of the present writer), is afforded in the first two chapters. Although the case law of the American antitrust law has been the subject of a number of prior studies, the extent of the present study is, it is belivied, still justified: As we shall see, the opinions as to how the case law should be interpreted diverge widely. The specific method of examination of the case law applied in the present study shall be discussed where relevant.

The question may rightly be asked, why this study does not include an analysis of the antitrust laws of other states with a view to establishing the jurisdictional rules stipulated in these laws. The choice not to extend the analysis this far has basically three grounds. First, the present study is not so much a comparative analysis of the jurisdictional rules of the antitrust laws of different states — a horizontal approach — as it is an analysis of the jurisdictional rules of one state under international law — a vertical approach. Secondly, the jurisdictional rules of the antitrust laws of the United States are, it is believed, together with those of the Common Market competition law, the most controversial, and probably still the only controversial, jurisdictional rules in the world today. The jurisdictional rules of the competition laws of West Germany,[3] although theoretically

far-reaching, have been applied only very rarely to foreign anticompetitive activities.[4] Moreover, the theoretical aspects of the West German jurisdictional rules have been extensively elaborated upon by such distinguished scholars as Schwartz and Rehbinder.[5] No other state has in practice claimed an application of its antitrust laws as wide as that of the United States.[6] Finally, a comparative analysis of the antitrust laws of the western world would lead this study too far astray, further than can be justified within the limits of a single book.

Thus, the main focus in part one of the present study is upon the antitrust laws of the United States and their substantive scope. It is also the "extraterritorial" application of the American antitrust laws that form the basis for the international law study in part two. The relatively extensive analysis of the "extraterritorial" application in the securities field has foremostly two purposes: 1) to further illuminate the jurisdictional rules and methodologies applied in American federal courts in general, as well as to other areas of law; 2) to display the influence that the jurisdictional doctrine in antitrust law has had in other areas.

The list of legal fields in which the problem of "extraterritorial" application has arisen — or may arise — could, of course, be prolonged; the problem of "extraterritorial" application is certainly not specific to antitrust law and securities regulation. However, legal research always implies a choice between, on the one hand, covering the broadest possible area in the horizontal sense and, on the other hand, analyzing a narrower area as thoroughly as possible. We have here preferred the latter way. Moreover, even though the problem of "extraterritorial" application is not specific to antitrust law and securities regulation, it is clear that the problem is particulary acute in these fields. And it is in these fields that the international discussion is centred. As many of the conclusions reached in the present study will have analogous applicability in other legal fields, a few examples of such fields will briefly be provided in this context: the export control laws, environmental law, labour law and laws against corrupt practices. Common to all of these laws, including antitrust law and securities regulation is the high degree of government involvement in a particular sector of life. They are regulatory (public) laws rather than private laws (although all law, at least to some extent, is government regulation).

In the summer of 1982, the extraterritorial application of the U.S. *export control laws* became the focal point of an international dispute. The dispute arose on June 22, 1982, when the U.S. Department of commerce, pursuant to Section 6 of the Export Administration Act,[7] amended Sections 376.12, 379.8 and 385.2 of the Export Administration Regulations.[8] The

amendments implied an extension of the U.S. controls on exports and re-exports of goods and technical data relating to oil and gas exploration, exploitation, transmission and refinement, and was particularly geared at obstructing the proceeding Soviet Union - European pipeline construction.[8a] The unilateral U.S. action provoked a vehement response from the European Community, a response submitted in a fourteen pages long note forwarded on August 12, 1982, by the representatives of the European Commission and of the presidency of the EC Council.[9] Requesting the American administration to withdraw its measures, the Community maintained that these measures seriously damaged Community interests and the business of European enterprises. In commenting upon the individual measures — the amendments to the U.S. Export Administration Regulations — the Community claimed that they were not only unlawful under international law because of their extraterritorial effects, but also that they ran cunter to criteria of the Export Administration Act and to certain principles of U.S. public law. Subsequently, whether as a result of the Community response or on other grounds, the U.S. Government chose to withdraw its measures to some extent.

The extraterritoriality of the U.S. *Foreign Corrupt Practices Act* of 1977[10] has also recently been subject to some discussion in the United States, especially its effect on U.S. foreign relations.[11] Although the Act seemingly does not extend to the conduct of foreign corporations and corporate officers,[11] the effective enforcement of the Act may necessitate investigations of the conduct of foreign government officials. A result of such investigations may be the disclosure of the foreign officials identity, if he is suspected of accepting bribes, the consequences of which may be far-reaching.[12]

Another controversial area is the applicability of U.S. *environmental laws,* particularly the National Environmental Policy Act (NEPA) of 1969,[13] and their applicability to foreign activities affecting the environment abroad and/or in the United States and to U.S. activities affecting the environment abroad.[14] Lively debated in the United States is furthermore the scope of the U.S. *labor laws,* especially the Labor Management Relations Act of 1947[15] and the power of National Labor Relations Board (NCRB).[16]

Part two of this study is an analysis of the existence and the contents of jurisdictional rules and principles in international law and the aspects of Conflict of Laws pertaining hereto. The point of departure is the complex set of questions: *Can* principles of international law binding on the states in their exercise of jurisdiction exist?; if so, *do* they exist; and, if so, what

exactly do these principles imply? These questions lead us to the very essence of international law, the most fundamental issues. Analyzed is the relation between national (municipal) law and international law (Chap. VII) the relation between national and international jurisdiction (Chap. VIII), the presence of lacunae in international law and the prohibition of *non liquet* (Chap. IX), the question whether there is a presumption for or against the freedom of the states in the absence of positives rules (Chap. X), and different facets of sovereignty (sovereignty and independence, sovereignty and equality, sovereignty and "fundamental" rights — Chap. XI—XIII). The principal query throughout this analysis of the basic concepts of international law, is whether these concepts convey anything with respect to limits on the exercise of state jurisdiction. The Conflict of Laws aspects are dealt with in Chap. VI.

In the following three chapters the limits of state jurisdiction are discussed more closely, particularly in Chap. XVI. This discussion is surrounded by both terminological and methodological studies. (Notes on general methodology are also supplied in Chap. V). The study concludes with an examination of national rules and principles of jurisdiction in light of the results of the analysis of international law and a survey of the international cooperation in this field.

The concept of international antitrust law, as employed throughout the present study, will be considered an equivalent of international criminal law, international administrative law, private international law, etc., all denoting that body of national law — principles and rules — in each respective field, that govern the applicability of substantive law (whether domestic or foreign). International antitrust law thus refers to the *national* jurisdictional principles and rules in the antitrust field (see further Chap. VI).

Notes, Introduction

[1] U.S. v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

[2] *Id.*, at 443.

[3] See Section 98:II of the West German Gesetz gegen Wettbewerbsbeschränkungen (GWB).

[4] But see the Morris Rothmans case, decided by the Bundeskartellamt (BKartA) on February 24, 1982 (B6-691100-U-49/81), reported in 6 Wirtschaft und Wettbewerb (WuW) 483 (1982), in which case a domestic (and simultaneously a foreign) merger was prohibited.

[5] See Schwartz, I.E, Deutsches internationales Kartellrecht (Köln-Berlin-Bonn-München, 1962); Rehbinder, E., Extraterritoriale Wirkungen des Deutschen Kartellrechts (Baden-Baden, 1965) and Rehbinder in: Immenga/Mestmäcker, Kommentar zum GWB, at 1870—1948. Also see Stockman, K. and Strauch, V., World Law of Competition, West Germany, Unit B, Vol. 5 (edited by v. Kalinowski, Matthew Bender, New York, 1981).

[6] As regards the substantive scope of the French law, see e.g. Plaisant, R., World Law of Competition, France, Unit B, Vol. 3, Pt. 4, § 2.06 [2] [a]—[3] [a] (edited by von Kalinowski, Matthew Bender, New York, 1981); OECD, Guide to legislation on Restictive Business Practices, Vol. 3 (France 1.0). As regards Great Britain, see e.g. Korah, V., Competition Law of Britain and the Common Market (London, 1975); Wilberforce, R. O., Campbell, A. and Elles, N., The Law of Restrictive Trade Practices and Monopolies (2nd ed., London, 1966, Supplements including 1969 and 1973); OECD, Guide to Legislation on Restictive Business Practices (United Kingdom 1.); Lever, The Extraterritorial Jurisdiction of the Restictive Practices Court, Int. & Comp. L. Q. (1963, Suppl.) p. 117.; Barack, at 321 ff.; Barounos, D. and Allan, W., World Law of Competition, United Kingdom, Unit B, Vol. 4 (edited by von Kalinowski, Matthew Bender, New York, 1981). As regards the Netherlands, see e.g. Ham, A. D., World Law of Competition, the Netherlands, Unit B, Vol. 3, Pt. 7, § 1.03 (edited by von Kalinowski, Matthew Bender, New York, 1981); OECD, Guide to Legislation on Restrictive Business Practices, Vol. 5 (the Netherlands 1.0); Barack 318 ff. As regards other states, such as Belgium, Denmark, Switzerland, Italy, see further in World Law of Competition, *supra,* Unit B, Volumes 3—6 and in the OECD Guide, *supra.*

[7] See the Export Administration Amendments of 1977, Pub. L. No. 95—52, 91 Stat. 235 (1977) amending the Export Administration Act of 1969, 50 U.S.C. app. § 2401, *et seq* (1970) (amended 1974).

[8] 43 Fed. Reg. 3508 ff. (1978). For a general overview, see further, e.g., Wayne, R. S., Extraterritorial Application of the Export Administration Amendments of 1977, 8 Ga. J. Int. & Comp. L. 741 (1978); Skol, A. G. and Peterson, C. H., Export Control Laws and Multinational Enterprises, 11 Int. Law. 29 (1977); Johnstone, J. M. and Paugh J., The Arab Boycott of Israel: The Role of United States Antitrust Laws in the wake of the Export Administration Amendments of 1977, 8 Ga. J. Int. & Comp. L. 661 (1978); Craig, Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections on Fruehauf v. Massardy, 83 Harv. L. Rev. 579 (1970).

[8a] Summarized, the amendments provided as follows:

1) Machinery for the exploration, production, transmission or refinement of oil and natural gas, or components thereof, may not, insofar as the machinery or components are of U.S. origin, be re-exported by persons in a third country without permission of the U.S. Government.

2) Any person subject to the jurisdiction of the United States — *i.e.,* either citizen or resident of, actually staying within, organized under the laws of, or owned or controlled by persons within the United States — is required to obtain prior written authorization by the Office of Export Administration for exports or re-exports to the U.S.S.R. of non-U.S. goods and technical data related to oil and gas exploration, production, transmission and refinement.

3) No person in the U.S. or in a foreign country may export or re-export to the U.S.S.R. foreign products directly derived from U.S. technical data (a broadly defined concept) relating to machinery, or components thereof, utilized for the exploration, production, transmission and refinement of petroleum or natural gas or commodities produced in plants based on such U.S. technical data, if (a) a written assurance was required under the U.S. export regulations when the data were exported; or if (b) any person subject to the jurisdiction of the United States — as defined under 2) *supra* — receives royalties or other compensation for, or has licensed, the use of the technical data concerned, regardless of when the data were exported from the U.S.; or if (c) the recipient of the U.S. technical data has agreed to abide by U.S. control regulations.

[9] See Europe Agence Internationale D'Information Pour La Presse, Europe Documents N. 1216, August 12, 1982 (Luxembourg-Bruxelles).

[10] Pub. L. No. 95—213, 91 Stat. 1494 (1977), 15 U.S.C. §§ 78 m, 78 dd, 78 ff.

[11] The Foreign Corrupt Practices Act applies only to domestic concerns defined as: "any individual who is a citizen, national, or resident of the United States; or ... any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which *has its principal place of business in the United States, or which is organized under the laws of a state of the United States or a territory, possession, or commonwealth of the United States*". (15 U.S.C.A. § 78 dd — 2(d) (1) West Supp. 1979, emphasis added).

[12] See further generally, e.g., Lashbrooke Jr., E. C., The Foreign Corrupt Practices Act of 1977: A Unilateral Solution to an International Problem, 12 Cornell Int. L. J. 227 (1979); Note, Prohibiting Foreign Bribes: Criminal Sanctions for Corporate Payments Abroad, 10 Cornell Int. L. J. 231 (1977); Note, Accounting for Corporate Misconduct Abroad: The Foreign Corrupt Practices Act of 1977, 12 Cornell Int. L. J. 293 (1979); Foreign and Corporate Bribes: Hearing Before the Senate Committee on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. 6 (1976). Also see McLaughlin, G. T., The Criminalization of Questionable Foreign Payments by Corporations: A Comparative Legal Systems Analysis, 46 Fordham L. Rev. 1071—1114 (1977—78); Hibey, R. A., Application of the Mail and Wire Fraud Statutes to International Bribery: Questionable Prosecutions of Questionable Payments, 9 Ga. J. Int. & Comp. L. 49 (1979); McManis, C. R., Questionable Corporate Payments Abroad: An Antitrust Approach, 86 Yale L. J. 215 (1976); Rill, J. F. and Frank, R. L., Antitrust Consequences of United States Corporate Payments to Foreign Officials: Applicability of Section 2 (c) of the Robinson-Patman Act and Sections 1 and 2 of the Sherman Act, 30 Vand. L. Rev. 131 (1977).

[13] 42 U.S.C. §§ 4321—4347 (1970).

[14] See further, e.g., Almond, H. H., The Extraterritorial Reach of United States Regulatory Authority over the Environmental Impacts of Its Activities, 44 Albany L. Rev. 739—779 (1980); Galton, J., The Scope of the National Environmental Policy Act: Should the 102 (2) (c) Impact Statement Provision be Applicable to a Federal Agency's Activities Having Environmental Consequences Within Another Sovereign's Jurisdiction? 5 Syr. J. Int. L. & Com. 317 (1978); Brennan, D. C., Extraterritorial Application of Federal Wildlife Statutes: A New Rule of Interpretation, 12 Cornell Int. L. J. 143 (1979); Note, Environmental Restrictions: Extraterritorial Reach of United States Environmental Quality Standards, 22 Harv. Int. L. J. 676 (1981); Note, "NEPA-Abroad" Controversy: Unresolved by an Executive Order, 30 Buffalo L. Rev. 611 (1981). Also see United States v. Mitchell, 553 F. 2d 996 (1977), where the applicability of the Marine Mammal Protection Act of 1972 (16 U.S.C.A. § 1361 *et seq*) was at issue. For a general survey in an international context, see OECD, Legal Aspects of Transfrontier Pollution (Paris, 1977).

[15] 29 U.S.C. §§ 141—188 (1970).

[16] See generally, e.g., Nothstein, G. Z. and Ayres, J. P., The Multinational Corporation and the Extraterritorial Application of the Labor Management Relations Act, 10 Cornell Int. L. J. 1 (1976); Goldberg, Labor Relations and Labor Standards for Employees of United States Enterprises Working in Foreign Areas, 48 N. D. L. Rev. 23 (1971); Carter, D. T., NLRB Jurisdiction over Foreign Governments, 11 Vand. J. Transnat. L. 483 (1978). Also see Lauritzen v. Larsen, 345 U.S. 571 (1953), where the applicability of the Jones Act (46 U.S.C. § 688 (1970)) was questioned.

There are, of course, other areas, such as trademark law (see Steele v. Bulova Watch Co.,

344 U.S. 280 (1952)), tax law, etc., in which issues of extraterritorial application may be raised, Borton, R. C. and Goss, J. M., Control of Multinational Corporations' Foreign Activities, 15 Washburn, L. J. 435 (1976). However, the few indications supplied here will suffice. As regards the applicability of U.S. criminal law in general, see e.g. Epstein, H. S., The Extraterritorial Reach of the Proposed Criminal Justice Reform Act of 1975 — S. 1., 4 Am. J. Crim. Law 275 (1975—76); Empson, The Application of Criminal Law to Acts Committed Outside the Jurisdiction, 6 Am. Crim. L. Q. 32 (1967); Feinberg, K. R., Extraterritorial Jurisdiction and the Proposed Federal Criminal Code, 72 J. Crim. L. & Criminology 385 (1981); Hirst, M., Criminal Law Abroad, 1982 Crim. L. Rev. 496 (1982); Womack, M., Extraterritorial Jurisdiction — Mere Intent to violate Criminal Statute Is Sufficient to Maintain Jurisdiction Under the Objective Territorial Principle, *United States v. Baker,* 609 F. 2d. 134 (5th Cir. 1980); *United States v. Arra,* 630 F. 2d. 836 (Ist Cir. 1980); *United States v. Mann,* 615 F. 2d. 668 (5th Cir. 1980), 16 Tex. Int. L. J. 149 (1981). Also see *United States v. Field,* 532 F. 2d. 404 (1976).

Another interesting field is, finally, the problem of national regulation or control of foreign "ultra-hazardous activity", particularly foreign atomic power stations close to the national border, see e.g. Randelzhofer, A. and Simma, B., Das Kernkraftwerk an der Grenze. Eine "ultra- hazardous activity" im Schnittpunkt von internationalen Nachbarrecht und Umweltschutz, in: Festschrift für Friedrich Berber zum 75. Geburtstag, at 389 (München, 1973).

Part one

Jurisdiction from the national law perspective

Chapter I.
United States—Antitrust law

1. Introduction

When a United States federal court[1] is called upon to settle a dispute of an antitrust nature, regardless of whether the plaintiff is the Antitrust Division, the Federal Trade Commission or a private company, the concern of the court is not just to decide the substantive issues, *i.e.*, what antitrust regulation is the defendant violating, if any, how shall we remedy it, etc.? In an early[2] phase of the proceedings, the courts inquiries must, in addition to this, be concentrated on the jurisdictional questions. The inquiry is whether the court *may* take the case,[3] and more specifically, 1) whether the court has jurisdiction (competence) to act in the particular type of case and, 2) whether it has jurisdiction having regard to the particular persons appearing therein. These two jurisdictional issues will here, as frequently elsewhere,[4] be designated as subject matter jurisdiction and personal jurisdiction.[5] They are matters of law. This means that a decision to adjudicate the case must be based on a juxtaposition of the particulars of the case with the requisites of the common law rule or the statute that confers the jurisdictional power upon the courts.

Constitutional requirements form the ultimate barrier. *Personal jurisdiction*, for one, cannot be established without attention being paid to the due process prerequisites of the Fifth Amendment.[6] These are, in essence, complied with if (1) there is some acceptable or adequate basis for jurisdiction over the person or persons involved in the proceedings, *i.e.*, some constitutionally sufficient relationship or contact existing between the state or the country of the forum (in our case United States territory) and the defendant party, and (2) if process is served in accordance with a valid statute which affords the parties to the action reasonable (if not actual) notice of the proceedings and a fair opportunity to be heard therein.[7]

One should bear in mind, though, that these requirements merely set the minimum standard.[8] While a statute cannot transgress these limits, it does not have to got that far. A statute can thus be more restrictive than the Constitution.[9]

As regards *subject matter jurisdiction*, the constitutional requirements are much more general and at the same time more indefinite. *Primarily*, subject matter jurisdiction is a question of statutory law, *i.e.*, whether the legislator has empowered the court to hear and determine the particular issue of the suit. Now and then, however, due to statutory vagueness or factual uniqueness, the court has to penetrate the legislator's intent more extensively than would normally be done. The constitutional norms will no doubt serve as guidelines in this regard, with the probable result that an intention to violate the Constitution will not readily be established.[10]

Personal jurisdiction and subject matter jurisdiction will next be outlined below, separately and in the now given order, not because these issues are so treated in the courts — they probably are not — but by reason of the pedagogical benefits to be gained thereby.[11]

2. Personal jurisdiction (over foreign and alien corporations)[12]

2.1 Some significant domestic developments — Individuals

In order to acquire personal jurisdiction over an individual in civil as well as in criminal cases, a state court — at the time immediately preceding *Pennoyer v. Neff*[13] and the years thereafter[14] — principally had to rely on a *de facto* power over the person. Originally this power was tantamount to physical power by arrest. The defendant had to be brought before the court. Only individuals within the territorial jurisdiction of the court, *i.e.*, within the forum state, were subject to arrest. The sovereignty of sister states had to be respected.

While this is still essentially the rule as far as criminal proceedings are concerned, personal jurisdiction on civil cases has, as we shall see, moved far away from this starting point.[15] A characteristic, if not singular, feature of United States Conflict of Laws — distinguishing it from the law in civil law countries — was then and still is, though, that personal jurisdiction, as a rule, can be obtained without any connection with the facts of the case for which jurisdiction is sought. Quite another matter is that the recent growth of the law of personal jurisdiction, in practice, has brought the criteria for personal jurisdiction and underlying facts of the specific case to-

wards a common ground; this seems to be more an effect of the general trend of increasing interrelationship and interdependence than of conscious adjustment whether towards the principle in the civil law countries or some inherent need. The fact is that personal jurisdiction still *can* be established on the basis of the old rules (general jurisdiction) as well as those of the modern age (specific jurisdiction). The old and the new complement each other.

The first significant development denoted that the *capias ad respondendum* was supplemented by a symbolic arrest; a personal service of summons. According to this rule, the person served still had to be present within the territory of the forum state at the time of service. This fulfilled two functions: to give proper notice and to give the forum court international (interstate) jurisdiction. The rationale of *Pennoyer v. Neff*[17] — summarized — rested on these basic notions. That case held, furthermore, that *intra*state personal service was the *only* constitutionally valid method to procure personal jurisdiction.[18] Out of this basic principle numerous exceptions have grown since then, all in an expanding direction,[19] so many that the rule tends to become the exception.

Modern law recognizes, for instance, that service of process on an agent appointed to receive such service, either in general or for the sake of specific litigation[20] (what still amounts to personal service),[21] irrespective of the whereabouts of the defendant-principal, is in conformity with the Constitution, as is service of process outside the forum state on a domiciliary (or resident) of the forum state,[22] service of process outside the United States to U.S. citizens (where a suit, based on a federal statute, is brought)[23] and service of process outside the forum state in combination with the person's (who has been served) voluntary appearance — in person or through an authorized attorney[24] — or in combination with actual or implied consent,[25] all provided, of course, that the service of process is carried out in accordance with a statute and that this statute does not conflict with the Constitution.[26]

2.2 Foreign corporations

The law of personal jurisdiction over corporations follows the same principal line of development as that concerning individuals. Any differences in this respect — basically practical — are due to the peculiar legal structure of corporations and their fictitious nature. Constitutionally, the due process requirements (as those of the equal protection) apply indiscriminately. A corporation was traditionally regarded to be "present" *only* in the state

of its creation.[27] Process was to be served on the principal officer of the corporation.[28] Statutes enacted in every state — the fact that there is a statute is also a constitutional prerequisite[29] — provide for new forms of process-serving. The statutory designation of Secretary of State as agent for service of process is typical.[30] Another form is the naming of certain officers or responsible agents as amenable to service, or a combination of these methods.

To secure personal jurisdiction over *foreign* corporations, numerous legal constructions were practised from time to time. One of these rested on the notion that a state does not have a duty to accept a foreign corporation, as a business-making entity within the state's borders.[31] Therefore, as consideration for such acceptance, a state could require a corporation about to enter into business relations across the state borders, to submit to certain efficient modes of service of process. Thereby, the corporation was held to have consented to jurisdiction.[32]

In other cases, again, foreign corporations were deemed subject to the jurisdiction of the forum court on the ground that they had "impliedly consented" to it by voluntary business engagements within the forum state.[33] The "consent" and "implied consent" theories were, however, limited in one important respect. They did not apply to causes of action unrelated to business actually executed.[34] To overcome this, the next constructive device in the development was therefore to deem a foreign corporation "present", not only — as earlier — in its domestic state, but also in every state where the corporation conducted regular business operations for a considerable period of time; where it was "doing business". This theory of "presence" enabled the courts to acquire jurisdiction over foreign corporations (as over natural persons) in any cause of action.[35] But there was, as we shall see, more to come.

2.3 The doctrine of "minimum contacts"

The modern law of personal jurisdiction has extracted its principal impetus from the *International Shoe* case, decided in 1945.[36] Here the State of Washington brought a tax suit in Washington against the International Shoe Co., a Delawere corporation. Personal jurisdiction was upheld even though the defendant's contacts with the forum state were restricted to its maintenance of a line of salesmen in Washington, who were only authorized to solicit orders. Affirming the decision of the Washington courts, the U.S. Supreme Court threw the old "presence" and "consent" fictions overboard and moulded the theory of "minimum contacts". To subject a

foreign corporation to a judgment *in personam,* all that due process requires is that the corporation "have certain minimum contacts with the [forum] state — such that maintenance of the suit does not offend traditional standards of fair play and substantial justice".[37] (The preponderance of the authorities today agree that the rationale of International Shoe is equally applicable to individuals and partnerships).[38] While earlier cases generally laid the major stress on business quantity concepts, *International Shoe* implied more of a qualitative test, including not only a contact inquiry but also, for instance, an estimation of the inconveniences for the defendant in having to appear in the forum court, the hardships on the plaintiff if obliged to litigate elsewhere and the interest of the forum state in, *e.g.*, regulating the activities involved and in an efficient judicial administration. It is not a question of finding the most *appropriate* court, it is whether suit in one state or the other is so unfair to either party as to amount to a *denial of due process.*[39]

What exactly amounts to sufficient minimum contacts was, however, not made evident and, as a consequence, the requisite contacts today vary from state to state, from statute to statute, from lawsuit to lawsuit and from purpose to purpose. Each case requires consideration of the quality and nature of the contacts between the defendant and the forum. *International Shoe* did not formulate a precise test, it just altered and broadened the basic criteria for personal jurisdiction, and it supplied instruments for future development of workable law in this field. The constitutional limitations were somewhat relaxed and states were afforded the power to enact statutes within the newly set limits.

Earlier fictions, such as those of "presence" and "consent", which revealed little or nothing of the underlying notions of the due process clause, were thus replaced by guidelines of more tangible but at the same time more pliable substance, such as "fairness" and "reasonableness". This alteration did not, however, necessarily call for statutory modifications. The state laws applied thus far were within the constitutional standards by a broad margin.[40] Whether or not to expand state jurisdiction to the extent possible under the *International Shoe* mandate is for each state's legislature to decide (not for the state courts). Many have chosen to do so, others have not.

While state laws thus vary, common denominators are easily discovered. One is that the law of personal jurisdiction moves along two supplementary lines, the dividing element being the relation between the activities carried out by the foreign corporation in the forum state, on the one hand, and the plaintiff's cause of action, on the other. Where a foreign corporation has

conducted business, not occasionally or casually, but with a fair measure of permanence and continuity in the forum state, a plaintiff's cause of action does not have to relate to these transactions (general jurisdiction).[41] On the other hand, where such a relation *can* be found, a single activity attributable to the foreign corporation may suffice,[42] provided that the act is purposefully initiated (specific jurisdiction). Such isolated activities, capable of tying the foreign corporation to the forum state and producing liability, are today defined in greater detail in so-called long-arm statutes. The typical "long-arm statute" confers personal jurisdiction over any non-domiciliary who, *e.g.*, transacts *any* business, commits a tortious act or owns property situated within the forum state in case where the cause of action arises from these acts or circumstances.[43] The conclusion of a single contract (in extreme cases even a bid by telephone) will normally amount to transaction of any business.[44] An injury or effect caused within the forum state by a tortious act committed outside the forum state — where the injury was intended or should have been foreseen — is sufficient to vest personal jurisdiction over the tortfeasor.[45] Some statutes provide personal jurisdiction over any non-resident who causes an "event to occur" within the forum state and that event is the subject of the complaint.[46]

2.4 Actual notice and fair opportunity to be heard

In addition to minimum contacts, due process requires that the defendant is actually notified of the lawsuit filed against him and that he is afforded a fair opprtunity to appear in court and defend himself. At the time when personal service of process (on the defendant while present in the state) was the exclusive mode of obtaining jurisdiction *in personam*, the actual notice requirement did not raise independent problems. The breakthrough of the doctrine of minimum contacts altered this situation radically. Constitutionally it is today immaterial whether the defendant receives notice while present in the forum of state or outside that state,[47] provided, of course, that there are sufficient (minimum) contacts. It is essential, however, that notification is conveyed in accordance with a valid statute (whether state or federal) which in itself is based on the necessary constitutional prerequisites. Therefore, no actual notice is effective without a state authorizing it. On the other hand, service that, in a specific case, does not give actual notice to the defendant, is not necessarily ineffective, provided a constitutionally unobjectionable statute is complied with.[48]

The methods employed for notice of proceedings may vary. Apart from personal service, pleadings may be mailed to the defendant or delivered to

him personally wherever he is residing. The defendant may also be notified through publications in newspapers or through posters in a public place or service on a agent appointed by him (substituted or constructive service). It is not, however, constitutionaly sufficient to, for instance, publish a notice in a local newspaper, where another, more efficient mode is aviable. This was made clear in *Mullane v. Central Hanover Bank & Trust Co.*,[49] where the Supreme Court laid down the following yardstick: The type of service chosen must be the one that is "most reasonably calculated" to give the defendant the requisite notice and a fair oppurtunity to appear.[50] As to a foreign corporation, service on an authorized agent or on a highly ranked corporate officer is, if practically possible, "more reasonably calculated" than service by mail. But it is probably never sufficient to serve some minor employee or independent intermediary.[51]

2.5 Alien corporations

The degree of conformity to the constitutional standards as expressed in the due process clause and specified in case law is, to a great extent, a question of expectance: Will the courts in sister states or foreign countries give full faith and credit to what has been decided? Will they recognize the decision? While courts in sister states are under a constitutional obligation to recognize constitutionally irreproachable court decrees, foreign courts have no *such* constitutional duty. But whatever the constitutional restraints imply, and whatever attention foreign courts will pay to these, recognition of U.S. court decisions by foreign courts is still dependent on limits imposed on the law of personal jurisdiction by international law.[53] (Issues now referred to, *i.e.*, recognition, international law, etc., will, as noted in the introduction, not be subject to scrutiny in this context; it is vital, however, to point out their interrelations).

There is but little reason to believe that the jurisdictional rules just described apply differently with respect to alien corporations. Likewise, the principles no doubt have equal relevance in federal courts as in state courts. Not only do a few of the cases already referred to[54] bear witness to this, but other cases mentioned below will also show the same.[55] Furthermore, the Restatement (2d) of the Conflict of Laws, although not unequivocally, seems to point in this direction (§ 47). The solution to the question of relevance of the *International Shoe* doctrine of minimum contacts lies primarily embedded in the doctrine itself. "Fairness", "reasonableness", "substantial justice", etc. are requisites of an elastic and non-mechanical nature.[56] If any conclusion of fairness, etc., is to be based on a balancing of

interests test (*e.g.*, estimation of the inconvenience for the defendant *and* the plaintiff is interest in the forum), then the fact that the defendant is an alien who has its place of business in another country, possibly with a different type of legal system, cannot be left out of consideration. What is sufficient "minimum contacts" for a corporation situated in one of the sister states, can obviously not suffice for an alien corporation. Something more has to be added, which pays regard to its alien character.[57] Whether this proposition corresponds to reality, remains to be seen in what follows (at least as far as antitrust case law is concerned).

2.6 Personal jurisdiction and antitrust law

Courts, in antitrust cases,[58] are guided by the same principles with regard to personal jurisdiction as are courts in general. As elsewhere, personal jurisdiction can be obtained only if there is a constitutional basis for it and if process has been fairly served. The courts' first task is to interpret and apply the statutes that provide for personal jurisdiction. These, in turn, have to meet the constitutional standards of "fair play and substantial justice".

The relevant provisions regarding personal jurisdiction in the antitrust laws are somewhat singulary moulded. On the one hand, there are certain venue provisions,[59] and, on the other, there are provisions relating to service of process. As to venue, Section 12 of the Clayton Act provides that an antitrust suit may be brought either in the judicial district where the defendant corporation is an "inhabitant" *or* where it may be "found" *or* where it "transacts business".[60] In addition, civil suits (actions for treble damages) can be brought in the district "in which the defendant resides or is found or has an agent".[61] When the defendant is an *alien* corporation, however, these provisions are *superseded* by Section 1391(d) of the Judicial Code, enacted in 1948, which provides that "An alien may be sued in any district".[62] There is thus no venue requirement at all as to antitrust suits against alien corporations. Suit can be brought in any federal court of the United States. Consequently, the venue provisions have no relevance when determining issues concerning personal jurisdiction over alien corporations.[63] For this reason, the burden of fulfilling the due process requisites lies solely on the service of process stipulations. These are:

(1) Section 12 of Clayton Act, which provides that all process in antitrust cases may be served in the district in which the defendant corporation is an "inhabitant", or wherever it may be "found".[64]

(2) Rules 4(e) and (i) of the Federal Rules of Civil Procedure which authorize service upon parties in *civil* actions[65] in the manner provided by state

law or rule of court and in the case of foreign (or alien) defendants in the form prescribed by or acceptable to the foreign state (or country) in question.[66]

The two provisions which apply for all antitrust purposes are supplementary in civil actions, while in criminal actions only the former applies. While the former provision affords general jurisdiction, the latter only constitutes a basis for specific jurisdiction.

2.6.1 Clayton Act Section 12 — General jurisdiction

The acquisition of personal jurisdiction in consonance with Section 12 of the Clayton Act is thus effective for all causes of action under antitrust law, *i.e.,* even for unconnected claims. In other words, if a corporation is either an "inhabitant" or "found" somewhere in the United States, it can be sued for any antitrust claim whether related or unrelated to the corporation's activities in the United States.

Alien corporations cannot be "inhabitants" of the United States by definition. This goes without saying. Whether they can be "found" there depends, of course, on how this relatively diffuse concept is to be interpreted.

At the time when Section 12 of the Clayton Act was enacted — in 1914 — it superseded Section 7 of the Sherman Act. That section, however, was similarly phrased. The crucial words were "resides or is found". Section 12 of the Clayton Act implied no significant statutory change with regard to aliens. They still had to be "found" for service of process purposes.[67]

The "found"requisite was carefully expounded in *People's Tobacco Co. v. American Tobacco Co.*[68] To be found, the court explained, the corporation must have been doing business within the forum state of such magnitude that it has "subjected itself to the local jurisdiction".[69] Moreover, "found", the court held, is in effect to be equated with "presence" or "doing business" by authorized agents. The defendant was therefore not "found" in this meaning, though it continued to advertise its goods, to make interstate sales to jobbers, to send people to solicit orders and to own stock in subsidiaries within the forum state. Thus, it seems that "found" was interpreted to imply the doing of business of a substantial and continuous character,[70] tantamount to the old fiction of "presence".

Doing business is, although in a sligthly relaxed design, still the prerequisite that determines personal jurisdiction over alien corporations. What then constitutes "doing business"? First, doing business must be distinguished from "transacting business", a requisite added to the venue provisions mentioned *supra.*[71] "Found" or "doing business" does not equal"transacting business"; it is not, what "transacting business" has

been held to be,[72] the "practical everyday business or ... carrying in business 'of any substantial character' ". Doing business is not business transactions of a sporadic and isolated nature. It presupposes something much more, something of permanence, continuity and systematization.[73] In *U.S. v. DeBeers Consolidated Mines Ltd.*,[74] extensive advertising, publicity campaigns, bank accounts, occasional visits by company representatives, sporadic sales and consultant contacts — all within the United States — were not held to constitute "doing business" or "being found".[75] But in *U.S. v. Aluminum Co. of America*,[76] a Canadian corporation ("Limited"), which maintained offices in New York with a large staff performing executive and administrative functions (*e.g.*, operating Limited's New York bank accounts), was "found" in New York after process being served upon Limited's president at one of these offices. In *U.S. v. Scophony Corp. of America*[77], again, a British corporation (Scophony) was "found" in the United States, partly because of the fact that it kept U.S. agents one of which had an unlimited and irrevocable power of attorney with regard to all of Scophony's interests in the United States.[78]

The evaluation of Scophony's business operations in the United States rested, however, on a broader reasoning, as we shall see forthwith.

2.6.2 The theory of enterprise entity

The theory of enterprise entity is rooted in the idea that what in fact is one, shall be treated so, even though legal forms indicate otherwise, that form shall not overshadow actualities.[79] An *alien parent* corporation that has *subsidiaries* in the United States is, therefore, deemed to be present (or found) in the United States if the latter in fact can be identified with the former. Legal separation will be recognized only where there is an actual separation. The mere fact that a subsidiary exists does not unify the corporations in this respect.

Determination of corporate status as united or separated may necessitate an exhaustive examination of the entire parent-subsidiary interrelationship. Indicative factors in such an examination may be: the amount of ownership of the subsidiary, the existence of interlocking directorates between the parent and the subsidiary, the subsidiary's degree of freedom to act on its own, the intermingling of affairs regarding accounts, taxes, etc., between the two, the ultimate responsibility for the subsidiary's operations, the amount of instructions that pass between the entities and to what extent these are attended to, the degree of capitalization of the subsidiary, and so forth.[80]

In cases where the subsidiary has no independent existence, where the parent is so directly and intimately connected with the affairs of its subsidiary, where the parent in fact does extensive business through the subsidiary, the parent and its subsidiary will be treated as a single entity and personal jurisdiction over the alien parent is to be sustained.

Conversely, where corporate activities and responsibilities are separately maintained, where the respect of independence is mutual and where directives in fact are only advice, courts will respect the legal separation.

An appraisal of the parent-subsidiary relations may even, in exceptional cases, lead to the conclusion that an *alien subsidiary*, which has an *American parent*, is "found" in the United States. (This is exemplified below).

In *U.S. v. Scophony Corp. of America*,[81] jurisdicton over the British parent (Scophony) was obtained through its U.S. agents and through its American subsidiary. The partly owned subsidiary was constructed originally to sell and manufacture television equipment and similar products and later to license and exploit patents related to such products, patents transferred from the parent to the subsidiary. By appointing the president and other officers in decisive positions in the subsidiary, partly through its own representatives, the British parent managed to control and supervise the subsidiary's business, beyond the normal exercise of a shareholder's rights. The subsidiary was found to be a mere instrument of the parent, employed to carry out the parent's business intentions in the United States.

U.S. v. United States Alkali Export Ass'n, Inc.[82] presented similar facts. Employees of the British parent held positions as officers in the American subsidiary and not only directed the subsidiary's operations, but also those of some other, South American, corporations. Moreover, an agreement between the parent and the subsidiary, as indicated by their mutual correspondence, supported the court's conclusion that the subsidiary had no other function than to conduct the parent's business in the United States.

Two Swiss organizations (here: FH and Ebauches), which were defendants in *U.S. v. The Watchmakers of Switzerland Information Center*,[83] were likewise amalgamated with their joint New York subsidiary. The latter's principal object was, *inter alia*, to advance the interests of its parents by performing advertising and promotional work in the United States and by functioning as an information center. The subsidiary's manager, a former employee of one of the parents, submitted a corporate budget every year for joint approval of FH and Ebauches. After a "realistic appraisal of the overall business" — through their subsidiary[84] — of the Swiss organizations, these were "found" in New York. The subsidiary, the court reasoned, had no independent business of its own. It was a mere adjunct of

its parents and its activities were regarded as theirs.[85]

As mentioned earlier, the theory of enterprise entity can also work the other way around. *Alien subsidiaries* can be subjected to U.S. jurisdiction *through the medium of their American parents*. This occured in the *Swiss Watch case* just referred to.[86] Two Swiss subsidiaries, each wholly owned by American parents, were both "found" in the United States (New York) for jurisdictional purposes. This was not because of the parents' power to regulate the subsidiaries' business, but to the contrary, because of the subsidiaries' power to bind the parents in one specific respect: the parents had voluntarily subjected themselves as affilliates, through their subsidiaries, to the *alleged* restrictive practises of the Swiss watch industry, and thereby committed themselves to follow directives originating from these practises.

Apart from this case, it is conceivable that personal jurisdiction over an American parent corporation implies personal jurisdiction over its alien subsidiary when the parent totally controls its subsidiary, when thus the control is so strong that the parent and its subsidiary are considered a single entity.

2.6.3 Agency relationship and the ostensibly independent intermediary

An alien corporation that conducts its business in the United States through agents is, for jurisdictional purposes, not distinguished from corporations "present" in the United States, provided, of course, that the agent furthers the interests and instructions of its principal. This we have seen above (*supra* p. 12). An independent intermediary — *e.g.*, a distributor of imported alien goods — cannot, on other hand, without more be regarded as the alien exporter's lengthened arm. But where independence is ostensible, where the contract that sets the terms between the alien producer and the U.S. distributor is but empty words, where the distributor in fact is dominated by the alien producer (exporter), or where the distributor in fact is limited in action by the alien producer, the distributor will be regarded as an agent of the producer, or in other words: an agency relationship will be "construed". This, again, may turn on the contents of the contract between the distributor and the producer. Who bears the risk for losses, in whose name is the distributor dealing, when does title to the goods pass, in what way's are the distributor's resales limited, etc.? How the intermediary distributor is characterized in the contract, has less importance.[87]

2.6.4 Patents or personal property within the United States

The possession of U.S. patents, or rights derived from such, is sufficient for the purpose of securing personal jurisdiction over alien holders of

patent rights[88]. Personal property of another nature, however, cannot alone constitute personal jurisdiction over alien proprietors. Yet, forfeiture of such property, which is possible only if there is a relation between the property and the alleged restrictive trade practises, can work as a pressure on the alien owner so as to extort "voluntary" appearance before the court. Antitrust suits may also be commenced and tried without the attendance of the alien owner, as jurisdiction — so-called *jurisdiction in rem* — can be based on the forfeited property. Any judgement resulting from such proceedings is to be limited to the property involved and normally has no effect outside the United States.[89]

2.6.5 Specific personal jurisdiction

While the general rules of personal jurisdiction, discussed above, seem to be equally applicable to civil, administrative and criminal proceedings,[90] the rules of specific personal jurisdiction *apply only to civil proceedings.*[91] Another distinguishing feature between general and specific personal jurisdiction is, as has been emphasized earlier, that the former is effective against *any* cause of action, whether related or unrelated to the jurisdictional contacts required (found = doing business), while the latter is effective only against related causes of action. Hence, acquisition of specific personal jurisdiction over an alien corporation must be based on a claim that has a connection to that corporation's business activities in the United States. If no such connection exists, only general personal jurisdiction can be obtained.

The foundation of the specific personal jurisdiction is the doctrine of minimum contacts as framed in the case law following the *International Shoe* case,[92]and the 40—45 "long-arm" statutes which have been enacted in the different states of the United States.[93]

For antitrust purposes, however, these "long-arm" statues were ineffective until 1963, when the Federal Rules of Civil Procedure were amended so as to permit federal courts to apply such statutes (or court rulings),[94] *i.e.*, the "long-arm" statute enacted, if there is one, in the state in which the court sits. Consequently, if a plaintiff foresees that only the New York "long-arm" statute requirements can be met, conceivably because the alien corporation he wants to sue conducts business only in New York, he can sue in no other place than in federal court in state of New York. The venue provision in Secton 1391(d) of the Judical Code ("alien may be sued in any district") thus has little or no importance in such instances.

The definite confirmation of the validity ot the Federal Rules in antitrust

cases came in 1965 when the decision i *Hoffman Motors Corp. v. Alfa Romeo S.p.A.* was handed down.[95] The defendant corporation in this case, Alfa Romeo, was served at its headquarters in Italy. This was made possible as the defendant had minimum contacts with New York, out of which the claim arose, in accordance with the New York "long-arm' statute.[96] Furthermore, the "long-arm" statute could be invoked since the Federal Rules of Civil Procedure were held to supplement Section 12 of the Clayton Act.[97]

As a rule, the various "long-arm" statutes afford a basis for personal jurisdiction whenever the non-domiciliary, *i.e.*, in this case the alien corporation, either (1) transacts any business (including contracting to supply services or goods), (2) commits a tortious act (the act itself or the effect of it), or (3) has interests (uses, owns, etc.) in real property, within the forum state. (See *supra* p. 15). The first two requisites will be discussed here.

The *transaction of any business test* is, as we have seen (*supra* p. 7 f.), considerably broader than the "doing business" test. A single transaction — a contract entered into, a contract to be partially or fully performed, a bid by telephone, any purposefully initiated event — [98] may suffice. It follows, that the typical "long-arm" statute prepares the ground for personal jurisdiction on the basis of less numerous contacts than Section 12 of the Clayton Act ("found"). The outer line is unclear and differs from state to state. In a North Carolina case,[99] it was held that partial performance of a contract constituted sufficient contacts, while the court in the same state relinquished jurisdiction on the basis of a single shipment of goods.[100] A Pennsylvania court has secured jurisdiction over a Swedish corporation, which traded its products in the United States through an obviously independent U.S. distributor and which had no other contacts with Pennsylvania.[101] New York courts have obtained personal jurisdiction over alien parent corporations that have subsidiaries in New York, not by means of the theory of enterprise entity,[102]but rather by a "benefit" theory — *i.e.*, the alien corporations enjoys benefits from its subsidiary, presumably of a purely economic nature.[103](Or it enjoys the benefit and protection of the laws of that state through its subsidiary.)[104]

Although none of the cases now referred to involved antitrust issues, they indicate a trend, which in itself is of some relevance.

The jurisdictional scope is likewise broadened by the *commission of a tortious act* test. The conclusions to be drawn are the same. Several states have adopted "long-arm" statutes authorizing the courts to acquire personal jurisdiction whenever a person (corporation) commits a tortious act within the state, or outside the state if it causes injury (effects) within the state. The place of effect requisite usually applies, provided that the corpor-

ation *alleged*[105] to have been committing the tortious act does regular business within the state or derives substantial revenue from goods consumed or services rendered therein.[106] The New York statute adds: if the corporation could reasonably foresee or expect the act to have consequences *and* derives substantial revenue from interstate or international commerce.[107] The California "long-arm" statute simply states that jurisdiction can be exercised "on any basis not inconsistent with the Constitution of this state or of the United States",[108] which authorizes the California courts to go as far as the due process clause allows.

It is thus a broadening and multifarious jurisdictional field that the Federal Rules of Civil Procedure place at the federal courts' disposal in antitrust cases. Each federal court can now choose between the general rule in Section 12 of the Clayton Act, and the "long-arm" statute in the state in which it sits. However, the antitrust case law regarding personal jurisdiction runs an obvious risk of being no more uniform than the "long-arm" statutes. A federal "long-arm" statute for federal purposes may of course remedy this situation.[109]

2.6.6 Estimation of inconvenience

To establish personal jurisdiction, whether general or specific, is, as we have seen above,[110] not just a matter of evaluating or enumerating contacts between the corporation and the forum state. "Fair play and substantial justice" also embraces, to wit, an estimation of the relative inconvenience to the defendant, and to the plaintiff, in combinaton with an appraisal of the forum's interest in regulating the issues involved. But how is the process of estimation of inconvenience to be distinguished from the doctrine of *forum non conveniens*, *i.e.*, the discretionary power to dismiss the case on various grounds, *e.g.*, inconvenience for the defendant, interest of the forum in cost efficiency and access to proof. The doctrine of *forum non conveniens* — the question being if the court will take the case — is not timely until the court has ascertained personal and subject matter jurisdiction, *i.e.*, when the court has decided that it *may* take the case. The issue of personal jurisdiction has to be decided, it seems, before *forum non conveniens* becomes an issue.[111] Personal jurisdiction and *forum non conveniens* seem, technically at least, to be separate stages of the process, but, although the doctrine of *forum non conveniens* has a broader spectrum, they comprehend the same type of elements. They seem interrelated but not united.[112]

However, there is surely no cause to estimate the inconveniences to the

parties both when deciding the issue of personal jurisdiction and when deciding the *forum non conveniens* issue.[113] Such an estimation cannot, on the other hand, be postponed until it is time to decide whether the trial is held at a convenient forum. This is so, since the question of personal jurisdiction requires (*i.e.*, fair play and substantial justice require) its own share of the estimation of inconvenience. The process of deciding whether the forum is a fair and reasonable place of trial for the parties will have to be independent from the determination of *forum non conveniens.*

Aspects of inconvenience become increasingly important as the jurisdictional scope widens, particulary through the frequent "long-arm" statutes. The less facts that tie the alien corporation to a U.S. court, the more reason there is to establish and consider the hardships to it in having to appear and defend itself in a distant forum.[114]

The *Swiss Watch case*,[115] which however involved no "long-arm" statute, is one of the few[116] international antitrust cases in which elaborate attention was paid to these questions. Applying the service of process provision in Section 12 of the Clayton Act the court elucidated: "A corporation is 'found' within the jurisdiction if ... there is proof of continuous local activities and whether under all the circumstances of the case, the forum is not unfairly inconvenient."[117] After having reached the conclusion that the activities of the Swiss companies and organizations were of a continuous character, the court proceeded by estimating the inconvenience of each defendant individually in accordance with the nature and intensity of each defendan's activities. Counterbalanced against the fact that the defendants had to litigate (stand trial) in a U.S. court, far away from their home offices in a foreign country with a different legal system, including far less restrictive antitrust laws, and the fact that most of the acts upon which the claim was based occured in Switzerland, were, *inter alia*, the following factors:[118]

(1) There was no other more convenient forum in which the Swiss corporations could be tried.

(2) The relief sought could not be obtained in Switzerland.

(3) The burden on the plaintiff (United States = the antitrust administration) in having to litigate elsewhere.

(4) The volume of activities in the United States and intimate relations with U.S. affiliates (parent corporations, subsidiaries or "agents") were expected to minimize the disadvantage of a distant forum.[119]

(5) Many of the acts alleged to be illegal were carried out in the United States (most of the acts were, however, performed in Switzerland).

(6) The laws alleged to be violated were those of the forum.

(7) The inconvenience and inefficiency of having separate trials for the American and Swiss defendants.

As a result, the court held that none of the Swiss defendants was subjected to unfair inconvenience when tried in the forum. Hence, the Swiss corporations were properly "found" in the United States.

Personal jurisdiction requirements, as moulded by the due process standard, are thus an amalgam of an evaluation of contacts and an estimation of inconveniences. "That is the only way an alien [or foreign] corporation can be 'found' in the state of the forum", according to the rule (principle) laid down in the *Swiss Watch* case. It is nevertheless noteworthy that the court, in that case, preferred to expand the objects of estimation as to include virtually all of the elements (ingredients) of the doctrine of *forum non conveniens*. (It would probably have included *all* of them if there would have been sufficient factual ground for it). Whether this was the intention of the founders of the doctrine of fair play and substantial justice is subject to doubt. The Constitution (the 5th and 14th Amendments) requires only that no person shall be deprived of life, liberty or property without due process. This seems to have little to do with the questions of whether the alleged acts were carried out in the United States or Switzerland, trial efficiency or the fact that the laws alleged to be violated are the laws of the forum. The fact that the laws of the forum were violated was convenient for the plaintiff, but that should not have benefitted him in any weighing-of-factors process, as no other law (*e.g.*, the antitrust laws of Switzerland) was, and probably could not have been, applicable in the case.[120]

2.6.7 The notice requirement in antitrust cases

Due process requires not only that an (alien) corporation have sufficient contacts with the United States — that it is "doing business", "transacting business", etc., there — but also that it be properly notified of the antitrust proceedings as well as have a fair opportunity to appear and defend itself. Process must be served in a manner reasonably calculated to give the defendant actual notice of the lawsuit against it.[121] When an alien corporation, in compliance with Section 12 of the Clayton Act, is "found" within the United States (which amounts to "presence") the corporation has normally been notified in person through either its agents (or "constructive" agents) or through its dependent subsidiaries. But there is nothing compelling in this. Notice of proceedings can just as well be transmitted by mail to the corporation's home office or by personal delivery there, when no other method is practically available.

When the alien corporation cannot be "found", but, in accordance with a "long-arm" statute, "transacts business" or commits a tortious act, etc., within the United States, the Federal Rules of Civil Procedure (Rule 4(e), also see 4(f)) stipulate that notice may be served "in the manner prescribed by [that] statute" or any authorized court order.[122] If such a provision, prescribing the manner in which the defendant may be notified, does not exist, the Federal Rules will apply. Regardless of whether this is the case, when service is to be effected upon a corporation in a foreign country, it is sufficient if notice is served in the manner prescribed by the law or as directed by an authority in that country, or to an officer, a managing or general agent, or by registered mail or as directed by order of the court.[123]

2.7 Conclusions

Personal jurisdicton has come a long way since *Pennoyer v. Neff*.[124] Its basis has been extended at a rapid pace. It has expanded from personal service within the forum state to cover such fortuitous contacts as single offerings by mail or by telephone, part performance of a contract and effects of tortious acts; from the traditional rule according to which the plaintiff had to seek out the defendant where he lived or stayed, to the "transient rule" and further to the broad notion of single activities as expressed in the "long-arm" statutes. The constitutional standard of due process marks the limit. "Fair play and substantial justice" is the decisive phrase. This extension of personal jurisdiction is, without doubt, a necessary as well as inevitable development in a federal system such as that of the United States. Intensified communications, an increasing number of multistate companies, enlarged interstate commerce, growing interdependence, etc., are all factors that have a tendency to blur borderlines. The negative effects that eventually arise, *e.g.*, the burden on a party sued to defend himself in a distant forum with unfamiliar laws, are in part neutralized by the very existence of the unifying factors just mentioned, and in part by the procedural remedy of the estimation of inconvenience coupled with the doctrine of *forum non conveniens.*

In the international arena, the development — both of law and in general — moves in the same direction. The law of personal jurisdiction does not distinguish between U.S. and alien corporations. In the field of antitrust, this has significant implications. Hence, jurisdiction *in personam* over an alien corporation may rest solely on the fact that a restrictive trade agreement which is signed, concluded and principally performed in a foreign country, has been (or is to be) partly performed within the United States;

or that such an agreement is concluded or negotiated in the United States; or that it is negotiated, signed, concluded and to be performed outside the United States but the alien corporation has an affiliate (subsidiary, agent) within the United States, independent or not, from which it collects pecuniary benefits; or that the corporation is "transacting business" in any other form. Moreover, an alien corporation that restrains the trade in a foreign country (*e.g.*, through a boycott) so as to effect the business of U.S. corporations, *i.e.*, commits a tortious act outside the United States that has effects within the United States, can likewise be tied to U.S. courts through a "long-arm" statute.

Hence, personal jurisdiction does not rest so much on general personal or corporate contacts as on the actual situs of a single act which is alleged to be illegal. Whenever the single act, which is the cause of the specific action, can be localized in any way to the forum state, by its occurence there or by its effects there, the necessary conditions for personal jurisdiction are fulfilled. As will be shown in the next chapter, subject matter jurisdiction is subordinated to the same line of reasoning, *i.e.*, subject matter jurisdiction can be secured where either the act occurs in the United States or has certain effects on the U.S. foreign or interstate trade. This intimates that already *alleged* effects of such a nature will authorize personal jurisdiction and that the existence of such effects will provide for subject matter jurisdiction. Consequently, the basis for the two kinds of jurisdiction seem to grow into one another, or more correctly: subject matter jurisdiction seems to take over the role of personal jurisdiction, and personal jurisdiction loses its independent significance.

One may entertain misgivings as to these recent lines of development, object to their extensive coverage as regards both U.S. and alien companies, and as regards both the domestic (U.S.) and the international scene, and one may endorse moderation as to their application. Yet, the bulk of these standpoints would not be justifialble, were only aspects of fairness, inconvenience, etc., to play a more prominent role in the courts' decision-making process. A proper and profound estimation of inconvenciences would tend to safeguard the interest of the alien defendant, and, as one eminent authority puts it,:[125] "Surprise, inconvenience, and unfamiliarity are not so likely when the corporation of one state is haled into the courts of another, as when a foreign national is brought before an American court."

There is a crux, however. Inconvenience on the part of the defendant has little persuasive force, if the plaintiff — should the court dismiss the complaint for want of personal jurisdiction — had no other forum where he could sue. That may well be the case as far as antitrust suits are concerned.

Courts outside the United States are not apt to apply the antitrust laws of the United States (and *vice versa*), although the situation in this respect may change. It follows that the plaintiff will probably be left without legal resort, if his suit is dismissed by the U.S. courts. On the other hand, as antitrust laws are rapidly developing around the world (often with the U.S. laws as a model), particularly in the western industrial countries — including the Common Market — the inconvenience to the plaintiff should decrease, *i.e.*, the plaintiff could take his case to a foreign country with antitrust laws of its own, a country which would be more convenient to the defendant.[126]

Notes, Chapter 1, Sections 1 and 2

[1] As we are dealing, exclusively, with the federal antitrust laws, it is quite proper to leave out the state courts from the scene. See, for instance, *Ackert v. Ausman*, 218 N.Y.S. 2d, 29 Misc. 2d 974, 980 (1961). Most of the states have their own antitrust laws, but due to the extensive application of the federal laws, through the commerce clause in the Constitution (Article 1, Section VIII (2)), relatively little is left for the states to regulate. (See also the "interstate commerce" and the "foreign commerce" criteria of the Sherman Act — Sections 1—3. More of this later).

[2] Whether the jurisdictional issues appear at an early stage of the proceedings or not, will often depend on the character of the substantive issue. Assuming that factors such as practicability and efficiency determine *when* and *what*, it seems that a *per se* ruling is not always to be preceded by a ruling on the subject matter jurisdiction. In the widely known *Alcoa* case, for instance, the words of Judge Hand pointed in this direction when he held that the quota and royalty agreements were *unlawful* "if they were intended to affect imports and did affect them". 148 F. 2d 416, 444 (2d Cir. 1945). This phrase suggests that the substantive issue already is decided upon — the agreements are already found to be unlawful — at the time when the requisites of subject matter jurisdiction are established.

[3] A different type of question, but just as important, is: *Will* the court hear the case?, *i.e.*, should it exercise the jurisdiction just established or should it (if possible) decline adjudication for instance on the ground that the forum is inconvenient. See e.g. Ehrenzweig, 120 ff.; Leflar, 111 ff. and the literature referred to there. Also note *The Bremen et al. v. Zapata Off-Shore Co.* 407 U.S. 1 (1971).

[4] The reader will find that the authors referred to in this chapter, with very few exceptions, have an analogous usage.

[5] Still, the terminology is not quite clear. The word jurisdiction resembles the notorious English king who framed his "face to all occasions". In an international law context, the terms legislative or prescriptive jurisdiction and enforcement jurisdiction are, as we shall see and examine closer in part two of this study, widely accepted. These (not so much the words, but what they represent) are instruments in the international sphere, reflecting the division of power between the nations. There the question is: Does the international law provide any rules that set limits on the jurisdictional extension. As opposed to this, the only inquiry pursued here is whether the United States Constitution or statutes set any boundaries as regards the jurisdiction of the federal courts in antitrust matters. But then again, how shall the court relate to situations where the *lex fori* to be applied does not meet the international law standards. See further *infra* p. 58. (The concept legislative jurisdiction as transferred to U.S. interstate scene, see Leflar, 5 f.)

Judicial jurisdiction is a broader term, often subdivided into *personal* jurisdiction and jurisdiction *in rem*. (See, for instance, Leflar, 4 ff., 33 ff.) The latter form of jurisdiction — *in rem* — has two subcategories: pure *in rem* and *quasi in rem*. Proceedings *in rem* are commenced to affect legal rights in specific *properties* of persons, frequently in cases where the plaintiff is unable to obtain personal jurisdiction over the defendant. This is especially true with respect to the *quasi in rem* actions. Through a *quasi in rem* proceeding, for instance, plaintiff is given the opportunity to recover damages of any kind in defendants property that has its *situs* within the boundaries of the forum state (country). Jurisdiction *quasi in rem* has, as we shall see, relevance in antitrust actions for damages.

The concept jurisdiction *in personam* is an equivalent of the term personal jurisdiction. The concepts "substantive scope" (of a statute), "subject matter scope" and substantive "reach" are tantamounts to "subject matter jurisdiction".

The concept of subject matter jurisdiction might lead the thoughts of, at least, the Anglo-american jurists to the fact the property upon which an *in rem* or a *quasi in rem* action is based has been duly brought before the court. In this way the concept is, it is admitted, ambiguous. But this circumstance has, as already noted (n. 4), not troubled the minds of most international jurists and it shall not trouble us here. Competence as a substitution for subject matter jurisdiction, would, as Ehrenzweig (72 ff.) points out, not be a perfect alternative.

On terminology, see Lorenzen, 15 ff.; Ehrenzweig, 71 ff.; Leflar, 33 ff.; Henn, 149 ff.; Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121 (1966); Smit, The Terms Jurisdiction and Competence in Comparative Law, 10 Am. J. Comp. L. 164 (1961); B.J. George, Jr., Extraterritorial Application of Penal Legislation, 66 Mich. L. Rev. 609 (1965—6).

[6] "No person shall be ... deprived of life, liberty or property, without due process of law ...". A company enjoys, in this respect, the same rights as a person, Sinking-Fund Cases, 99 U.S. 700, 718—719, 25 L.Ed. 504, 504—505, (1878). Also see in general, Henderson, Foreign Corporations in American Constitutional Law.

[7] What exactly is needed to meet these standards may depend on the type of case involved. So may, for example, tax cases be treated stricter than tort cases. See Leflar, 35.; Henn, 149, 163 ff., and dissent in Eli Lilly & Co. v. Sav-On-Drugs, Inc., 366 U.S. 276, 288, 81 S. Ct. 1316, 1324, 6 L.Ed. 2d 288, 297 (1961).

[8] A violation of the constitutional standards — the due process clause — will basically have two effects (on the United States' domestic arena): first, the judgment rendered is not compelling on any sister state, *i.e.*, it is not entitled to "full faith and credit" in accordance with Article IV of the Federal Constitution, and secondly, it is not even valid within the forum state. (In these cases the Fourteenth Amendment — not the Fifth — applies).

Whether the same kind of judgement will be recognized in a foreign *country*, is a matter for further elaboration in part two of the present study.

[9] At least in one case a statute has been so interpreted as to make it reach (in general) as far as the Constitution allows, with the effect that future interpretation of the statute is deemed unnecessary also in cases with a different fact-pattern. (See e.g. Henry R. Jahn & Son, Inc. v. Superior Court, 49 Cal. 2d 855, 323 P. 2d 437 (1958). Notable is also the Californian Code of Civil Procedure § 410.10, which authorizes the Californian courts to exercise jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States").

[10] See e.g. Leasco Data Processing Equip. Corp. v. Maxwell, 468 F. 2d. 1326, 1334 (1972).

[11] But see e.g. Rosenfield, Extraterritorial Application of United States Laws, 28 Stan. L. Rev. 1005, 1006 (1976), n. 2: "Once in personam jurisdiction has been established, the question then becomes whether the court ought to acknowledge subject matter jurisdiction", though admitting that these jurisdictional issues "overlap" and could be studied "simultaneously"; and Bloch, Extraterritorial Jurisdiction of U.S. Courts in Sherman Act Cases, 54 ABA J. 781, 782 (1968): "Once a court has determined that a conspiracy in restraint of trade

is a violation of the Sherman Act in that it has substantial effect on the foreign commerce or trade of the United States, the court must also decide whether it has jurisdiction over any of the parties to the conspiracy", hereby indicating another course of action. This last statement seems furthermore not to distinguish clearly between the question of subject matter jurisdiction and the application of the substantive rules of a statute, see further *infra* p. 35. Also see Steiner, H.J. & Vagts, D.F., Transnational Legal Problems (Mineola, 1968) p. 642, who also puts the jurisdictional issues in this order.

[12] This is not a pleonasm. The terms "foreign" and "alien" are used here to distinguish between a corporation situated (registered, incorporated under the laws of) in a sister state and one situated in a foreign country. There may be other and clearer terms, easier to grasp; still, these are the terms commonly used.

[13] 95 U.S. 714 (1878).

[14] This is not the place to discuss the history of the jurisdictional rules or the implification of the ancient common law rules of English heritage, in particular since the opinions on this point seem to be divided. See e.g. Blume, Civil Procedure on the American Frontier, 56 Mich. L. Rev. 161; the same, Place of Trial of Civil Cases, 48 Mich. L. Rev. 1 (1949); Note, Personal Services of Process — an Outdated Concept?, 28 U. Pitt. L. Rev. 319 (1966); Ehrenzweig, 88 f., 104 ff., Ehrenzweig, The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens, 65 Yale L. J. 289 (1956).

[15] From here on the discussion will be limited to personal jurisdiction in civil cases.

[17] See *supra* n. 13.

[18] Another scholar — Cheatham, Some Developments in Conflict of Laws, 17 Vand. L. Rev. 193 (1963—64) — chooses to describe the "old common-law view" somewhat differently when stating that it was the plaintiff's task, if he wished to bring an action on his claim, to "seek out the defendant and file the action where the defendant could be found and served with process" (*id.* at 194). Also se Coleman's Appeal, 75 Pa. 441, 458 (1874): "... a man shall only be liable to be called on to answer for civil wrongs in the forum of his home, and the tribunal of his vicinage ...", decided only four years before the *Pennoyer v. Neff* case. There does not really have to be a discrepancy between these statements and the principle laid down in *Pennoyer v. Neff* (personal service while present in the forum state) if due regard is paid to the facts of the common-day life of the nineteenth century: a low degree of mobility, primitive communication standards, an industry in its early development, etc. In other words, in those days the defendant generally was "present" where he had his home, and that was where the plaintiff or his agent had to go in order to serve process.

With increasing mobility and industrialization, a dogmatic approach to the "personal-service-while-present-rule" has its logical (although in some cases extreme) consequences. A mere temporary physical presence is accordingly held to suffice. Personal service to the most casual transient, even on an aeroplane while flying *over* the forum state is held to give the court of the state personal jurisdiction. (Fisher v. Fielding, 67 Conn. 91, 34 A. 714, 32 L. R. A. 236, 52 Am. St. R. 270 (1895); Darrah v. Watson, 36 Iowa 116 (1872); Peabody v. Hamilton, 106 Mass. 217 (1870); Grace v. MacArthur, 170 F. Supp. 442 (1959)). The "stretch" of the principle of personal service while present — the "transient rule" — has however been severly criticized: see e.g. Ehrenzweig, *supra* n. 14; dissent in Fisher v. Fielding, *supra,* 718, 729; Ross, The Shifting Bases of Jurisdiction, 17 Minn. L. Rev. 146, 159 (1932); Rheinstein, Book Review, 41 Mich. L. Rev. 83, 91 (1942). The "transient rule" is, however, not applicable to corporations or their representatives (*id.*). *But* also defended: see e.g. Schlesinger, Methods of progress in Conflict of Laws, J. Pub. L. 313 (1960); Restatement (1st) of Conflict of Laws §§ 77—79.

Cf. also the Restatement (2d) of Conflict of Laws § 28 ff. As to *forum non conveniens* as a corrective instrument, see e.g. Leflar, 111 ff.

[19] About exceptions in a *limiting* direction (fraud, force, immunity), see in general e.g. Ehrenzweig, 107 ff.

[20] National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964).

[21] Leflar (42 ff.) distinguishes here between *personal* and *constructive* service of process, the former denoting service to the defendant or his appointed agent within the forum state and the latter situations where the service is made without the forum state.

[22] Milliken v. Meyer, 311 U.S. 457 (1940), *rehearing denied,* 312 U.S. 712 (1941); Mounts v. Mounts, 181 Neb. 542, 149 N.W. 2d 435 (1967); Harrison v. Matthews, 235 Ark. 915, 362 S.W. 2d 704 (1962); Owens v. Superior Court, 52 Cal. 2d 822, 345 P. 2d 921, 78 A. L. R. 2d 388 (1959). Also see the Restatement (2d) of Conflict of Laws, §§ 29—30.

[23] See e.g. Blackmer v. U.S., 284 U.S. 421 (1932) and the Restatement (2d) of Conflict of Laws, § 31.

[24] Rest. (2d) Conflicts, §§ 33—34; Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189 (1915); Eddy v. Lafayette, 49 F. 807 (1892), York v. Texas, 137 U.S. 15 (1890); Everitt v. Everitt, 4 N.Y. 2d 13, 148 N.E. 2d 891, 171 N.Y.S. 2d 836 (1958).

[25] Rest. (2d) Conflicts, § 32. Also see *supra* n. 3 and Washington v. Superior Court, 289 U.S. 361 (1933); Grover v. Radcliffe, 137 U.S. 237 (1890); Hess v. Pawloski, 274 U.S. 352 (1927); Wuchter v. Pizzuti, 276 U.S. 13 (1928).

[26] See *supra* p. 1.

[27] An early decision even held that a corporation was *nonexistent* outside the state of incorporation. Bank of Augusta v. Earle, 13 Pet. (38 U.S.) 517 (1839). Also see Paul v. Virginia, 8 Wall. (75 U.S.) 168 (1869).

[28] Kansas City, Ft. S. & M. R. R. v. Daughtry, 138 U.S. 298 (1891).

[29] Rest. (2d) Conflicts, § 41. Note Wuchter v. Pizzuti, 276 U.S. 13 (1928); State v. Scott, 387 S. W. 2d 539 (1965); St. Mary's Franco-American Petroleum Co. v. West Virginia, 203 U.S. 183 (1906).

[30] See e.g. the New York Business Corporation Law, § 304, which provides that "[n]o domestic or foreign corporation may be formed or authorized to do business in this state ... unless ... it designates the secretary of state as" an agent upon whom process against the corporation may be served. For a sufficient survey over the state statutes see e.g. Fletcher, Corporations, §§ 4410—4423.

[31] Restatement (2d) Conflicts, §§ 168—169; and cases *supra* n. 27; Henderson, Foreign Corporations in American Constitutional Law, 101.

[32] See Restatement (1st) of the Conflict of Laws, § 90 and Kansas City Structural Steel Co. v. Arkansas, 269 U.S. 148 (1925); Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93 (1917); Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 60 S. Ct. 153 (1939). *Cf.* n. 30 *supra.*

[33] Washington v. Sup. Ct., 289 U.S. 361 (1933); Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1856); Connecticut Mutual Life Ins. Co. v. Spratley, 172 U.S. 602, 19 S. Ct. 308 (1899).

Occasionally the consent theories are combined with the theory of presence (see right below), as in St. Clair v. Cox, 106 U.S. 350, 1 S. Ct. 354 (1882).

[34] See e.g. Simon v. Southern Ry. Co., 236 U.S. 115, 35 S. Ct. 255 (1919) and Old Wayne Mutual Life Association v. McDonough, 204 U.S. 8, 27 S. Ct. 236 (1907). But as to express consent, see also Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., *supra* n. 32.

[35] For example, Barrow Steamship Co. v. Kane, 170 U.S. 100 (1898); Doherty & Co. v. Goodman, 294 U.S. 623 (1935) and In re Hohorst, 150 U.S. 653, 14 S. Ct. 221 (1893).

Also note: Isaacs, An Analysis of Doing Business, 25 Colum. L. Rev. 1018 (1925); Cahill,

Jurisdiction Over Foreign Corporations and Individuals Who Carry on Business Within the Territory, 30 Harv. L. Rev. 676 (1917) and Farrier, Jurisdiction over Foreign Corporations, 17 Minn. L. Rev. 270 (1933); Note, 35 Colum. L. Rev. 591 (1935).

[36] 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, 161 A. L. R. 1057 (1945).

[37] *Id.* 66 S. Ct. at 158; 326 U.S. 316. Reference is here made to earlier case law.

[38] See e.g. Hanson v. Denckla, 357 U.S. 235, 78 S. Ct. 1128 (1958). Also see Restatement (2d) Conflicts, § 40.

[39] This is expressed in the International Shoe case partly in the following lines: [Due process]... demands may be met by such contacts of the corporation with the state of the forum as make it reasonable ... to require the corporation to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection". And: "To require the corporation in such circumstances [casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state on the corporation's behalf] to defend the suit away from its home ... has been thought to lay too great and unreasonable a burden on the corporation to comport with due process". 326 U.S., at 317.

[40] With one main exception: Maryland, that anticipated the trend by enacting a "long-arm" statute (see below) as early as in 1937. (Maryland Annotated Code art. 23, § 92(d) (1957), later superseded (1965)).

[41] In *International Shoe,* some cases are referred to (*id.* at 318) "in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities", e.g. Missouri, K. & T. R. Co. v. Reynolds, 255 U.S. 565, 41 S. Ct. 446, 65 L. Ed. 788. The concern is still here with the *quantity* of contacts. But requisites of "regular and systematic course of dealings" or "continuous and systematic business activities" were by and by weakened in some states. See Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 72 S. Ct. 413 (1951) and the development thereafter in e.g. McKnight v. Greenlee, 133 F. Supp. 830 (N. D. Ind. 1955); Behling v. Wisconsin Hydro Electric Co., 275 Wis. 569, 83 N. W. 2d. 162 (1957); Cosper v. Smith & Wesson, 53 Cal. 2d 77 (Cal. S. Ct. 1959); WSAZ v. Lyons, 254 F. 2d 242 (6th Cir. 1958); KLM v. Sup. Ct., 107 Cal App. 2d 495 (Court of App. 2nd Distr. 1951), (where ticket and purchasing officies tied KLM to California for injuries sustained in a plane-crash that occured in England); Bryant v. Finnish National Airline, 15 N.Y. 2d 426, 208 N. E. 2d 439, 260 N. Y. S. 2d 625 (1965), (where a small office with limited functions tied the Finnish defendant to New York for injuries suffered in Paris); Frummer v. Hilton Hotels International, Inc., 19 N. Y. 2d 533, 227 N. E. 2d 851, 281 N. Y. S. 2d 41 (1967), *cert. denied,* 389 U.S. 923 (1967).

But this development has generally not yet reached the point where a sporadic or isolated transaction justifies personal jurisdiction for unrelated causes of action. See e.g. Fisher Governor v. Sup. Ct., 53 Cal. 2d 222 (Cal. S. Ct. 1959) and Delagi v. Volkswagenwerk AG of Wolfsburg, Germany, 29 N. Y. 2d 426, 278 N. E. 2d 895, 328 N. Y. S. 2d 653 (1972), where the court refused to further broaden the guidelines for personal jurisdiction over foreign corporations. Alsosee Restatement (2d) Conflicts, § 47 (2)

[42] See, in particular, McGee v. International Life Insurance Co., 355 U.S. 220, 77 S. Ct. 239 (1957) and Hanson v. Denckla, 357 U.S. 235, 78 S. Ct. 1228 (1958). The basic test expressed in these cases is whether the foreign corporation has purposefully initiated some liability-producing activity within the forum state by which it obtains real benefits from the state or otherwise relies on the privileges or protection of the forum laws, and whether it is fair and reasonable to expect that the foreign corporation shall appear and defend itself in the forum state.

Under this limited jurisdictional approach, manufacturers — in product liability cases — may be held subject to personal jurisdiction in any state in which it is reasonably foreseeable

("must have known") that their products will be sold or consumed even when the selling-organization is independent of the manufacturer. See e.g. Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N. E. 2d 761 (1961).

[43] See e.g. McKinney's N. Y. CPLR § 302 and 2 Ill. Rev. St., Chapter 110, § 17.

[44] See e.g. U.S. v. Montreal Trust Co., 358 F. 2d. 239 (1966) and Parke-Bernet Galleries v. Franklyn, 26 N. Y. 2d 13 (Court of App. 1970) (a bid by telephone from California on paintings at an art auction in New York subjected defendant to New York jurisdiction — the bid affected everybody's business on the market place).

[45] See note 42 *supra*. A step further is taken in Cornelison v. Chaney, 16 Cal. 3d 136 (Cal. S. Ct. 1976) (the accident occured outside the forum state, but a "substantial nexus" was found between the accident and the defendants activities in the forum state).

[46] See e.g. Ariz. R. C. P. § 4(e)(2). Mark though, as was observed in Hanson v. Denckla (*supra* n. 42 at 251) that "it is a mistake to assume [that the trend towards relaxation of minimum contacts requirements] heralds the eventual demise of all restrictions on the personal jurisdictions of the state courts".

For a detailed study of the development of the principles of personal jurisdiction as applied to foreign corporations, see e.g. Developments in the Law, "State-Court Jurisdiction", 73 Harv. L. Rev. 909, (1960); 'Jurisdiction over Foreign Corporations', 25 Corp. J. 291 (1968); Johnson, 'How Minimum Is 'Minimum Contact'? An Examination of 'Long Arm' Jurisdiction', 9 S. Tex. L. J. 184 (1967); Kurland, 'The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts: From Pennoyer to Denckla: A Review', 25 U. Chi. L. Rev. 569 (1958); Note, 'Recent Interpretations of 'Doing Business' Statutes, 44 Iowa L. Rev. 345 (1959); Note, 'In Personam Jurisdiction Over Foreign Corporations: An Interest Balancing Test', 20 U. Fla. Rev. 33 (1967).

[47] See e.g. McGee v. International Life Ins. Co., 355 U.S. 220 (355 U.S. 924), 78 S. Ct. 199, (77 S. Ct. 239) (1957); Milliken v. Meyer, 311 U.S. 457, 61 S. Ct. 339 (1940). Ehrenzweig, 92 ff.; Ehrenzweig & Mills, Personal Service Outside the State, 41 Cal. L. Rev. 383 (1953).

[48] See Leflar, 37 f. But as to corporations, see also Wuchter v. Pizzuti, 276 U.S. 13, 48 S. Ct. 259 (1928).

[49] 339 U.S. 306, 70 S. Ct. 652 (1950).

[50] Fair oppurtunity to appear (to be heard and to defend) denotes such matters as reasonable time for preparation of trial, reasonable information of the contence of the proceedings, etc.

[51] International Paper Co. v. Aud, 210 Ark. 425, 196 S. W. 2d 578 (1946).

[53] Rosenfield, *infra*, n. 57, at 1005 n. 2, indicates that "[i]n deciding whether to exercise in-personam jurisdiction, courts have first examined the nationality of the parties", and thereafter states the different criteria for determining nationality. And later in the same note: "In addition to nationality, courts have adopted a second test for in personam jurisdiction", whereafter he describes the *International Shoe* case and its significance.

Is thus the test for personal jurisdiction twofolded: Nationality and "minimum contacts"? Assuming that the "minimum contacts" doctrine includes a test of "fairness", "reasonabless" etc., which, when applied, comprehends the inconveniences of the parties, such as burden to defend in distant trials where unfamiliar laws are applied, divergences in legal systems between that of the forum country and the "home"-country of the defendant, etc., what then is the independent significance of the nationality test? Is there in other words any jurisdictional rule — whether in domestic or international law — that distinguishes between, for instance, a Californian and a Canadian corporation in a New York court with regard to the courts personal jurisdiction over the corporations for the sake of nationality alone? Rosenfield does not mention a such rule and he does not give examples of cases in which such a rule is employed.

In issues concerning subject matter jurisdiction (see *infra*) nationality might have some rel-

evance. When it comes to personal jurisdiction, it is hard to see how and why.

[54] In particular those mentioned *supra* n. 47.

[55] Meaning the cases discussed under the next chapter. But *cf.* also, Fogel v. Chestnutt, (1967-1969 Transfer Binder) CCH Fed. Sec. L. Rep., ¶ 92, 133 at 96, 612 (S. D. N. Y. Jan. 18, 1969); Scriptomatic v. Agfa Gevaert, Inc., 1973 Trade Cas. ¶ 74, 594 (S. D. N. Y. 1973). For a wider discussion, see Shapira A., The Interest Approach to Choice of Law, 34 (1970). Also see Friesinger, at 19.

[56] This is made crystal clear in International Shoe Co. v. Washington, 326 U.S. 310 (1945), at 319.

[57] See Brewster, 55 and Sullivan, 716 f. Also see, B. A. Rosenfield, Extraterritorial Application of United States Laws: A Conflict of Laws Approach, 28 Stan. L. Rev. 1005 ($1975—76_2$), at 1006, n. 2 ("significant contacts"); Friesinger, at 18 f.

[58] That is: federal courts, see *supra* p. 1, n. 1.

[59] See further Rahl, at 132.

[60] 15 U.S. C. A. § 22 (1973).

[61] 15 U.S. C. A. § 15 (1973).

[62] 28 U.S. C. A. § 1391 (d) (1973).

The Supreme Court so ruled in Brunette Machine Works, Ltd. v. Kockum Industries, Inc., 406 U.S. 706, 92 S. Ct. 1936, 32 L. Ed. 2d 428 (1972), holding that since Brunette was an alien corporation it could be sued in any district under Section 1391 (d) as suits against alien defendants "are outside the scope of all the venue laws." Furthermore, the provision mentioned "is properly regarded, not as a venue restriction, but rather as a declaration of the long-established rule that suits against aliens are wholly outside the operation of all the federal venue laws, general and special." (*Id.* at 714.) Also see Pure Oil Co. v. Suarez, 384 U. S. 202 (1966); Olin Mathieson Chem. Corp. v. Molins Organizations, Ltd., 261 F. Supp. 436 (at 440 f.) (E. D. Va. 1966) and Edward J Moriarity & Co. v. General Tire & Rubber Co., 289 F. Supp. 381 (S. D. Ohio 1967).

Cf. Rahl, 132 f.; Sullivan, 716 f.; Antitrust Developments 1968—75, at 362 and Friesinger, at 12, 16. Also *cf.* Fugate, at 93; Antitrust Guide for International Operations, at E-1 and E-3; E. Kintner & M. Joelson, An International Antitrust Primer, at 41 f.; W. D. Kingery Jr., Personal Jurisdiction Over Alien Corporate Parents and Affiliates in Antitrust Actions: A Plea for Perspicuity, 5 Syr. J. Int'l L. & Com. 149, at 181 (1977) and the cases there noted in n. 236.

[63] Whether they ever *had* any such relevance is open to doubt. The latter provision does not limit the personal jurisdiction of the courts. Neither did the prior provisions, with one possible exception: where there are several defendant corporations and one of these is incorporated in the U.S., plaintiff might have to seek out the proper venue relating the U.S. corporation in order to sue all of the defendants there.

[64] 15 U.S. C. A. § 22 (1973).

[65] Federal Rules of Civil Procedure, 1 and 81 (1973).

[66] Federal Rules of Civil Procedure, 4 (e), (i) (1973).

[67] The venue provision in the first half of the same section was, however, supplemented by the requisite "transacting business" and now thus holds three alternative requisites: "inhabitant", "found" and "transacts business".

[68] 246 U.S. 79, 38 S. Ct. 233, 62 L. Ed. 587 (1918).

[69] *Id.* at 87.

[70] On this, see generally Antitrust Developments 1955—68, 40 ff.; the same, but 1968—75, 360 ff.; Brewster, 54 ff.; Friesinger, 12, 16 ff.; Homburger, Rechtsgrundlagen der amerikanischen Gerichtsbarkeit über ausländische Gesellschaften in Antitrust-Prozessen, Wirtschaft

und Recht (WUW) (1959) p. 269; Barnard, 110 ff.

By juxtaposing the venue and the service of process provisions in Section 12 of the Clayton Act along with the case law relating to these, one can easily conclude that the former provision is the broader of the two, *i.e.,* proper venue can be secured on lesser facts, lesser business activities, than can valid service of process; it is "found *or* transacts business" against simply "found". This circumstance raises conceivable problems, hitherto, it seems, unsolved.

First, a recollection of the constitutional due process requirements for the establishment of personal jurisdiction shows that such an establishment is possible only if there is sufficient (minimum) contacts between the corporation and the forum state and if the corporation has been afforded reasonable notice and opportunity to be heard.

Assuming now that a corporation has conducted business in a state where it is seated enough to have been "transacting business" there, but not enough to be "found" there. Venue is certainly proper in that state. But under the assumption again that no corporate agents are amenable to service in that state, can process be served upon the corporation or its agent *outside* the state, whereever the corporation is an inhabitant or is found — e.g., by mailing the summons or by sending a court's clerk with the summons to the corporation? Constitutional objections arise only if "transacting business" is something less than "minimum contacts". Suppose it is not, then the "minimum contacts" requirement is, consequently, met by application of the venue provision. What is left of the constitutional requirements — reasonable notice, etc. — will have to be taken care of by the service of process provision. The venue provision, when applied, has hence taken the role of the service of process provision in one important respect. (See e.g. Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, at 374, 47 S. Ct. 400, at 403, 71 L. Ed. 684 (1927).). Also see dicta in U.S. v. Scophony Corp. of America (*infra* n. 72) pointing in the same direction (at 810 and 817, but different at 818).

But what happens when, as in the cases where *alien* corporations are involved, no venue provision is applicable; when the venue provision is outruled by the stipulation that aliens may be sued "in any district"? Since such a stipulation surely constitutes little or no aid in fulfilling the due process requirements, all the burden in this task must fall on the service of process provision. *Alien* corporations thus have to be "found" within the forum state. It is not enough if they "transact business" there. (That "transact business" may suffice constitutionally, is of no relevance. The more restrictive statute has to be complied with). As "transacting business" means fewer contacts with the forum state than means "being found" or "doing business", U.S. and alien corporations are consequently measured by different legal standards.

Secondly, having established that an alien corporation, for jurisdictional purposes, has to be "found", the next unavoidable question becomes "found where?" — *i.e.,* does the corporation have to be found in the state or district in which the suit is brought or is it sufficient that the corporation is found in any part of the U.S. In the former instance, venue is not proper in "any district", but only in the district where the alien corporation can be "found". (*Cf.* Rahl, 133, "[p]rocess therefore may not be served on an alien from 'any district.' ... "unless the *district* is one that satisfies constitutional limitations on the acquisition of personal jurisdiction". (Emphasis added). Rahl makes reference to Japan Gas Lighter Ass'n. v. Ronson Corp., 357 F. Supp. 219, 225 and 232—236 (D. N. J. 1966).) Where the entire U.S. constitutes the place when the alien corporation can be "found", venue would be proper anywhere. Hence, if an alien corporation were to, for example, concentrate all its business activities to Florida, suit could still be brought in New York. (See e.g. U.S. v. The Watchmakers of Switzerland Information Center, Inc., 133 f. Supp. 40, at 46 f. (S. D. N. Y. 1955), which seems to favour this view. Here one of the defendant's only contacts with the U.S. where centered to the state of Ohio. Suit was brought in New York.)

[71] P. 10.

[72] See Eastman Kodak Co. v. Southern Photo Materials Co., *supra* n. 70, 273 U.S. at 371 ff. and U.S. v. Scophony Corp. of America, 333 U.S. 795, at 807, 68 S. Ct. 855, at 861—62, 92 L. Ed. 1091 (1948).

[73] And it turns on a factual appraisal of the particular situation. "Because all corporate action must be vicarious," ... the content of such abstracts as doing or transacting business, ... could be determined only by an act of judgement which selects and attributes to the corporation, from the mass of activity done or purporting to be done on its behalf, those acts of individuals which are relevant for the particular statutory purposes and policies in hand." (U.S. v. Scophony Corp. of America, *id.* at 804. *Cf.* Justice Frankfurter's concurring opinion, *id.*, at 819.) Primary importance should be attached to the overall picture, not specific outsingled facts. (See Scophony, at 817).

[74] Civ. 29-446, S. D. N. Y. (1948), CCH 1948—1949 Trade Cases π 62,248.

[75] These activities, the court concluded, only added up to "transacting business" and not to "doing business".

[76] 20 F. Supp. 13 (S. D. N. Y. 1937). Only cases dealing with antitrust law will be referred to hereinafter, for the fact mentioned *supra* that jurisdictional concepts such as "doing business" vary in contence from purpose to purpose, from one field of law to another etc.

[77] *Supra* n. 72.

[78] See especially at 816: "for all relevant purposes ... [the agent] was the company" (Scophony).

Fugate would not agree. His construction of the Scophony case (see *supra* n. 72) is summarized as follows: "Thus, in obtaining jurisdiction of alien corporations in an antitrust case, the Court will sustain such jurisdiction if the corporation is carrying on business of *any substantial character* in the district, even though such activity may be through an *American* subsidiary. It is unimportant whether this be considered as a liberalization of the jurisdictional tests with respect to an interpretation of 'found', or whether it represents, in effect, a decision to apply the test of 'transacts business' to service of process as well as venue." (At 92 (2d ed.), first emphasis added). (Also see W. D. Kingery Jr, Personal Jurisdiction Over Alien Corporate Parents and Affiliates in Antitrust Actions: A Plea For Perspicuity, 5 Syr. J. Int'l L. & Com. 149, at 170 (1977)). While it is true that "transacts business" amounts to the carrying out of business of any substantial character (see the Scophony case at 807, where Eastman Kodak Co. v. Southern Photo Materials Co. (273 U.S. 359, page 403 (1927)) is cited), "found" and "transacts business" are in no way considered to coincide. And while it may be admitted that the Scophony case has a cryptic touch, some lines cannot be misunderstood, such as: "We think that Scophony not only was 'transacting business' of a substantial character in the New York district at the time of service, so as to establish venue there, but also on the sum of the facts regarding its activities was 'found' there within the meaning of the service-of-process clause of § 12 [Clayton Act]". (*Id.* at 818). The crux of the case is that "found" — or "doing business" — requires business engagement of a constant and continuous character in contrast to "transacting business", which merely requires business of "any substantial character". (*Id.*, at 810 and 816).

[79] Instead of "enterprise entity", some authors prefer to describe the phenomenon as "piercing the corporate veil", see e.g. Bloch, Extraterritorial Jurisdiction of U.S. Courts in Sherman Act Cases, 54 ABA Journal 781, at 783 (1968); Griffin, The power of Host Countries Over the Multinational: Lifting the Veil in the European Economic Community and the United States, $6_{(1)}$ Law & Pol. Int'l Bus. 375, at 383 (1974); Adler, (Comments) Civil Procedure — State Courts — Jurisdiction — New York's Doing Business Test Applied to Preclude Jurisdiction Over West German Corporation, 5 Int'l Law & Pol. 575, at 583 (1972).

"Piercing the corporate veil", the traditional concept adopted early in U.S. corporate law and elsewhere (see e.g. Henn, 250 ff.), denotes, to my mind, something broader than the specific phenomenon discussed in this chapter, including for instance the situation where corporate structure is disregarded to make shareholders resposible for corporate action, to reach corporate property, and many other aspects.

[80] The theory of enterprise entity has coextensive relevance when it comes to deciding *where* certain conduct, restricting trade, should be localized.

[81] *Supra* n. 72

[82] 1946—1947 Trade Cases π 57, 481 (CCH) (S. D. N. Y. 1946). See also (same case) 58 F. Supp. 785 (S. D. N. Y. 1944), *affirmed,* 325 U.S. 196, 65 S. Ct. 1120, 89 L. Ed. 1554 (1948), 86 F. Supp. 59 (S. D. N. Y. 1949) and United States v. Imperial Chemical Industries, Ltd., 100 F. Supp. 504 (S. D. N. Y. 1951). Comparable are Massey-Harris-Ferguson v. Boyd, 242 F. 2d 800, *cert. denied,* 78 S. Ct. 48 (1957) and In re Grand Jury Subpoena Duces Tecum Addressed to Canadian International Paper Co., 72 F. Supp. 1013 (S. D. N. Y. 1947).

See also Restatement (2d) Conflicts, § 52 Comment b. and Reporter's Note Comment b.

In general see e.g. Reith, (Comments) Jurisdiction Over Parent Corporations, 51 Cal. L. Rev. 578 (1963).

[83] 133 F. Supp. 40 (S. D. N. Y. 1955). *motions for reargument denied,* 134 F. Supp 710 (S. D. N. Y. 1955).

[84] FH had another subsidiary in the U.S. — Foote, Cone & Belding — whose activities, the court held, "round[ed] out the picture of presence ...". *Id.* at 46.

[85] *Id.* at 45.

[86] *Id.* at 46 f. Also see the Restatement, *supra* n. 82.

[87] See *supra* n. 70, especially Barnard, 112 f. A fifth defendant in the Swiss Watch case (Eterna A.G. Uhrenfabrik) was subjected to U.S. personal jurisdiction on these grounds (see *supra* n. 23, at 48 f.). Here the New York distributor — in the court's view — could operate independently only as long as it did as the Swiss manufacturer wished in major matters. If the manufacturer's wishes were not complied with, it could either cease doing business with or take over total control over the distributor.

Also see Scriptomatic, Inc. v. Agfa-Gevært, Inc., 1973-1 Trade Cases π 74, 594 ((S. D. N. Y. 1973) where a foreign corporation was tied to the United States through an exclusive distributor and Honeywell, Inc. v. Metz Apparatenwerke, 509 F. 2d 1137 (7th Cir. 1975); Gutor Int'l AG v. Raymond Packer Co., 493 F. 2d 938 (1st Cir. 1974) — personal jurisdiction in a counterclaim.

[88] 35 U. S. C. A. Section 293 (1964).

[89] See Sherman Act, Section 6, 15 U. S. C. A. § 6 (1964) and Section 76 Wilson Tariff Act, 15 U. S. C. A. § 11 (1964).

Also a last resort there is the *jurisdiction quasi in rem,* which gives a court power to adjudicate with respect to local property whether related or unrelated to the cause of action and whether personal or real. Due process only requires some sort of notice and judicial hearing prior to the forfeiture or seizure of the property. (See Sniadach v. Family Finance Corp., 395 U.S.337 (1969); Fuentes v. Shevin, 407 U.S. 67 (1972). In general see Ehrenzweig, 99 ff.,; Leflar, 33 f., 40 ff.

[90] See e.g. United States v. National Malleable Steel Castings Co., 6 F. 2d 40, 43 (N. D. Ohio, 1924) and In re Grand Jury Subpoena Duces Tecum Addressed to Canadian International Paper Co., 72 F. Supp. 1013 (S. D. N. Y. 1947) where this matter was discussed.

[91] Federal Rules of Civil Procedure, 1 and 81.

[92] See *supra* p. 6 ff. and the cases mentioned there.

[93] Sometimes referred to as "single-act" statutes.

Cf. Hunt v. Mobil Oil Corp., 1975-2 Trade Cas. π 60,558 (S. D. N. Y. 1975) and Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. 262 (E. D. Pa. 1975). Also see Centronics Data Computer Corporation v. Mannesmann, A. G. (432 F. supp. 659 (D. N. H. 1977)), where personal jurisdiction was based on contacts with the U.S. as a whole and the fact that the alleged antitrust violation was aimed at persons within the forum district.

[94] Federal Rules of Civil Procedure, 4 (e), (f) and (i) (1973).

[95] 244 F. Supp. 70 (S. D. N. Y. 1965).

[96] *Id.* at 78. See McKinney's New York C. P. L. R., § 302 ff.

[97] *Id.* at 80.

[98] See e.g. Singer v. Walker, 15 N.Y. 2d 443, 209 N. E. 2d 68, 261 N. Y. S. 2d 8 (1965), *cert. denied,* 382 U. S. 905 (1965); Continental Nut Co. v. Robert L. Berner Co., 345 F. 2d 395 (7th Cir. 1965); Kramer v. Vogl, 17 N. Y. 2d 27, 215 N. E. 2d 159 (1966); U.S. v. Montreal Trust Co., 358 F. 2d 239 (2d Cir. 1966) and the cases referred to p. 7 f. *supra.*

[99] Goldman v. Parkland of Dallas, Inc., 277 N. C. 223, 176 S. E. 2d 784 (1970).

[100] Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F. 2d 502, 507 (4th Cir. 1956).

[101] Benn v. Linden Crane Co., U.S. District Court for Eastern Pennsylvania, April 30, 1971, in: United States Law Week: Vol. 39, Nr. 45 p. 2663 (also see p. 1177). (May 25, 1971).

[102] *Supra* p. 12.

[103] Restatement (2d) Conflicts, § 52 and Reporter's Note to Comment b (at p. 182)

[104] See e.g. International Shoe Co. v. State of Washington, *supra* n. 36; Henn, at p. 113 and 154.

[105] Nelson v. Miller, 11 Ill. 2d 378 (Ill. S. Ct. 1957).

[106] The Uniform Interstate and International Procedure Act as approved by the National Conference of Commissioners on Uniform State Laws in 1962 (9B U. L. A. 307, 1966).

[107] McKinney's N. Y. C. P. L. R., § 302.

[108] The California Code of Civil Procedure, § 410.10.

[109] *Cf.* the opinions of Justice Black and Douglas, 374 U.S. 869 (1963).

[110] *Supra* p. 10 ff.

[111] For a general understanding, see e.g. Ehrenzweig, 71 f., 120 ff.; Leflar, 111 ff.; Barrett, The Doctrine of Forum Non Conveniens, 35 Cal. L. Rev. 380 (1947); Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 Colum. L. Rev. 1 (1929); Braucher, The Inconvenient Federal Forum, 60 Harv. L. Rev. 908 (1947). Also see the Federal Statute of Forum Non Conveniens (the Judicial Code — 28 U.S.C. § 1404 (a).

[112] See in particular Leflar, 72 f.; Ehrenzweig, 72, 118 (where reference is made to a statement by Judge Learned hand in Latimer v. S/A Industrias Reunidas F. Matarazzo, 175 F. 2d 184 (2d Circ. 1949), *certiorari denied,* 338 U.S. 876, 70 S. Ct. 141 (1949): "[I] may still be true that in theory the issue as to jurisdiction is different from that as to forum non conveniens ...". But in an earlier case the same judge delivered the following formula: "[T]he court must balance the conflicting interests involved: i.e. whether the gain to the plaintiff, in retaining the action where it was, outweighed the burden imposed upon the defendant; or vice versa. That question is certainly indistinguishable from the issue of 'of forum non conveniens' ". (Kilpatrick v. Texas & P.R.R., 166 F. 2d 788, 790 (2d Cir. 1948), *cert. den.* 335 U.S. 814, 69 S. Ct. 32 (1948). Also see Deutsch v. Hoge, 146 F. 2d 201, 203 (2d Cir. 1944) *cert. den.* 325 U.S. 852, 65 S. Ct. 1088 (1945).

[113] But assume that the forum is inconvenient for the defendant, e.g. an alien corporation, but due to counterbalancing factors, not inconvenient enough to cause the court to grant the defendants motion to dismiss the complaint for lack of personal jurisdiction. The fact that the issue was very, or relatively, close, might have an effect upon the overall picture when deciding the issue of *forum non conveniens.* That way the same facts could have relevance at two stages of the process.

[114] See e.g. Ehrenzweig 72; Leflar, 72 f.; Ehrenzweig, The Transient Rule of Personal juris-

diction: The Power "Myth" and Forum Conveniens, 65 Yale L. J. 289, 303—314 (1956).

[115] U.S. v. Watchmakers of Switzerland Information Center, 133 F. Supp. 40 (S. D. N. Y. 1955).

[116] Of the international antitrust cases referred to above, for instance, neither U.S. v. Scophony Corp. of America (*supra* p. 13) nor Hoffmans Motors Corp. v. Alfa Romeo S.p.A. (*supra* p. 16) comprise consideration of these issues, though the defendant (alien) corporation in both cases had moved for dismissal of the complaint for want of personal jurisdiction.

[117] *Supra* n. 115 at 43.

[118] *Id.* at 46, 48 and 50.

[119] *Id.* at 48: "[T]he long and intimate relationship beween Swiss and American affiliates and the complete lack of conflicting financial interets between them assures that the facilities of the parental home office will provide the Swiss affiliate with a well equipped and hospitable base from which to pursue its litigation in this forum."

[120] See further on this subject part two below.

[121] Milliken v. Meyer, 311 U.S. 457, 61 S. Ct. 339 (1940); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652 (1950).

[122] Fed. R. Civ. P. 4 (e) and 4 (f) (1973).

[123] *Id.* Rule 4 (i). For interpretation of these rules in antitrust cases, see in particular Hoffman Motors Corporation v. Alfa Romeo S.p.A., 244 F. Supp. 70 (S. D. N. Y. 1965), at 77 ff.

[124] 95 U.S. 714 (1878). (Also see Cleary, the Length of the Long Arm, 9 J. Pub. L. 293 (1960)).

[125] Brewster, 56.

[126] Some scholars, however, support the view that the requisites for personal jurisdiction (in antitrust cases) should coincide with the limits of the due process standards; otherwise antitrust policies would be impeded. See e.g. Katzenbach, Conflicts On An Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law, 65 Yale L. J. 1087, 1151 (1956).

3. Subject matter jurisdiction

3.1 Introduction

Determining subject matter jurisdiction is fundamentally a question of reading and interpreting the statutes upon which the cause of a given action is founded, with a view to establishing the substantive scope of these statutes. Substantive scope, in turn, is conditioned by congressional intent and congressional power.

Whether certain market operations carried out by alien corporations can be subject to U.S. antitrust scrutiny and condemnation is thus dependent upon whether Congress intended the antitrust laws to cover such acts and whether the Constitution has vested the necesary power in the Congress. In the words of Judge Learned Hand,[1] when confronted with international restraints: "as a court of the United States, we cannot look beyond our own law". The necessary power of the Congress is granted by Art. 1, Section 8 of the Constitution, which is the capacity to regulate interstate and foreign commerce. To regulate is to govern, which is to restrain, to prohibit, to promote, to protect, etc., commerce, for the furtherance of whatever benign public purpose, in any field of society. Hence, the "commerce clause" has, for instance, been a useful vehicle in deterring and preventing racial discrimination, air pollution and instigational crimes.[2] The regulative power must, however, not be exercised so as to transgress the constitutional safeguards, such as the due-process clause and the provision against cruel and unusual punishment (8th Am.)

With the enactment of the first piece of antitrust legislation, the Sherman Act of 1890, Congress made the first significant attempt to utilize this regulative power to regulate interstate and foreign commerce. The Sherman Act, however, had little effect in the very incipient period, greatly due to the fact that the term commerce was limited to denote the mere transportation of commodities and not, for instace, the manufacturing of such.[3] This very narrow interpretation has now been abandoned for the broad modern view suggesting that anything having an impact of some import on interstate (or foreign) commerce lies within the ambit of Congress' governmental power.

Only transactions or activities of an entirely *intra*state or local nature, fall beyond the control of Congress and thus belong to the several states alone (as will be outlined below). This is very roughly the line drawn by the Supreme Court with respect to the separation of federal and state power. The purpose of this chapter is to examine and possibly to ascertain with

some degree of precision where the Congress intended to draw the line as far as regulating foreign commerce through the antitrust laws is concerned, the power to which has been granted exclusively to the Congress. For this purpose, the controlling language of these laws and their interpretation by the courts will be analyzed and various commentators consulted.

There is nothing in statutory language that indicates that the concept of foreign commerce in content or extension shall be distinguished from that of interstate commerce. On the contrary, the prevailing view is, as once stated by Chief Justice Taney,[4] that "[t]he power to regulate commerce among the several States is granted to Congress in the same clause, and by the same words, as the power to regulate commerce with foreign nations and is coextensive with it." It therefore serves our purpose to first, although very briefly, examine the purely domestic developments in case law involving interstate commerce, with a view to shedding some light on the foreign commerce clause. The interstate commerce clause will thus play the role of an indicator, whose function is to illuminate the foreign commerce clause.

While the power to regulate commerce among the several states and *with* foreign nations is granted to Congress as a result of the distribution of power between the federal government and the states, commerce *among* nations is ultimately governed by the written or unwritten principles of international law. To what extent such principles exist, and, if they do, in what way and how far the Congress and the Supreme Court of the United States are bound by these, is elaborated in part two below.

Before proceeding further, an essential distinction: the discussion in this chapter will deal exclusively with the issue of subject matter jurisdiction, *i.e.*, whether the court — under the antitrust laws — may assume jurisdiction over certain restrictive operations, international in nature. Few words will hence be dedicated to the substantive issue, *i.e.*, whether the restrictive conduct constitutes a violation of U.S. antitrust laws. It may well be that the prerequisites for jurisdiction and substantive violation at times coincide, or that fulfillment of the requisites of one will automatically suffice for the other, but that is a different matter. Nevertheless, the distinction itself must be kept alive.

3.2 The controlling statutory provisions

The portal U.S. antitrust laws are of an early origin. They were passed by Congress at a time when the United States still was an agrarian country undergoing a massive industrial expansion. They have remained basically

unchanged right up to the present. This is especially true of the Sherman Act of 1890 and the Federal Trade Commision Act (FTC Act) of 1914, but perhaps less true of the Clayton Act of 1914, which has been subject to major changes through the Robinson Patman Act (1936)[5] and the Celler-Kefauver Act (1950).[6]

The Sherman Act is the statute most frequently applied to international restrictive trade practises and will probably continue to be the dominant source of regulation. It was enacted as a response to the vehement public reaction against the trusts and combinations of "big business", which were threatening to break down competition in vital industries.[7] Its paramount purpose was to protect American consumers by providing a necessary base for free competition, thereby spurring efficiency, innovation and cost-related pricing in American commerce.[8] But the Sherman Act was also designed to protect the numerous small companies against the tactics and market behaviour of their more powerful competitors.[9] Furthermore, federal "trust-busting" through federal antitrust agencies and federal courts, was believed to function more successfully than the local antitrust law that existed at that time in various states within the U.S. federal system.[10]

The broadly phrased[11] language of the Sherman Act declares illegal "[e]very 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*" (Section 1), and monopolizing, attempts to monopolize, or combinations or conspiracies to monopolize, by any persons(s) with any other person(s) in "*any part of the trade or commerce among the several states, or with foreign nations*". (Section 2, emphasis added.)[12] At a cursory reading, these sections seem to reach restrictions on competition — horizontal or vertical, bilateral or unilateral — that occur either in interstate commerce or in foreign commerce (export-import). The sections seem to imply that even restrictive conduct by alien corporations is covered, provided such conduct occurs "in" the interstate or foreign commerce. This immediate interpretation is apparently supported by Section 8 of the Sherman Act, which defines the word "person" to include both U.S. and alien-corporations[13] without distinction. It seems to be supported further, at least partially, by the legislative history of the Sherman Act. The debates in Congress, Senator Sherman's original, but later altered proposal and the general discussions at that time indicate a serious concern for a free and unhampered import trade.[14]

In an early phase of the discussions, Senator George attracted attention to the limited effectiveness of the Sherman Act: "[I]f the agreement or combination, which is the crime, be made outside of the jurisdiction of the

United States [exemplifying Mexico and Canada] it is also without the terms of the law and cannot be punished in the United States... Then if these conspirators are foreigners and remain at home, or, being [U.S.] citizens, shall cross our borders and enter into any foreign territory and there make the combination or agreement they escape the criminal part of this law; and proceedings carrying out the combination may be carried on with impunity in the United States. The raising of prices and the prevention of free and full competition may all take place in the United States, and yet no crime has been committed."[15] This statement clearly suggests that restrictive "acts" performed "outside" the United States were not covered by the provisions of the original bill proposed to be but not finally adopted.[16a]

Whether the Sherman Act, as ultimately formed, took these asserted insufficiencies into consideration is subject to some uncertainty. The insertion of Section 6 in the final version of the Act — the possibility of forfeiture of property situated within the United States — is probably one remission in this respect.[16b] The fact that the Sherman Act was redrafted quite considerably, might be another.[17] Moreover, a declaration made by Senator Hoar, with reference to the Act in its final form, emphasized the extension of the old common law principles to cover the "international and interstate commerce in the United States" that the Act involved.[18] In addition to this, various contributions to the congressional debate marked a will to encompass imports from trusts in other countries.

Yet, the general picture of the Sherman Act is one of ambiguity and inconclusiveness, of adaptability and inaccuracy. When are restrictive arrangements "in" interstate or foreign commerce? Is a restrictive agreement concluded outside the United States within the substantive scope of the Act?; and if so, under what circumstances? Alien corporations that agree to fix prices on U.S. export goods, are they violating the U.S. antitrust laws? Or in other words: what are the jurisdictional criteria that determine the ambit of the Sherman Act? Such questions are left unanswered. The particularization — a part of Congress' legislative authority — is entrusted to the courts.

There are, in essence, three concepts (emphasized above) in the first two sections of the Sherman Act that indicate some jurisdictional limitation, each of which shall from now on be the center of discussion: "(trade or) commerce", "among the several states" and "with foreign nations".

"*Commerce*" for Sherman Act purposes is, as interpreted in case law,[19] defined to be coextensive with the Congress' constitutional power that is set out in the commerce clause. Thus, most activities that constitute "commerce" in the constitutional sense, and in other areas where the Congress'

commerce-regulating authority has been exercised,[20] also constitute "(trade or) commerce" within the meaning of the Sherman Act. "Commerce" in the antitrust area, accordingly, comprehends every species of commercial activity, including, for example, transactions in commodities, financial dealings, furnishing of services (such as legal consultation[21] and insurance[22], communications media, entertainment and transportation, engaged in for financial gain,[23] with the only exceptions being those explicitly created by statute.[24]

The notion of "*commerce among the several states*" is likewise intended to be an equivalent to the constitutional proviso in the commerce clause. The Congress exhausted its legislative authority and thereby enabled the federal courts to assert jurisdiction over restraints in interstate commerce to the extent that Congress could regulate such commerce under its constitutional power.[25] The prohibited restraint must in some aspect *relate* to interstate commerce.[26] Consequently, the jurisdictional issue — which again must be distinguished from the question of whether or not there in fact is a violation of the law — in each specific case is: Is there a sufficient relationship between the restrictive conduct and interstate commerce, *i.e.*, the "commerce among the several states". This is *the interstate commerce test.*

3.3 The Sherman Act and the interstate commerce test

The interstate commerce test thus requires some causal or functional relationship between the restraint of competition (restrictive conduct), on the one hand, and the commerce among the several states, on the other.[27] The relationship constitutes the jurisdictional criteria in the domestic sphere that determine the issue of subject matter jurisdiction. The legislative power of Congress does not, as we have seen,[28] reach purely local or *intra*-state commercial activities, unless they are connected to interstate commerce, or, as somewhat drastically expressed in one case, "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation [is]...".[29]

Court of the United States have devoted considerable time and effort in order to unveil the cryptic phrasing of the Sherman Act and ascertain its mode of application to restraints of trade. Divergent opinions have been and still are revealed. But the general trend is discernable: federal jurisdiction as to interstate and intrastate commerce is expanding at the expense of state jurisdiction.[30] This is the realization of the "positive" power granted Congress to "legislate concerning transactions which, reaching across state

boundaries, affect the people of more states than one...".[31] It is not until recent years that the jurisdictional criteria are beginning to acquire a stabilized structure. Out of vague and diffuse material, these criteria have crystallized into two alternative formulae, each of which constitutes a sufficient basis for subject matter jurisdiction. Summarized, these formulae read as follows: Subject matter jurisdiction can be assumed with respect to

(1) restraints occurring "in", ("in the flow" or "in the stream of") interstate commerce,

(2) restraints *not* "in" interstate commerce, but substantially (or materially) affecting such commerce.[32]

3.3.1 Restraints "in" interstate commerce

In the first formula, the required connection between the restraint and the interstate commerce amounts to *identification* or fusion. The restraint alleged to be violating the Sherman Act — whether horizontal or vertical, bilateral or unilateral — must, for jurisdictional purposes, directly apply to goods or services that move across state lines. A simple example: A and B, incorporated in state X, both producing leather, agree to fix prices on leather with respect to sales to C, a shoe manufacturer, incorporated in state Y. Thus, the price-fixing agreement directly and immediately concerns goods in interstate commerce. In fact, it is a condition in the agreement between A and B that interstate commerce is encompassed. The agreement *applies* to interstate commerce. The question how much interstate commerce is affected is immaterial. It is not the quantity that counts, it is the quality. And it does not matter that the eventual effects of the restraint are purely local (in our case if C is forced to close down).

Yet, if the criteria for establishing when interstate commerce begins and when it ends are nebulous, one has not become much wiser. Were A and B to store their *goods temporarily in state Y,* in facilities owned or controlled by them, prior to delivery to C, the goods would likewise be "in" interstate commerce. Temporary local storage does not terminate the interstate flow of commerce for antitrust purposes,[33] at least where a subsequent sale can be anticipated. Suppose, however, that A and B have *processing factories in state Y* where the goods are processed to a certain degree. Are the goods in the stream of interstate commerce if the sale of these to C is subjected to a restriction? The answer to this will depend on the degree of processing. Milk processed for ultimate sale, for instance, "survives" interstate commerce as well as cars which are assembled and equipped,[34] but not crude oil refined to petroleum products, nor electrical systems which are

assembled.[35] Where the process of alternation starts with the raw material and ends with manufactured products, the stream of interstate commerce is probably brought to a standstill in most cases.[36]

Assume, again, that A and B — this time not collaborating — sell their leather to distributors D and E in state Y, and that D and E market the goods solely to retailers within state Y. Does a restrictive agreement between D and E occur "in" interstate commerce, or does the stream of interstate commerce terminate when it reaches D and E? *Walling v. Jacksonville Paper Co.*[37] stands for the proposition, if applied to our example, that a restraint imposed by D and E, regarding the goods sold in state Y, does not fall "in" interstate commerce, *unless* D and E have purchased the goods from A and B pursuant to a *prior order* from any retailer in state Y. The prior order accompanies the first sale (from A or B *to* E or D) and with it the interstate commerce, until the goods arrive at the final customer ordering the goods. But in the absence of a prior order, is a restrictive agreement by D and E beyond the reach of the federal antitrust laws? They are not, not quite. A few lower federal courts have expanded the "prior order" doctrine beyond recognition by holding that there is a "practical continuity of movement" of the goods from the manufacturer (in our case A and B) via the distributor (D and E) to the final customer, and that the goods remain "in" interstate commerce throughout this movement, with or without a prior order.[38]

This expanded view has not, thus far, been expressly ruled on by the Supreme Court. Opinions in a few recent cases, however, seem to be contra. Thus in *Burke v. Ford,*[39] for instance (discussed further *infra*), local restraints executed by wholesalers purchasing out-of-state goods, were not regarded to be "in" interstate commerce, although the situation could be characterized as a "continuing movement". In *U.S. v. American Building Maintenance Ind.*[40a], the flow of interstate commerce ceased pursuant to the distributor's sale locally but *before* reaching the final customers. (Justice White, *dissenting* in principle but not in fact, argued that "the regular movement of goods from out-of-state manufacturer to local wholesaler and then to retailer" should place restraints imposed by the latter "in" interstate commerce.)

Nevertheless, none of these cases would leave the alleged restraints without the ambit of the Sherman Act, since a restraint — if not "in" interstate commerce — may still "substantially affect" interstate commerce. As a practical point of view, it may seem unnecessary to extend interstate commerce movement for jurisdictional purposes, as long as the "substantially affect" test plays a strong supplementary role, which it no doubt does as

far as the Sherman Act is concerned, as we shall see next. Otherwise the two instruments of the interstate commerce test would tend to overlap.

3.3.2 Restraints "substantially affecting" interstate commerce

The second formula is supplementary to the first and is invoked when the latter does not apply. "Substantially affect" connotes a quantitative standard, but not in any specific meaning. This deserves further elaboration. The word "affect" could simply mean to have an influence upon, whether good or bad or indefinable, marking merely a relationship, where the impulse waves only move in one direction: from the restraint to the interstate commerce. If this is correct, the term "substantial" must relate to the interstate commerce, *i.e.,* that the interstate commerce "affected" must be substantial, *not* the "affect" itself. On the other hand, "substantially affect" could also denote, and this has already been indicated, a negative result upon interstate commerce; to be specific, such negative results of restrictive practises that the antitrust laws were designed to prevent: price and cost increases, a decrease of efficiency and commercial flow, etc. It would follow that "substantial" must relate to "affect"; a certain magnitude regarding the "affect" is required. A more pertinent way of formulating the formula would be, provided the latter interpretation is correct, restraints that have "*a* substantial *e*ffect" on interstate commerce.[40b]

These issues were raised in *Burke v. Ford,*[41] where Oklahoma liquor retailers brought an action against Oklahoma liquor wholesalers, who allegedly had divided the Oklahoma market. Since there were no liquor distillers in Oklahoma, liquor was shipped in from other states to the warehouses of the wholesalers. The Court of Appeals found, as did the District Court,[42] that the liquor "came to rest" in the wholesaler's warehouses and that interstate commerce ceased at that point. These courts held that the restraint was therefore neither "in" interstate commerce, nor did it "substantially affect" interstate commerce, since "the proof [of the existence of the restraint] was entirely insufficient to show that the activities complained of ... adversely affected interstate commerce".[43] Accordingly, the lower courts declined jurisdiction. The Supreme Court reversed and remanded. In a *per curiam* opinion the Court held that proof of the restraint — the state-wide market division — is, at times, in itself sufficient proof of affected interstate commerce, especially in those cases where general inferences — based on common experience — can be drawn from the *type* of restraint involved, inferences that would warrant the conclusion that interstate commerce is substantially affected. The Supreme Court thus found that

"[h]orizontal territorial divisions almost invariably reduce competition...", which in turn increases prices, which reduces sales to the final customer. Fewer final sales result "almost surely" in fewer sales to retailers and "hence fewer purchases from out-of-state distillers...". The interstate commerce was thus "inevitably" affected. There is the Supreme Court's line of reasoning. It was not so much the magnitude of an effect that the Court was looking for, although the negative influence of the restraint on the interstate commerce is stressed. It was much more the *potential* of the restraint to affect such commerce in *any* direction, based on general experience of the type of restraint involved which guides the reasoning.

A fairly recent case, *Goldfarb v. Virginia State Bar,*[44] supports this view. There, a class action was brought against the Virginia County Bar Association, which operated — through fee schedules — to fix prices for legal services provided within the state of Virginia. Financial institutions required as a condition of making loans for real estate purchases that the title to the property be examined by a member of the bar. A married couple, who planned to buy a home in Virginia, failed to retain an attorney willing to perform such an examination for a fee less than that prescribed by the bar association.

The Supreme Court, holding that legal services constituted "commerce", assumed subject matter jurisdiction on the ground that the price-fixing arrangement "substantially affected" interstate commerce. "[S]ignificant portion[s] of funds", the Court reasoned, "for the purchasing of homes" in Virginia and guaranties to loans came from without the state of Virginia. Loans and guaranties necessitated title examination and the hiring of the services of an attorney. Here we have the required connection: legal services — whose prices are fixed — indispensable in interstate financial transactions.[45] The Court: "Given the substantial volume of commerce involved, and the inseparability of this particular legal service from the interstate aspects of real estate transactions, we conclude that interstate commerce has been sufficiently affected."[46] No proof to the effect that interstate commerce in fact was affected was needed (for instance, that homebuyers were discouraged by the fixed prices). Hence, the necessary ingredients in this jurisdictional formula seem to be (1) the volume of interstate commerce involved, and (2) the potentiality of the alleged restraint to affect such commerce; if there is no such potential or where the volume of commerce is insignificant, the conditions for interstate commerce being "substantitally affected" are probably lacking.[47] Primarily, however, it is the logical causal connection between the restraint imposed and the flow of interstate commerce that determines the issue.

A *purpose* or *intent* to affect interstate commerce is entirely without relevance. This was made abundantly clear in *Hospital Building Co. v. Trustees of the Rex Hospital.*[48] There, an antitrust suit was instituted against a group of co-conspirators (among them the Rex Hospital), who allegedly had orchestrated a plan to delay and, if possible, prevent the issuance of necessary authorization for, and otherwise block an expansion of the plaintiff's hospital facilities. The hospitals involved — private corporations or operated by such — were located in North Carolina, and were thus competitors of business providing medical and related services in that area. The Supreme Court, reversing and remanding the decision of the lower courts, held that interstate commerce was "substantially affected" by the concerted acts,[49] while at the same time rejecting the argument presented that the Sherman Act did not cover acts not purposely directed toward interstate commerce. Said the Court: "[T]he fact that the respondents ... may not have had the purposeful goal of affecting interstate commerce does not lead us to exempt that conduct from coverage under the Sherman Act."[50] Intent was "simply irrelevant".

To *summarize*: Restraints carried out by U.S. corporations (not taking into account restraints of trade or commerce *with foreign nations, infra* p. 54 f.) fall within the scope of the Sherman Act, *i.e.*, the courts have subject matter jurisdiction, if either (1) the restraint is "in the flow of" ("in", "in the midst of", "in the stream of", etc.) of interstate commerce — the restraint is directly applied to the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer, *or* if (2) the restraint "substantially affects" interstate commerce, in that it has a sufficient nexus to such commerce and empirically or by a plausible theory or probability has a tendency to affect it, with no particular stress on "substantiality" or proof of actual effect whether on the market structure or prices, or the volume of interstate commerce.

3.3.3 The Clayton, Robinson-Patman and FTC Acts and the interstate commerce test

In contrast to the Sherman Act, the Clayton and Robinson-Patman Acts cover only restraints occurring "in" interstate commerce and carried out by corporations (or persons) "engaged in commerce". Local activities "substantially affecting" interstate commerce are thus not covered. This conclusion was reached by the Supreme Court in *Gulf Oil Corporation v. Copp Paving Co.*[51] and *U.S. v. American Building Maintenance Ind.*[52] hav-

ing juxtaposed the critical sections of these statutes.

While the Sherman Act, as we have seen, applies to all restrictive conduct "in restraint of trade or commerce among the several States", Section 26 of the Clayton Act (as amended: the Robinson-Patman Act) prohibits price discrimination by "any person[53] engaged in commerce, in the course of such commerce"... "where either or any of the purchases involved in such discrimination are in commerce" and where the discrimination has substantial anticompetitive effects[54] "in any line of commerce".[55] ("Commerce", as defined in Section 1, means "trade or commerce among the several States and with foreign nations...".)[56] Similarly, Section 3 of the Clayton Act declares illegal any person's — "engaged in commerce, in the course of such commerce" — tie-in sales, entering of exclusive dealings, etc., that "may ... substantially lessen competition[57] or tend to create a monopoly in any line of commerce".[58] Section 7 of the Clayton Act, finally, forbids acquisitions by a corporation "engaged in commerce" of the assets or stock of another corporation also "engaged in commerce", where the effect may be to substantially lessen competition[59] "in any line of commerce in any section of the country".[60]

In sum, the provisions of the Clayton Act extend only to persons that are engaged in interstate commerce *and* whose restrictive activities occur in the stream of interstate commerce. The jurisdictional requirements of these provisions cannot thus be fulfilled merely by a showing that an alleged restraint "substantially affects" interstate commerce.[61] But that is not all: the restraint occurring "in" the interstate commerce formula is more narrowly applied for Clayton Act purposes than are similar formulae in other areas.

The *Gulf Oil case*[62] will serve as an illustration. There, the plaintiffs (Copp et al.), manufacturers of asphalt concrete, instituted suit, *inter alia,* under Sections 2(a), 3 and 7 of the Clayton Act against local competitors and their parent corporations (among these Gulf Oil Corp.) and alleged discriminatory pricing, tie-in selling, exclusive dealing and anti-competitive corporate acquisitions. Due to the nature of the product subject to competition between the parties involved, all sales were made *intra*state. However, a portion of every competitor's production was used for the surfacing of local segments of interstate highways.

The plaintiffs, either unable or simply neglecting[63] to show specifically — as Section 2(a) jurisdictionally requires — that at least *one* of the defendants' discriminatory sales was made "in" interstate commerce, that the tie-ins and exclusive dealings occurred "in" interstate commerce (§ 3) and that *both* the acquiring and the acquired corporations on the defend-

ants' side were engaged "in" interstate commercial activities (§ 7), rested their case entirely on a more general argument: by supplying asphalt concrete for the construction of interstate highways, and since such are instrumentalities of interstates commerce, the defendants' restraints — so the plaintiffs claimed — were also "in" interstate commerce. In arguing so, the plaintiffs had ample support from cases[64a] which had arisen under the Fair Labor Standards Act (FLSA),[64b] where the courts have held that, since interstate roads are indispensable instrumentalities of interstate commerce, employees engaged in the construction or repair, or even in the manufacturing of materials used for construction of such roads are "in" commerce for FLSA purposes.

The Supreme Court rejected the plaintiff's analogical approach. While the jurisdictional language in both Acts (Clayton Act and FLSA) essentially coincide, and while both Acts represent a realization of Congress' commerce power, the Court reasoned, each Act, and its jurisdictional extension, must be judged on its own merits — *i.e.,* its own purposes and historical background. The significance of the phrase "in (interstate) commerce" is thus not uniform throughout the various acts enacted by Congress. Therefore, the jurisdictional scope of the Clayton Act (including the Robinson-Patman Act) must be "anchored in the economic realities of interstate markets, the intensely *practical* concerns that underlie the purposes of the antitrust laws",[65] and cannot rest on a purely *formal* nexus between the restraint and interstate commerce. And as such — purely formal — was the plaintiffs' "in commerce" argument characterized by the Court.[66]

A similar narrow interpretation of the "in (interstate) commerce" wording of the Clayton Act (specifically Sec. 7) motivated a dismissal of a complaint for lack of subject matter jurisdiction in *U.S. v. American Building Maintenance Ind.*[67] A corporation that merely supplied intrastate local services to and purchased goods from other corporations engaged in interstate commerce, and in this way conducted business through independent intermediaries,[68] was not held to be engaged "in" interstate commerce.[69]

In limiting the jurisdictional scope of the Clayton Act to restraints occurring "in" interstate commerce — and thereby excluding restraints merely "substantially affecting" such commerce — the Supreme Court, in part at least, has relied on an older case establishing *the scope of the FTC Act: FTC v. Bunte Bros.*[70] decided in 1941. In that case the Court held that Section 5 of the FTC Act as then formulated — which declares unlawful "unfair methods of competition in commerce" — only applied to restraint "in" interstate commerce. Recently, however, the FTC has been amended to encompass "unfair methods of competition *in or affecting* commerce

and unfair and deceptive acts or practises *in or affecting* commerce".[71] ("Commerce" is defined in Section 4 to mean "commerce among the several States or with foreign nations".) The words "or affecting" were inserted because of the perceived impracticability in restricting the provision to the purely interstate transactions, and the realization of the fact that it is possible for a "determined law violator" to escape the law, in its old form, by organizing his business "in the form of a series of *intra*state steps", only incidentally related to interstate commerce.[72]

To summarize: Whereas the FTC Act in jurisdictional reach is co-existent with the Sherman Act, the Clayton Act, including the Robinson-Patman Act, covers only restraints "in" interstate commerce in a strict sense.

The distinction in coverage may, however, have little practical consequence in the everyday struggle against anticompetitive practises, due to the considerable overlapping functions of the major antitrust laws. Restraints not covered by the Clayton Act may thus be attacked under either the broadly phrased Sherman Act or the FTC Act, which is designed to fill gaps and to pursue restraints in their incipient stages,[73] to a greater extent than was done before.[74]

Notes, Chapter 1, Section 3

[1] U.S. v. Aluminum Co. of America, 148 F.2d 416, at 443-444 (2d Cir. 1945). This case will be discussed in some length *infra* at 81 ff.

[2] See e.g. Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241 (1964) and Katzenbach v. McClung, 379 U.S. 294 (1964) (racial discrimination); U.S. v. Bishop Processing Co., 287 F.Supp. 624 (1968); U.S. v. Standard Oil Co., 384 U.S. 224 (1966) and Illinois v. City of Milwaukee, 406 U.S. 91 (1972) (air pollution); 18 U.S.C. § 2101 (1973) (instigation), enacted in 1968.

[3] United States v. E.C. Knight Co., 156 U.S. 1 (1895).

[4] License Cases, 5 How. 504, at 578 (1847). But see Lottery Case, 188 U.S. 321, 373-374 (1903).

[5] 49 Stat. 1526 (1936, 15 U.S.C.A. § 13 (1976).

[6] 64 Stat. 1125 (1950), 15 U.S.C.A. § 18 (1976).

[7] See e.g. statement made by Senator Sherman, 21 Cong. Rec. 2460 (1890).

[8] In the words of the Supreme Court: "[T]he Sherman Act was designed to a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the

greatest material progress, while at the same time providing an environment conducive to the preservation if our democratic political and social institutions." Northern Pacific Ry. Co. v. United States, 356 U.S. I, at 4 (1958).

[9] See e.g. Klor's Inc. v. Brodway-Hale Stores, Inc., 359 U.S. 207, at 213 (1959): "[Coercive restraints are] not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups".

[10] For a general background, see e.g. Thorelli, 4; Areeda, 18 ff.; Sullivan, 152 ff. For a comprehensive view of the underlying purposes see, e.g. Carl Kaysen & Donald F. Turner, Antitrust Policy (Harv. U. Press, Cambridge Mass., 1959); Corwin D. Edwards, Maintaining Competition; Brewster, Enforcable Competition; Unruly Reason or Reasonable Rules, 45 Am. Econ. Rev. 482 (1956); Sullivan, 1 ff.

[11] The Sherman Act has been termed a "charter of freedom" with "a generality and a adaptability comparable to that found to be desirable in constitutional provisions." Appalachian Coals, Inc. v. U.S., 288 U.S. 344, at 359—360, 53 S.Ct. 471, at 474, 77 L.Ed. 825, at 829 (1933) (Chief Justice Hughes).

[12] 26 Stat. 209 (1890), 15 U.S.C.A. §§ 1 and 2 (emph. added) (*amended* in parts not cited here; December 21, 1974, Pub. L. 93-528, § 3, 88 Stat. 1708 (1976). In this context, observe the proposed Cartel Restriction Act of 1979, House Bill 4661 (H.R. 4661, 96th Cong., Ist sess. (1979), proposed amendment to 15 U.S.C. §§ 20 & 21 (1976)). See 125 Cong. Rec. 5420 (1979). Also note the bills introduced in both the Senate and the House of Representatives referred to as the Foreign Trade Antitrust Improvements Act of 1981 (97th Cong., Ist sess., 127 Cong. Rec. 2656; H.R. 2326, 97th Cong., 1st sess., 127 Cong. Rec. 795 (1981)). The latter bills seem to be codifications of existing law as developed through court construction of the Sherman Act.

[13] Section 8 of the Sherman Act reads: "The word 'persons' wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." See *supra* n. 12. Also compare Clayton Act, Section 1 (third paragraph), Act of October 15, 1914, *as amended*, 15 U.S.C.A. § 12 (1973).

[14] As to the debates, see e.g. 21 Cong. Rec. 1768, 2457 and 2462 (1890). Section 1 of Senator Sherman's original bill provided: "That all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view or which tend to prevent full and free competition in the importation, transportation, or sale of articles imported into the United States .... are hereby declared to be against public policy, unlawful, and void." S. 1. 51st Cong., Ist Sess. § 1 (1890).

[15] 21 Cong. Rec. 1766 (1890).

[16a] *Supra* n. 14. Senator Sherman replied (in part): "Either a foreigner or a native may 'escape the criminal part of the law', as he [Senator George] says, by staying out of our jurisdiction, as very many do, but if they have property here it is subject to civil process. I do not see what harm a foreigner can do us if neither his person nor his property is here. He may combine or conspire to his heart's content if none of his co-conspirators are here or his property is not here." 21 Cong. Rec. 2461 (1890),

[16b] Section 6 of the Sherman Act, 15 U.S.C.A. § 6 (1976): "Any property [involved in a restraint] .... being in the course of transportation from one State to another, or to a foreign country, shall be forfeited....".

[17] 21 Cong. Rec. 3152 (1890).

[18] For a broader view of the underlying purposes of the Sherman Act see e.g.: *Attorney General's Report,* 6 ff.; *Fugate,* 9 ff.; *Areeda,* 21 ff.; *Brewster,* 18 ff.; *Antitrust Developments 1955-1968,* 1 ff.; *Thorelli;* The Federal Antitrust policy, 229; *Letwin,* Congress and the Sherman Antitrust Law 1887-1890, 23 U.Chi.L.Rev. 221 (1956).

[19] See e.g. U.S. v. South-Eastern Underwriters Ass'n., 322 U.S. 533, at 558, 64 S.Ct. 1162, at 1176, 88 L.Ed. 1440, at 1460 (1944); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, at 234, 68 S.Ct. 996, at 1005, 92 L.Ed. 1328, at 1339 (1948); U.S. v. Employing Plasterers Ass'n., 347 U.S. 186, 74 S.Ct. 452, 98 L.Ed. 618 (1954); Burke v. Ford, 389 U.S. 320, 88 S.Ct. 443, 19 L.Ed.2d 554 (1967). Also see *Attorney General's Report,* 77-80.

[20] See e.g. *supra* n. 2.

[21] Goldfarb v. Virginia State Bar, 421 U.S. 773, 96 S.Ct. 2004, 44 L.Ed.2d 572 (1975), *rehearing denied,* 96 S.Ct. 152 (1975).

[22] U.S. v. South-Eastern Underwriters Ass'n., *supra* n. 19.

[23] U.S. v. National Ass'n. of Real Estate Bds., 339 U.S. 485, at 490-91, 70 S.Ct. 711, at 715, 94 L.Ed. 1007, at 1013-14 (1950): "Trade or commerce" equals any "occupation, employment or business .... carried on for the purpose of profit or gain and covers all occupations that men are engaged in for a livelihood, see U.S. v. American Medical Ass'n., 110 F. 2d 703, at 710 (D.C. Cir. 1940). Also see: Associated Press v. U.S., 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945) (news-furnishing): U.S. v. Paramount Pictures, Inc., 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260 (1948) and Radovich v. National Football League, 352 U.S. 445, 77 S.Ct. 390, 1 L.Ed.2d 724 (1957) (entertainment and sports).

[24] See *von Kalinowski,* 16 § 4.02, p. 4-14 f. About the exemptions: § 4.02, notes 19-25.

[25] See *supra* n. 19, U.S. v. South-Eastern Underwriters Ass'n., at 558: In enacting Section 1 of the Sherman Act, Congress "wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements...". Also compare Apex Hosiery Co. v. Leader, 310 U.S. 469, at 495, 60 S.Ct. 982, 84 L.Ed. 1311 (1940); U.S. v. Frankfort Distilleries, Inc., 324 U.S. 293, at 298, 65 S.Ct. 661, 89 L.Ed. 951 (1945); Gulf Oil Corporation et al. v. Copp Paving Co., Inc., 419 U.S. 186, at 194, 95 S.Ct. 392, 42 L.Ed.2d 378 (1974); U.S. v. American Building Maintenance Industries, 422 U.S. 271, at 278, 95 S.Ct. 2150, 45 L.Ed.2d 177 (1975); U.S. v. Finis P. Ernest, Inc., 509 F.2d 1256, at 1259 (1975).

[26] See e.g. Apex Hosiery Co. v. Leader, *id.* at 495: "The addition of the words 'or commerce among the serveral States' was not an additional kind of restraint to be prohibited by the Sherman Act but was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes....".

[27] For a better understanding of the concept "restraint of trade", see e.g. *Sullivan,* 152 ff.; *Neale,* 18 ff.; *Areeda,* 18 ff. The terms "trade" and "commerce" are considered to be synonymous, see e.g. Atlantic Cleaners & Dyers, Inc. v. U.S., 286 U.S. 427, at 434 (1932).

[28] *Supra* p. 34.

[29] U.S. v. Women's Sportswear Mfrs. Ass'n. 336 U.S. 460, at 464, 93 L.Ed. 805, 69 S.Ct. 714 (1949).

[30] For a more substantial analysis, see e.g. Yeager, Antitrust Law — "Incidental Effect" and Jurisdiction under the Sherman Act, 21 Wayne L.Rev. 965 (1975). Also see *amicus curiae* brief by the United States discussed by the court in Gulf Oil Corp. et al. v. Copp Paving Co., Inc., *supra* n. 25, at 201-202: When the Clayton Act was originally enacted (1914) "it was thought that Congress' Commerce Clause power reached only those subjects within

the flow of commerce, then defined rather narrowly by the Court. Thus... the 'in commerce' language was thought to be coextensive with the reach of the Commerce Clause and to bring within the ambit of the Act all activities over which Congress could exercise its constitutional authority. Since passage of the Act, this Court's decisions have read Congress' power under the Commerce Clause more expansively, extending it beyond the flow of commerce to all activities having a substantial effect on interstate commerce."

[31] U.S. v. South-Eastern Underwriters Ass'n., 322 U.S. 533, at 552 (1944).

[32] This was duly recognized in Burke v. Ford, 389 U.S. 320, 88 S.Ct. 443, 19 L.Ed.2d 554 (1967), where the Supreme Court (*per curiam*) made clear: "[I]t is well established that an activity which does not itself occur *in* interstate commerce comes within the scope of the Sherman Act if it substantially *affects* interstate commerce." (Emphasis original). Compare U.S. v. Employing Plasterers Ass'n., 347 U.S. 186, 74 S.Ct. 452, 98 L.Ed. 618 (1954); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328 (1948). Also see *Rahl,* 54 ff., particularly at 63 ff.; *Sullivan,* 709 ff.; *Areeda,* 59 f.; *von Kalinowski,* § 4 f.; *Eiger,* The Commerce Element in Federal Antitrust Litigation, 25 Fed.B.J. 282 (1965); *Note,* Potrait of the Sherman Act as a Commerce Clause Statute, 49 N.Y.U.L.Rev. 323 (1974).

[33] Standard Oil Company (Indiana) v. FTC, 340 U.S. 231, at 237 (1951). Also see Hardrives Co. v. East Coast Asphalt Corp., 329 F.2d 868 (5th Cir. 1964), *certiorari denied,* 379 U.S. 903 (1964).

[34] Foremost Dairies, Inc. v. FTC, 348 F.2d 674, at 678 (5th Cir. 1965); Dean Milk Co. v. FTC, 395 F.2d 696, at 715 (7th Cir. 1968); Plymouth Dealers' Ass'n. of Northern California v. U.S., 279 F.2d 128 (9th Cir. 1960).

[35] Myers v. Shell Oil Co., 96 F.Supp. 670, at 676 (S.D. Cal. 1951); U.S. v. San Francisco Elec. Contractors Ass'n., 57 F.Supp 57, at 65 (C.D. Cal. 1944).

[36] Rangen, Inc. v. Sterling Nelson & Sons, Inc., 351 F.2d 851 (9th Cir. 1965); Lawson, v. Woodmere, Inc., 217 F.2d 148 (4th Cir. 1954).

[37] 317 U.S. 564, at 568-571 (1943).
The case did not directly concern the Sherman Act (rather the Fair Labor Standards Act). However, since both acts imply the application of the Commerce Clause and since "Congress wanted to go to the utmost extent of its Constitutional power" in enacting the Sherman Act (U.S. v. South-Eastern Underwriters Ass'n. 322 U.S. 533, at 558) there is no reason why the reach of the two acts should not parallel. But see Gulf Oil Corporation, *et al.* v. Copp Paving Co., 419 U.S. 186, at 196 ff., where parallelity was not found between the Fair Labor Standards Act on the one hand and the Clayton Act and Robinson-Patman Act on the other. (see *infra* p. 44 f.). Also *cf.* FTC v. Pacific States Paper Trade Ass'n., 273 U.S. 52 (1927) and Plymouth Dealers' Ass'n. v. U.S., 279 F.2d 128 (9th Cir. 1960).

[38] Northern California Pharmaceutical Ass'n. v. U.S., 306 F.2d 379 (9th Cir. 1962). Also see Food Basket, Inc. v. Albertson's, Inc., 383 F.2d (10th Cir. 1967); Las Vegas Merchant Plumbers Ass'n. v. U.S., 210 F.2d 732 (9th Cir. 1954) and U.S. v. Utah Pharmaceutical Ass'n., 201 F.Supp. 29 (D. Utah, 1962), *affirmed per curiam,* 371 U.S. 24 (1962). In the two latter cases, the intermediary or distributor was characterized as mere "conduits" in the stream of interstate commerce.

[39] 389 U.S. 320, 19 L.Ed.2d 554, 88 S.Ct. 443 (1967).

[40a] 422 U.S. 271, at 283-286, 45 L.Ed.2d 177, at 188-190, 95 S.Ct. 2150 (1975).

[40b] For a brief but illuminating discussion of the history of this, the second formula, see Perez

v. U.S., 402 U.S. 146, at 150 ff., 91 S.Ct. 1357, 28 L. Ed.2d 686 (1971), commented upon in e.g. *Yeager*, Antitrust Law — "Incidental Effect" and Jurisdiction under the Sherman Act, 21 Wayne L.Rev. 965 (1975). Prior to Wickard v. Filburn (317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942)) the formula was phrased "direct and substantial effects", "direct" intimating something very similar to "flow of commerce", *i.e.*, what already is covered by the "in" interstate commerce formula, (discussed *supra* at p. 39 ff.). "Directly affect" is nothing but an equivalent to "in the flow" of interstate commerce or, in other words, a restraint "directly affecting" interstate commerce is also "in" the midst such commerce (the required nexus is direct) and therefore there is no reason to repeat the first formula and at the same time narrow down the second. Hence, Wickard v. Filburn disposed of the "direct" requirement, explaining that the test is one of "substantial effect.... irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect'." (317 U.S., at 125). Also see *Rahl,* 63 ff.; *von Kalinowski,* § 4 f. Compare Heart of Atlanta Motel v. U.S., 379 U.S. 241 (1971); commerce power reaches local activities that "might have a substantial and harmful effect upon [interstate commerce]". (*Id.* at 258). *But see* e.g. U.S. v. Bensinger Co., 430 F.2d 584 (8th Cir. 1970) and Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co., 469 F.2d 416 (5th Cir. 1972).

[41] 389 U.S. 320, 88 S.Ct. 443, 19 L.Ed.2d 554 (1967).

[42] United States District Court for the Norhtern District of Oklahoma. The decision of the Court of Appeals: 377 F.2d 901 (10th Cir. 1967).

[43] *Id.* at 903.

[44] 421 U.S. 773, 44 L.Ed.2d 572, 95 S.Ct. 2004 (1975).

[45] 421 U.S. 773, at 783 ff.

[46] *Id.* at 785 (footnote omitted).

[47] That it is not the quantitative substantiality of the impact on the flow of commerce that is critical under this part of the interstate commerce test is emphasized by e.g. *Sullivan,* 710 ("[I]f a local activity has in a practical sense a significant impact on competition in commerce and if the commerce so affected is substantial in amount, the [Sherman] Act applies to the local activity even though the activity does not reduce the quantity of interstate commerce in any discernible degree, or perhaps even if it does not alter it at all, or, indeed increases it.") Also see *Rahl,* 86 and *Fugate,* 55. Intimately linked with questions of substantiality is the question of how much proof is required of actual or probable effects on interstate commerce. The cases viewed thus far (Burke v. Ford and Goldfarb v. Virginia State Bar *supra* p. 41 and 42) and others (e.g. Hospital Building Co. v. Trustees of the Rex Hospital, discussed *infra*) display, as we have and will see, a theroy of plausibility of the following purport: If the plaintiff proves the existence of substantive violation of the Sherman Act from which the court can reasonably infere that interstate commerce can or will be affected, such proof will suffice (Burke v. Ford). Considered as sufficient proof is also plaintiff's showing of an inescapable nexus between the restrained activities and interstate commerce, from which the court can infer effects. (Goldfarb v. Virginia State Bar, where legal service was necessarily interrelated with interstate financial transactions); or a showing to the effect that if the restraint would have been successful, interstate commerce would probably have been affected (Hospital Building Co. v. Trustees of the Rex Hospital). Hence, even if proof were to be presented, showing *un*affected market prices and market structure, the test of "substantial affect" could still be satisfied (425 U.S. at 745-746), provided that the allegations, if proved, *could* show that the restraint resulted in "unreasonable burdens on the free and uninterrupted" flow of interstate commerce with regard to the goods involved in the case. "[S]ince in this case the allegations fairly claim that the alleged conspiracy, to the extent it is successful, will place "un-

reasonable burdens on the free and uninterrupted flow' of interstate commerce, they are wholly adequate to state a claim." (425 U.S. 738, at 746), with reference to U.S. v. Employing Plasterers Ass'n., 347 U.S. 186, at 189, 74 S.Ct. 452, 98 L.Ed. 618 (1954).

The question of proof is thus approached very pragmatically and will seldom import any practical difficulties. A more rigorous approach would bring to the fore the strictly held distinction between restraints prohibited *per se* and restraints subject to the *rule of reason*. Restraints of the *per se* category are, "because of their pernicious effect on competition and lack of any redeeming virtue... conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." (Northern Pacific Railway Co. v. U.S., 356 U.S. 1, at 5, 78 S.Ct. 513, at 518, 2 L.Ed.2d 545 (1958). Such restraints (price fixing, boycotts, etc.) need no showing of effects or injury — in the individual case — of any kind, whether on commerce or competition, to establish a substantive offense. (Restraints subject to the rule of reason, on the other hand, are estimated in the light of an overall picture of all negative and positive effects). Where the alleged restraint falls within the *per se* category — where proof of effects to establish *a substantive* offense thus is unnecessary — it would be anomalous to require elaborate proof of effects to meet the jurisdictional test. See e.g. *Areeda,* 60 ("While the courts may be reluctant to invoke overwhelming federal power to quash each local restraint, antitrust policy is concerned with stamping out some forms of conduct in every manifestation and without pausing for argument about effects.") Also see *Sullivan,* 711 f. and *Rahl,* 86.

[48] 425 U.S. 738, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976). Also see Burke v. Ford, 389 U.S. 320, at 322, where the matter of intent was likewise held to be immaterial.

[49] *Id.* at 744-746. The Court applied a hypothetical reasoning in arguing that if the alleged restrictive conduct was to succeed in its aim (to block plaintiff from further expansion on the market), the plaintiff's purchases of out-of-state medical wares and other — demonstrably existing — out-of-state transactions, would decrease in volume.

[50] *Id.* at 745. Reference was made to U.S. v. McKesson & Robbins, 351 U.S. 305, 76 S.Ct. 937, 100 L.Ed. 1209 (1956) and Burke v. Ford, 389 U.S. 320 at 322 88 S.Ct. 443, 19 L.Ed.2d 554 (1967).

[51] 419 U.S. 186, 95 S.Ct. 392, 42 L.Ed.2d 378 (1974).

[52] 422 U.S. 271, 95 S.Ct. 2150, 45 L.Ed.2d 177 (1975).

[53] Section 1 of the Clayton Act, par. 3: "The word 'person' or 'persons' ... shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." (15 U.S.C.A. § 12, 1973).

[54] Mark that the last phrase speaks of effects on *competition* (not on commerce), which is a question of substantive violation — not a jurisdictional issue. The distinction is not always easy to realize but can be elucidated by the following illustration: A restraint that does not fall within the jurisdictional scope of a provision, does not, of course, violate that provision. It is so, however, not because the restraint does not have effects on competition — the restraint may wholly prevent competition — but because there is no effect on interstate commerce (the jurisdictional criteria). On the other hand the restraint may very well be covered by the jurisdictional language in the provision — because the goods subject to the alleged restraint move "in" interstate commerce — but still be reasonable, because of its minimal negative effects on competition.

[55] Act of October 15, 1914, *as amended,* 15 U.S.C.A. § 13 (1973). Section 2(c), (d) and (e) are similarly phrased, though not expressly requiring that at least one of the purchases be "in" (interstate) commerce.

[56] 15 U.S.C.A. § 12 (1973). "'In" commerce is thus by legal definition an equivalent to "in" interstate commerce and will so be regarded in the text below.

[57] See *supra* n. 53.

[58] Act of October 15, 1914, *as amended,* 15 U.S.C.A. § 14 (1973).

[59] See *supra* n. 53.

[60] Act of October 15, 1914, *as amended,* 15 U.S.C.A. § 18 (1973). Section 8 of the Clayton Act (15 U.S.C.A. § 19, 1973), dealing with interlocking directorates, applies when the corporations involved are "engaged in commerce".

[61] For further analysis of the Clayton Act and its scope, see e.g. *Vecchiarelli,* Antitrust — Clayton Act Does Not Apply to Corporations "Affecting" Commerce, 44 Cin.L.Rev. 844 (1975); *Note,* Antitrust Law — The Clayton Act — "Engaged in Commerce" Requirement of Section 7, Brigham Young U.L.Rev. 763 (1975); *Rahl,* 50 ff.; *Sullivan,* 713 f.

[62] 419 U.S. 186 *supra* n. 51.

[63] "Neglecting" because of the fact that the plaintiff might have been able to prove that the restraints were "in" interstate commerce, by showing that some of ingridients of asphaltic concrete came from out-of-state. The market in liquid asphalt, for instance, was interstate. See *supra.* This is also indicated *id.* at 196: "[The plaintiff] does not contend that the local market is an integral part of the interstate market in other component commodities or products."

[64a] Overstreet v. North Shore Corp., 318 U.S. 125, 63 S.Ct. 494, 87 L.Ed. 656 (1943) and Alstate Construction Co. v. Durkin, 345 U.S. 13, 73 S.Ct. 565, 97 L.Ed. 745 (1953).

[64b] Fair Labor Standards Act of 1938, 52 Statute 1061, *as amended,* 29 U.S.C. § 203 (1946).

[65] *Supra* n. 62, at 198. Reference was made to U.S. Yellow Cab Co., 332 U.S. 218, at 231, 91 L.Ed. 2010 (1947). The Supreme Court: "The justification for an expansive interpretation of the 'in commerce' language, if such an interpretation is viable at all, must rest on a congressional intent that the Acts [Clayton and Robinson-Patman] reach all practises, even those of local character, harmful to the national market place. This justification, however, would require courts look to practical consequences, not to apparent and perhaps nominal connections between commerce and activities that may have no significant economic effect on interstate markets." *Id.* at 198-199.

[66] In light of the cases discussed above (*supra* p. 39 ff.), concerning the Sherman Act, there is cause to wonder how the Supreme Court distinguishes between a "purely formal nexus" and a "practical" one. It would seem that the Court's reasoning in *Gulf Oil* must apply to antitrust cases in general, *i.e.,* not only to cases subject to the "in" interstate commerce formula, but also to those under the "substantially affect" formula, even though the Court in *Gulf Oil* concerned itself primarily with the "in" interstate commerce test. But the underlying purposes of the antitrust laws do not alter with the formula applied. (See Gulf Oil 419 U.S. at 197-199, where the purposes are focused upon.). If this is true, that is, if "practical nexus" is the guideline also for cases where the "substantially affect" formula is applied, then the jurisdictional approach in e.g. *Burke v. Ford, Goldfarb v. Virginia State Bar* and *Hospital Building Co. v. Trustees of the Rex Hospital* seem to confuse the distinction between "formal" and "practical" nexus even more.

[67] 422 U.S. 271, *supra* p. 43 n. 52.

[68] But, as noted in the concurring opinion of Justice White (*id.* at 286), one of the intermediaries was in fact a wholly owned subsidiary of the *acquiring* company (under Sec. 7) which in turn was a national enterprice engaged in interstate commerce.

[69] *Id.* at 283-286.

[70] 312 U.S. 349, 61 S.Ct. 580, 85 L.Ed. 881. Discussed *id.* at 276-277.

[71] Act or September 26, 1914, as amended, 15 U.S.C.A. § 45 (1976) (emphasis added). Pub. L. 93-637, § 201(a) substituted "in or affecting commerce" for "in commerce" wherever appearing therein.

[72] 1974, U.S. Code Congressional and Administrative News, p. 7702, at 7713.

[73] See e.g. FTC v. Motion Picture Advertising Service Co., 344 U.S. 392 (1953); FTC v. Brown Shoe Co., 384 U.S. 316 (1966) and Atlantic Refining Co. v. FTC, 381 U.S. 357 (1965).

[74] Also see the Wilson Tariff Act, 15 U.S.C.A. § 11 (1964) and the Webb-Pomerene Act (Export Trade Act), 15 U.S.C.A. §§ 61-65 (1973).

4. The foreign commerce test

4.1 Introduction

Congressional power to regulate foreign commerce emanates, as noted above,[1] from the Constitution,[2] and the courts of the United States have long recognized the authority of Congress to enact laws that rule "every species of commercial intercourse between the United States and foreign nations",[3] and that "prohibit any disturbance or interference with external affairs".[4]

To prevent and remove "disturbance" and "interference" in foreign commerce and to safeguard an unfettered movement of goods and services between the United States and foreign nations and thereby, *inter alia,* securing the American consumers' benefit of a free import competition and protecting American export opportunities, Congress has enacted antitrust laws each of which — in addition to the interstate commerce clause — contains a foreign commerce clause. The Sherman Act, accordingly, forbids contracts "in restraint of trade or commerce ... with foreign nations".[5] The FTC Act declares unlawful unfair methods of competition and deceptive "practises in or affecting" (interstate or) foreign commerce.[6] The Clayton Act, although not as straightforward as the Sherman Act and the FTC Act, and with certain additional prerequisites, is also moulded with the object of regulating foreign commerce.[7]

It is the precise application of these foreign commerce stipulations that constitutes the conundrum. Are restraints on U.S. import trade carried out by alien corporations encompassed?; is a boycott of U.S. exports?; or the hampering of trade that indirectly affects U.S. exports or imports? The statutes do not provide a clear answer. At least they do not set limits, *i.e.,* as long as foreign commerce is involved, in one way or the other, the statutes, it taken at face value, seem to apply. Moreover, we know that when the Sherman Act was passed, Congress showed serious concern regarding unrestricted foreign commerce, but no more.[8]

To commence with the issues relatively close at hand: "Commerce" comprehends, as we have seen, the entire scope of economic activity; whatever that makes money.[9] Commerce "with foreign nations" denotes a line of commercial activities originating anywhere in the United States and terminating anywhere outside the United States, or *vice versa.* At least one case,[10] however, indicates that the flow of commerce does not have to originate or terminate in the United States in order to be within the reach of the Sherman Act, but can also be localized entirely to two foreign countries.

This requires, it is true, additional "American characteristics", which presumably implies that some specific American interest must be affected.[11]

However, the crucial issue is to establish the required relation between the alien restraint and foreign commerce, to establish when and under what circumstances restrictive conduct performed by alien corporations are so connected with U.S. foreign commerce that they become subject to the antitrust laws of the United States. Is the interstate commerce test of any indicative assistance in this respect and what relevance does an analogy to this test have? This seems, in light of the swift excursion through the elements of that test, to be a logical track on which to proceed the precent analysis. Moreover, can restraints carried out by alien corporations be either "in" or "substantially affect" interstate commerce, and if so, under what conditions? Which test prevails when both the interstate commerce test and the foreign commerce test apply? Subsequently, a line of cases involving restraints executed by alien corporations will be discussed, accompanied by opinions of some commentators.

4.2 The interstate commerce test as an indicator

Is the interstate commerce test of any assistance in determining the content of the foreign commerce test? Are there, or should there be, any distinguishing factors between the two? (What did Congress intend?)

To begin with, there is nothing in the statutory language of the antitrust laws that warrants a distinction between the two tests. Throughout the Sherman, Clayton and FTC Acts, the same jurisdictional prerequisites apply alternatively to interstate and foreign commerce.[12] And throughout these Acts, the substantive provisions apply equally to all corporations, associations, etc., wherever incorporated.[13] If desirable, one could — to support a parallel radius — draw attention to the underlying purposes of the antitrust legislation and maintain that these will be frustrated, should the foreign commerce test be more limited in scope than the interstate commerce test.[14] Furthermore, looking back on the legislative history, there seems to be no *explicit* indications of an intent on the part of Congress, that is decisive in one direction or the other.[15]

Assuming thus, *arguendo,* that the interstate and the foreign commerce tests run parallel, that they both hold the same elements, the same jurisdictional criteria,[16] what would follow? Any restraint carried out, no matter where and no matter by whom, would fall within the scope of the U.S. antitrust laws, provided that the restraint either occurs "in" the flow of foreign commerce or "substantially affects" such commerce. Accordingly,

whenever a restraint is directly applied to U.S. export or import trade, the movement of goods or services between any point in the United States and any point outside the United States, or whenever a restraint *may* (not actually but by a plausible theory or by empirical reasoning) "substantially affect" U.S. export or import trade, that restraint would be subject to U.S. antitrust laws, the Sherman and FTC[17] Acts and also, in the former case, to the Clayton Act. To illustrate: Company Mont and Company Martre, both located in France, and both importing electronic equipment from the United States, agree to fix prices regarding the resale of these products to Switzerland and Germany. The price-fixing agreement is illegal per se under the Sherman Act and is within the scope of the Act by virtue of the "in" foreign commerce formula, if the French import and resale is preceded by a prior-order or can be characterized as a "continuity of movement".[18] Personal jurisdiction over the French corporations will depend on the volume of business engaged in, within the United States, by these corporations.[19] The American exporters would not, however, be found responsible, unless they participated in the agreement. Minor processing or temporary storing would not change the picture. Were the German and Swiss retailers to conspire against any or all of the French importers, this would have a tendency to "affect" U.S. export and would therefore be covered by the Sherman Act or the FTC Act.

Conversely, if the French Companies were exporters of electronic articles to the United States, then restraints performed by them would no doubt be "in" foreign commerce and restraints on prior sales, for instance from the manufacturers to the exporters, would be, if not "in", then at least "affecting" foreign commerce. In the extreme, any restraint that may affect U.S. exports or imports, by affecting the export or import business of any alien corporation *vis-à-vis* the United States, would theoretically fall within the ambit of the antitrust laws of the United States. Portuguese restraints on exports to Brazilian companies, for instance, would therefore tend to run counter to these laws, should the Brazilian companies be in the exporting or importing business with the United States. No actual effect on the U.S. foreign commerce would, *nota bene,* have to be proved: if the U.S. interstate commerce case law is indicative, conclusionary and empirical reasoning from the restraint itself, its potential to affect, or a plausible theory showing that the restraint would have an effect were the Portuguese corporations to succeed in their intentions, would suffice.

As these few examples are meant to expose, a full transfer of the interstate commerce test to the foreign commerce area has far-reaching consequences. A foreign commerce test equipped with the formulae of the inter-

state commerce test would, if drawn to its limits, not only regulate U.S. foreign commerce, but also tend to set conditions for a considerable part of the commerce and market behaviour in foreign countries. The question arises thus, whether the indicative role of the interstate commerce test is relevant.

4.3 The question of relevance

The interstate commerce test constitutes an instrument with which to divide federal and state power in the United States. It marks the limit for the federal government in its power to regulate domestic commerce. The test is extracted from the Constitution, which again is a delegation of (principally) enumerated[20] powers from the states to the federal government.

The foreign commerce test has no such function. Authority to regulate foreign commerce is entrusted exclusively to the federal government. Hence, if the foreign commerce test has any function, it would not be to define the spheres of influence of the several states and the federal government. At the same time, the basis for characterizing a restraint as either being "in" or "substantially affecting" interstate commerce would be irrelevant for foreign commerce.[21] If there are any restrictions to be imposed upon the scope of the U.S. antitrust laws in the foreign commerce area, such restrictions must emanate from sources other than the Constitution.[22] Such sources exist, mainly, it seems, in the form of general principles of international law, in the form of treaties, bilateral or unilateral, or in the form of other rules regulating conflicts of public policies and laws. (To what extent — if at all — international law, etc., marks the boundaries for a state's legislative jurisdiction and to what extent international "comity" works or should work as an inducement for self-restraint in this respect, will be discussed in part two below).

Assuming, *arguendo,* that international law limits (if somewhere there has to be a limit) the power to regulate foreign commerce (and did so when the antitrust laws were enacted), how did Congress regard these limitations when enacting the antitrust laws? There are at least three possibilities:

1) It is possible that Congress considered the limitations and therefore made a distinction between restraints in interstate commerce and restraints in foreign commerce. Although the statutory language is not distinct on the point, Congress may have intended that different tests should apply. The foreign commerce test may have been intended to be moulded with due regard paid to international law. Congress' intention could, for example have

been to subject restraints carried out by alien corporations to U.S. antitrust laws if they have an actual, substantial and foreseeable effect on U.S. exports and imports. If such a specific foreign commerce test is satisfied, there is subject matter jurisdiction.

2) It is also possible that Congress considered the international law limitations, but that it did not intend to formulate a specific foreign commerce test. According to this approach, all restraints would fall under the same jurisdictional criteria: "in" or "substantially affecting" commerce. Considerations of international law would thus *not* be embedded in the foreign commerce test. Implications of international law would, therefore, have to be considered separately, pursuant to the application of the foreign commerce test. Subject matter jurisdiction would, under this two-step approach, only be obtained if the foreign commerce test is met *and* if the principles of international law, etc., are complied with.

3) It is, finally, possible that no *specific* foreign commerce test was intended (as under 2)). According to this approach, principles of international law would be considered in that the burden of proof is generally stricter in foreign commerce cases — either as to the jurisdictional standard or as to the standard for substantive violation, or in that more lenient substantive rules are applied in the foreign commerce area (thus, for instance, the rule of reason could be all-pervading in foreign commerce cases). Subject matter jurisdiction would be acquired when the foreign commerce test, and the stricter burden of proof concerning that test, are met. A few of the problems arising in foreign commerce cases, due to principles of international law, etc., would however be dealt with substantively rather than jurisdictionally. It is also conceivable that all of the problems mentioned could be solved *either* within the framework of the foreign commerce test *or* by applying different sets of substantive rules in foreign commerce cases.

In addition to the three touched upon above, there is always a fourth possibility: that Congress had no particular intention with respect to the principles of international law, but, well aware of the deepseated doctrine in the United States that courts do not interpret laws enacted by Congress as being contrary international law, unless the law applied explicitly so provides,[25] Congress entrusted the further identification of international law problems and closely related matters to the courts. In effect, this is tantamount to view 2) above. Both views presuppose a foreign commerce test identical to that of the interstate commerce test. Both views attach to this test a separate matter of judgment, where international law problems,

national interests and "comity" questions are included.

However, there is a discernable distinguishing feature. Whereas the Congress in view 2) is assumed to have directed the courts, through the antitrust laws, to consider the international law complications likely to arise, such consideration is paid at the courts' own discretion according to the fourth view. Subject matter jurisdiction in the former instance cannot be acquired until due regard is paid to problems of international law. In the latter instance, subject matter jurisdiction is secured when the foreign commerce test is met. Thereafter the court has to ask itself: *Should* the court assume jurisdiction, considering the international problems involved?

Of the several approaches discussed so far, the second approach (or the fourth) seems to correspond most closely to the statutory language of the antitrust laws (see *supra* p. 36). Apart from this, the second approach has some obvious advantages. Whereas considerations imposed by international law and "comity" are woven into the foreign commerce test in the first approach and into burden of proof issues or questions of substantive law in the third, leaving little room for an appreciation of the particular circumstances in the given case, the second approach offers a non-mechanical and less technical course of action, while allowing an extensive contemplation of relevant international law factors. In addition, international law is not constant and perpetual, it develops and changes from time to time. Any change in international law is easier to take into consideration in the second approach than in either of the other two approaches.

Thus, in conclusion — as to the question of the relevance of the interstate commerce test in the foreign commerce area — the interstate commerce test has direct relevance depending on which approach the courts choose, which in turn depends upon the courts' interpretation of Congress' intentions. We will find below that the foreign commerce case law and the available authorities embrace all of the approaches mentioned.

4.4 Restraints by alien corporations still "in" or "substantially affecting" interstate commerce

Before focusing on the foreign commerce case law there is cause to ask whether, under any conditions, alien corporations may disturb the *interstate* commerce through anticompetitive practices. It may be argued, with some force, that there is no need to dwell on the substance of the foreign commerce test as long as the restraints carried out by alien corporations have an impact on the interstate commerce. In a certain group of cases this may be perfectly true, as in those instances where *the doctrine of "enter-*

prise entity'' is applicable. This doctrine may — as discussed *supra*[26] — support personal jurisdiction over alien corporations, if these are found to have too close of a "nexus" to either subsidiaries or parents situated within the United States. Such a "nexus" may exist by virtue of a strong dominance exercised by the alien corporation over its U.S. affiliate. The U.S. parent or subsidiary is an dependent instrumentality in the hands of the alien corporations. The alien corporation does business through its affiliate on the U.S. market.

An alien corporation may also operate in U.S. domestic commerce through agents or "constructive" agents (see *supra* p. 14 f.), and thereby be subject to personal jurisdiction. If this is so, the agent is said to be "the lengthened arm" of the alien corporation. The same reasons that support personal jurisdiction over an alien corporation may be transformed to support subject matter jurisdiction over restrictive conduct performed by alien corporations through the "medium" of their affiliates and directed at interstate commerce. Such restraints are no different from the ordinary domestic restraints (U.S. corporations restraining competition "in" or "substantially affecting" commerce or purely *intrastate* restraints) with one exception: they are ordered or directed from outside of the United States by alien corporations. This, it is true, may create practical problems by way of enforcement. In principle, however, there is no distinction. Moreover, no issue as to the localization of the restrictive acts should arise.[27] The fact that the decision to restrain competition was taken abroad has very little influence in this respect. It is hard to imagine that U.S. corporations would escape the interstate commerce test by locating their decision-making outside the country.[28]

Suppose, however, that two alien corporations that have U.S. subsidiaries decide to merge, and that the merger between the parents has no connection to U.S. foreign commerce whatsoever and thus is not actionable. Is the merger between the subsidiaries — a natural consequence of the parents' course of action, it would seem — within the reach of the interstate commerce test? Prevention of the subsidiaries' merger would no doubt render a merger between their parents impractical (but not impossible), and may therefore disturb the economic policy in the parents' country of creation. But in point of fact, the merger situation is not distinguishable from those mentioned before: Compare, for example, the situation where two alien corporations agree to direct their subsidiaries in the United States to take concerted action as to pricing, boycotting, market-sharing, etc. Prevention or removal of such restraints may likewise have side-effects outside the United States. Yet, should the frustration of

the parent corporations' intentions (and conceivably the policies of their home countries) have any bearing on the legality or indictability of the restraints performed through the U.S. subsidiaries?[29]

There is another category of conceivable cases in which restraints carried out by alien corporations, may either be "in" or "substantially affect" interstate commerce. Almost any restraint touching U.S. foreign commerce — especially the import trade — may produce effects on U.S. interstate commerce. Only exceptionally is such a restraint confined to a single state. An alien corporation restraining U.S. imports, may thus simultaneously restrain competition in interstate commerce. This brings out the question of whether the alien corporation, accordingly, could be tried solely under the interstate commerce test in disregard of the seemingly rather complex foreign commerce test. Where the two tests to be identical, no objections could probably be raised. On the other hand, should the foreign commerce test be more rigorous than the interstate commerce test, subject matter jurisdiction over such alien restraints should primarily, if not only, pass the legal barrier of the former. (Should the foreign commerce test — contrary to all expectations — be less rigorous than that of the interstate commerce, no reason would exist to evade the former.)

4.5 U.S. corporations contra alien corporations in foreign commerce

U.S. corporations that engage in U.S. export trade are under certain conditions exempted from the antitrust laws. The Webb-Pomerene Act of 1918[30] permits U.S. competitors to form export associations (so-called Webb-Pomerene associations) through which they can co-operate in pricing, by market allocations or otherwise, provided, *inter alia*, that the export trade of any domestic competitor is not restrained thereby[31] and that the association does not "artificially or intentionally" enhance or depress prices within the United States or substantially lessen competition therein.

The Act was intended to spur export trade by permitting U.S. competitors to act in concert on the U.S. export markets. This was done by furnishing possibilities for U.S. exporters to compete on "equal terms" with alien cartels, while simultaneously protecting the American consumer and businessman from the negative effects of a restrained export. As interpreted in case law and by the antitrust administration,[32] alien corporations are excluded from this exemption.

As it is, the Webb-Pomerene Act has essentially failed in its primary object, that of increasing American exports. Its practical importance today is minimal.[33] The desired positive effects of the Act tend to be overshadowed

by its negative consequences.[34] And what is more conspicuous: the Act constitutes an anomaly in U.S. antitrust philosophy in the foreign commerce area. What the U.S. antitrust laws are to suppress with one hand, they encourage with the other. Theoretically, the Webb-Pomerene Act provides some argument for a rigid interpretation of the foreign commerce test. It may, for instance, be argued that Congress by enacting the Webb-Pomerene Act, and thereby endeavouring to equalize the terms of competition among world exporters, to some extent neutralized the potential of the antitrust laws to combat cartelization. Whatever the persuasiveness of such reasoning may be, the Webb-Pomerene Act is bound to create some hesitation on the part of the courts as to stretching the foreign commerce test to its utmost limits.

However, apart from the Webb-Pomerene Act, is there any rationale for treating U.S. corporations differently from alien corporations in the sphere of foreign commerce? One may venture the observation that if there are any limitations imposed by international law or "comity", on the substantive scope of the U.S. antitrust laws, they have little relevance as to U.S. corporations engaged in, and restraining competition in U.S. foreign commerce (not exempted by the Webb-Pomerene Act). It would follow — assuming international law limitations exist — that divergent foreign commerce tests apply with a varying degree of severity, depending on which countries' corporations are involved. If there is any sense in this, the more rigorous test, if any, should apply to U.S. corporations. A transmutation of the interstate commerce test as to restraints carried out by U.S. corporations in the foreign commerce area should be beyond dispute. But then again, in antitrust actions, where alien and U.S. corporations are joined as defendants accused of co-conspiracy, different rules for different defendants could lead to irregular results.

Notes, Chapter 1, Section 4

[1] *Supra* p. 34 ff.

[2] The power to "regulate Commerce with foreign Nations," coupled with the power to "make all laws which shall be necessary and proper for carrying into Execution the foregoing powers ...". U.S. Const. Art. I, § 8, cl. 3 and 18. Another theory claims that the power of sovereignty (including the power over foreign relations) existed before the Constitution — and continued to exist thereafter, — by virtue of a transference from Great Britain to the United States. See U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304, at 317 (1936). Also see U.S. v. Belmont, 301 U.S. 324, at 330 (1937) *Cf.* Henkin, The Treaty Makers and the Law Makers:

The Law of the Land and Foreign Relations, 107 U.Pa.L.Rev. 903 (1959); Attorney General's Nat. Committee Report at 77 ff.

[3] Gibbons v. Ogden, 22 U.S. (9 Wheat) I, at 193, 6 L.Ed. 23 (1824); Schooner Exchange v. McFaddon, 7 Cranch 116, 3 L.Ed. 287 (U.S. 1812); The Appollon, 22 U.S. (9 Wheat.) 362, 6 L.Ed. 111 (U.S. 1824), and Welton v. Missouri, 91 U.S. 275, at 280, 23 L.Ed. 347 (1876); Board of Trustees v. U.S., 289 U.S. 48, at 56 (1933).

[4] U.S. v. Peace Information Seller, 97 F.Supp. 255, at 260 (D.D.C. 1951).

[5] *Supra* p. 36.

[6] *Supra* p. 36.

[7] *Supra* p. 36 and 43 ff.

[8] *Supra* p. 36 ff.

[9] *Supra* p. 37 f.

[10] Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804 (D.C. Cir. 1968), *certiorari denied,* 393 U.S. 1093 (1969). The Sherman Act was held to cover restraints applied solely in shipping business between foreign ports.

[11] *Supra* n. 10, at 816: "[I]t is the United States that has the greatest interest in this trade, and its conduct on a strong and efficient basis." See further, *infra* p. 113 ff.

[12] See the Sherman Act, Sections 1 and 2, (*supra* p. 36 f.) the Clayton Act, Section 1, § 2 (*supra* p. 36 and 43 ff.) and the FTC Act, Section 4, § 2 (*supra* p. 36).

[13] Sherman Act, Section 8, Clayton Act, Section 1, § 3 and the FTC Act, Section 4, § 3.

[14] *Supra* p. 38 ff.

[15] *Supra* p. 36 ff.

[16] This assumption is made by e.g. Rahl, 59 ff., in particular at p. 66, and Sullivan, 714 ff., both holding that the case law on the foreign commerce area support such an assumption. (Rahl, at 67).

[17] *Supra* p. 45 f.

[18] See *supra* n. 17.

[19] *Supra* chapter 1.

[20] See e.g. Corwin, 5 ff.

[21] See e.g. Whitney, Sources of Conflict Between International Law and The Antitrust Laws, 63 Yale L.J. 655, at 660 f. (1954).

[22] About the Due Process Clause and the Constitution, see *supra*. p. 6 ff.

[25] "An Act of Congress ought never to be construed to violate the Law of Nations, if any other possible construction remains," marked Chief Justice Marshall in the Schooner Charming Betsy, 2 Cranch 64, at 118 (U.S. 1804), (Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, at 118 (1804). *Cf.* the statement made by Mr. Justice Story in The Appollon, 9 Wheat. 361, at 367 (U.S. 1824) (The Appollon, 22 U.S. (9 Wheat.) 362, at 370 (1824): "[H]owever general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the legislature

have authority and jurisdiction."

But where there is a clear intent on the part of the Congress to pass a provision that may arguably violate international law, courts are reluctant to interfere. See e.g. Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, at 1334 (2d Cir. 1972), where the court felt "bound to follow the Congressional direction"; Tag v. Rogers, 267 F.2d 664, at 666 (D.C.Cir. 1959): "There is no power in this Court to declare null and void a statute adopted by Congress or a declaration included in a treaty merely on the ground that such provision violates a principle of international law". In Diggs v. Schultz, 470 F.2d 461 (D.C.Cir. 1972), the court felt powerless to interfere when Congress had decided to allow the importation of certain goods from Rhodesia in violation of a treaty commitment with the United Nations, stating, *inter alia*, that the "quarrel is with Congress, and it is a cause which can be pursued only at the polls and not in the courts." (*Id.* at 465). Also see Restatement (2nd) of Foreign Relations Law, § 3 (3), Comment i. and Reporter's note 2. (p. 9 ff.).

[30] Export Trade Act, April 10, 1918, 15 U.S.C.A. §§ 61—65 (1973).

[31] On this see e.g. Areeda, 52; Rahl, 166, Brewster, 108 ff.; Fugate, 21 ff. and 223 ff.

[32] See FTC, Economic Report on Webb-Pomerene Associations: A 50-Year Review (1967) at 19 and U.S. v. United States Alkali Export Ass'n., 86 F.Supp. 59, at 64 (S.D.N.Y. 1949).

[33] See FTC Report, *supra* 32, at 23 ff. Also see Rahl, 166; Fugate, 245 ff.; Note, An appraisal of the Webb-Pomerene Act, 44 N.Y.U.L.Rev. 341, at 370 (1969); Cynthia Rollings, The Extraterritorial Application of American Antitrust Law and the Export Expansion Act of 1971, 5 Int. Law & Pol. 531, at 533 f. (1972).

[34] See Testimony of Donald F. Turner, Assistant Attorney General, in Hearings on International Aspects of Antitrust Before the Subcommitte on Antitrust and Monopoly of the Sen. Comm. on the Judiciary, 90th Cong., Ist Sess., Review of the Webb-Pomerene Act of 1918, at 125 (1967). Also see *supra* n. 33.

5. The foreign commerce case law

5.1 The method of examination

The purpose of examining the foreign commerce case law is primarily, of course, to establish the criteria for subject matter jurisdiction in this field. That could be done — as was, with regard to the interstate commerce — simply by fixing the critical wording (the "formulæ") in each case and then elaborate as to the precise meaning of the given wording. But the examination could neither begin nor end there. Since, in theory, any foreign commerce case may be affected by international law considerations, the examination has to proceed from a different angle. The impact of international law, in the individual case, may turn not only on the jurisdictional formula applied. There are certain other variables. As far as possible the following line of analysis — in the stated order — will thus be observed.

5.2 Parameters

1) *Characterization* (qualification, classification) of the action brought. Relevant international law was originally built on laws more easily divided into categories such as criminal law, civil law, administrative law, etc.[1] The relatively recently developed antitrust laws are difficult to label according to this scheme and it would be premature to venture to do so at this moment. Yet, it is valuable to track the courts' points of view in this respect, if such are available at all. Hence, the object is to find out, if possible, how the court in the given case *characterized* the action, apart from being one in antitrust. This again may depend on many factors: the parties involved, if the original plaintiff is a private party (company or person) or a representative of the government; the remedy asked for (to be distinguished from the remedy actually afforded, see below under 4)), such as imprisonment, fines, damages, injuctive relief, dissolution, divestiture, divorcement, cease-and-desist order, etc. To the extent possible such factors and their relevance in the characterization process will be localized and defined. Furthermore, the court's view of the relevance of the characterization will be discussed.

2) *Identification* and *localization* of the *acts* complained of, again from the court's point of view. The international law may vary depending on where the acts were performed, or at least the courts in some cases may think it does and proceed accordingly. The task is then to define the act which the

court considered relevant for its purposes and to find out where the court localized these acts. There is also reason to ask what consequence the localization, in the given case, had as regards the impact of international law.

Other courts, in other cases, may find the localization of the acts wholly irrelevant in determining the impact of the international law. If so, that will be noted, and if available, the reasons why.

3) Definition of the *jurisdictional criteria* stipulated. Here, any formula actually maintained or applied will be identified, where the reasoning, dicta or holding allow. The formula (or test) — connecting factors — may be similar to that applied in the interstate commerce cases, but it may also differ. The inducement for differentiation will, where germane, be indicated. If the interstate commerce test is simply transmuted to the foreign commerce area, any other considerations paid to international law — for instance, in a separate reasoning[2] — will be pointed at.

4) Identification of other *distinctive elements* in the foreign commerce law, as compared to interstate commerce cases, either as a result of the impact of the international law or other considerations (such as easement of United States exports). The distinction may lie for instance in the fact that *divergent substantive rules*[3] are applied.

5) Identification of any *distinction* made between *alien and U.S. corporations*[4] — whether substantively or jurisdictionally — and the underlying motives for these.

6) *Description of the remedy* actually *afforded* in the given case, as compared to the remedy requested, and in light of the overall picture of the alleged restraints. The more limited the remedy is in scope in such a context, the less impact will probably the international law have on the case in general, *i.e.*, including the other factors mentioned so far.

The cases in the foreign commerce area may not always, of course, be amenable to the suggested atomization. The variables heretofore mentioned may be intertwined, nebulos and, at times, undiscoverable. They may, in part, not even exist. Still, if the bulk of the cases provides for some answers, much is to be gained. Each case will, furthermore, be accompanied by relevant interpretations and comments by legal authorities.[5]

5.3 Early case law

5.3.1 The American Banana Case

American Banana Co. v. United Fruit Co.[6] is the first case touching upon the scope of the Sherman Act in the international sphere. A U.S. corporation, American Banana Co., sought to recover (treble) damages[7] for injuries inflicted on business and property by United Fruit, another U.S. corporation. While procuring business opportunities in Costa Rica[8] — operating a banana plantation and constructing a railway for purposes of export trade — American Banana was effectively blocked in its efforts by instruments of the Costa Rican Government. (A part of the plantation was seized and deprived of and the railway construction was desisted.) The Costa Rican Government's actions were allegedly instigated by United Fruit, which thereby carried out a plan — the bulk of which was already realized by a panoply of anticompetitive practises[9] — to monopolize the banana trade. United Fruit had, furthermore, by other means prevented American Banana from purchasing bananas from banana producers.

1) The Court (speaking through Justice Holmes), characterized, it seems, the action as one sounding in tort, a civil action, on the ground that the case involved a *private* party, which requested *damages* for *injuries* suffered in business.[10] The acts complained of were oftentimes referred to as torts,[11] occasionally, however, they were referred to as criminal acts.[12] The ostensible anomaly can be explained: Whereas words such as criminal or unlawful were used in the Court's general reasoning, the term "tort" was used as the general reasoning was applied to the specific case.[13] This, in turn, indicates something of greater importance: In the international law context, the Court made no distinction, in principle, between crimes and torts, *i.e.*, the impact of the international law is the same, whether the action is characterized as criminal or tortious. Thus, even if the Court characterized the action as one sounding in tort and thereby civil, it did not consider this to have any particular relevance for international law purposes.[14]

2) All of the acts complained of took place in Costa Rica, or at any rate outside the United States, according to the Court. This includes United Fruit's inducements of the Costa Rican Government, the compelling of banana producers to discontinue sales to other than United Fruit, and thus the prevention of American Banana from purchasing bananas. However, the agreement to accomplish these acts was localized to the United States, presumably on the ground that the Court believed that the relevant decisions in

this respect were taken at the defendant's main office. Since the acts complained of, and which took place in Costa Rica, were legal, the Court held, an agreement in the United States to perform these acts could not be illegal.[15]

3) *The jurisdictional criteria:* International restraints were held to be within the scope of the Sherman Act whenever the acts that form the restraint occur in the United States, *i.e.*, where the acts take place outside the United States, as in the instant case, the Sherman Act (or any other antitrust law) does not apply.[16] The term "act" must, however, be understood in a very limited sense. It is not the consequence of the act, nor the effect of it, that shall be localized and that subsequently determines the issue of subject matter jurisdiction. It is the positive act in its initial stage — the seizure of the plantation, the blocking of railway constructions, etc. The rationale for localizing the prevention of purchases to Costa Rica was probably that the producers were there and that their omission (refusal) to sell "occurred" there.[17] Any decison made, or agreement concluded within the United States[18] — *e.g.*,between United Fruit and one of those producers or a governmental agent from Costa Rica — that could amount to a conspiracy, the Court found, is legal, if only the act itself, which the conspiracy is aimed at, is legal.[19] The fact that the blocking of the railway construction, which would have afforded the only means of export for American Banana (the latter was noted by the Court), alone or coupled with the fact that banana purchases were restrained, probably affected U.S. imports, the Court did not consider. And so, it seems, not because the fact was overlooked, but because it was regarded as irrelevant.[20]

4—5) Both parties in the case were U.S corporations. There is nothing in the case to support a distinction between alien and U.S. corporations as regards the applicability of the U.S. antitrust laws.

6) The complaint was dismissed as not setting forth a cause of action.[21] The Court provided two, apparently supplementary, reasons for dismissal.[22] First, as already mentioned, acts committed outside the United States are not governed by the Sherman Act. Secondly, and less pertinent here, a court in the United States will not (with few exceptions) sit in judgement on the acts of a foreign state, performed within its own territory — the act of state doctrine.[23]

5.3.1.1 Some general conclusions

The American Banana case has been subject to numerous interpretations, some of which correspond and some of which do not. Foreign commerce

cases decided subsequent to *American Banana* (discussed *infra*) seem to deviate from the reasoning and holding in that case. And the breach tends to widen from one case to another. It is believed that the *American Banana* case is either distinguished[24] or simply overruled.[25]

Much of the confusion, as to real significance of *American Banana*, is probably due to the jurisdictional test provided by Justice Holmes. It lies in the ostensibly simple "place of tort" rule — localize the act and you will know what law to apply — and the apparently easily absorbed dogma: "All legislation is prima facie territorial." If some *criteria for localization of anticompetitive acts* are not provided, nothing much is gained. How is the "act" to be localized, how is it to be defined? Does "acting" include the consequences — the effects — of the anticompetitive scheme? Is a law that prohibits such effects "territorial"? These questions were left essentially unanswered in *American Banana* and this may be the prime source of the confusion.

5.3.2 U.S. v. American Tobacco Co.[26]

The *American Tobacco* case (the first),[27] notable for its substantive antitrust aspects (*e.g.*, the application of the rule of reason), is predominantly a domestic case with a slight flavour of international antitrust. American Tobacco had, posterior to its and other U.S. corporations' monopolization and restraint of the domestic tobacco market by a multitude of subtle devices, initially purchased a British tobacco company and later, in concert with other American companies, entered into contracts with a British-Irish combination, the Imperial Tobacco Co. These contracts stipulated 1) that the latter should limit its business to the United Kingdom, except for leaf purchasing in the United States which was made through a resident general agent, 2) that the former should limit their business to the United States and its vicinity, and 3) that a new company should be organized under British law (the British-American Tobacco Co.) to be owned two thirds by the American side and one third by the British. This new company was to take over the companies' business in countries not reserved to either.

The new company was subsequently formed. It maintained a branch office in New York whose principal officer was the vice president of the American Tobacco Co., and, by agreement, purchased all leaf, aimed for subsequent export, through the American Tobacco Co.

1) In this action, the United States Attorney General prayed the Court to declare the contracts illegal under the Sherman Act, Sections 1 and 2, and to prevent and correct the market situation, as profiled by the contracts, by

means of multifarious regulatory orders.[28] No punishment in terms of imprisonment or fines was, in fact, requested. As the Court never discussed the issue, it is hard to tell how the Court characterized — or would have characterized — the action, apart from *not* being a civil action.[29]

2) The contracts were entered into in Great Britain (London) and the British-American Tobacco Co., was formed in and under the laws of that country. The Imperial Tobacco Co. agreed not to do business in the United States, except for purchasing leaf there. It thus agreed, chiefly, not to export its products to the United States (or to any other country outside the United Kingdom). It agreed to remain passive, to refrain from acting. The Court made no attempt to localize these acts.[30] A tantamount promise was conveyed from the American companies and the British-American Tobacco Co., as to their shares of the world market. In addition, the latter company carried out an exclusive bying agreement within the United States through its office situated there.

3) No specific jurisdictional criteria were stipulated. The Court laconically concluded, without devoting separate discussion to the foreign commerce aspects,[31] that the "assailed combination in all its aspects ... including the foreign corporations in so far as by the contracts made by them they became co-operators in the combination ...', came within the prohibitions of the Sherman Act. This much seems clear though: no relevance was attached to the fact that the contracts were made in Great Britain. The Court, in this respect, reserved the lower court's descision to dismiss the case as far as the foreign corporations were concerned. It did so on the ground that the contracts were entered into in London where they were legal and proper.

Beyond that, no guidelines were provided other than the arguments presented before the court. Whereas the Government emphasized, without even mentioning the *American Banana* case,[32] that the Sherman Act was to apply "when the direct result or necessary tendency" of a contract is the "material obstruction" or "hindrance" of interstate or foreign commerce (the effect on it), taken as a fact in each individual case,[33] the Imperial Tobacco Co., urged that the Sherman Act did not, and was not intended to cover, acts committed outside the United States, citing the *American Banana* case. Thus, while Imperial advocated a localization-of-act process for jurisdictional purposes, the Government was more concerned with the impact on commerce. Yet the Government was not wholly uninfluenced by localizition-of-the-act thinking: "An agreement or combination which in purpose or effect conflicts [with the policy or laws of the United States], al-

though actually made in a foreign country where not unlawful, gives no immunity to parties *acting here* in pursuance of it."[34] Whether this refers to the acts done by the British American Tobacco Co. through its New York office within the United States, or to the omission on the part of Imperial to export to the United States (as agreed), is uncertain.

Similary uncertain is, as indicated, on which arguments the Supreme Court's decision rested, even if the decision itself was in harmony with that desired by the Government.

4—5) No explicit distinction was made between U.S. and alien corporations.

6) For permanent relief, the case was sent back to the court below.[35] That court was directed to work out a model which would dissolve the combination and recreate a new condition, which would both rectify the existing situation and be in harmony with the law. As an ultimate sanction, the court below was afforded the right and duty to restrain all movement of the concerned products in interstate and foreign commerce. As temporary relief, all defendants were to be restrained from doing *any* act which might have furthered the power and intents of the combination. Seemingly, this is more than the Government asked for on appeal — restraint of any act *within* the United States, observance of antitrust laws as to dealings *in* the United States, etc.[36] But then again, the distinction may depend on how Imperial's and British-American's omission to export to the United States is localized. The Supreme Court's directives, however, as to temporary relief, seem to catch these companies' omission to export to other countries (according to the agreement) as well. This is probably a consequence of the Court's somewhat casual attitude with respect to the ascertainment of the jurisdictional criteria.[37] All in all, in designing the final decree, the lower court showed serious concern when formulating the injunctions relating to the alien corporations, so as not to overstep, what it belivied to be, the jurisdictional limits.[38] These provisions were confined so as to apply strictly to trade or commerce between the several states, or between the United States and foreign countries.[39] Any clauses in the agreements between the U.S. and the British corporations that related wholly to business in foreign countries, were thus not included in the remedial scheme.[40]

5.3.2.1 Some general conclusions

The case is not definitely distinguishable from *American Banana*. First, that the legality of a contract in restraint of trade is to determined by the law of its making was neither acknowledged in *American Tobacco* nor

quite so, according to dictum, in *American Banana* (at least indirectly).[41] Secondly, the nebulous and scant nature of the reasoning in *American Tobacco* in the pertinent parts, offers little of substance to support distinctions.

It is, of course, conceivable that the court in *American Tobacco* meant to snare all of the acts of the foreign corporations in furtherance of the combination, irrespective of where they were done — as the all-embracing remedy seems to suggest — but that would be to resort to mere speculation. A more reasonable interpretation is that the court probably only wished to include such anticompetitive conduct, on the part of the foreign corporations, that directly contributed to the domestic combination and monopolization (as, for instance, the exclusive purchasing agreement between American Tobacco and British-American).

5.3.3 U.S. v. Nord Deutscher Lloyd

U.S. v. Nord Deutscher Lloyd,[42] did not arise under an antitrust law, but is of some interest since it sheds light on the *American Banana* case.[43] Nord Deutscher Lloyd was a German corporation which operated a line of steamers between Bremen and New York, maintaining offices and places of business in both cities. I was alleged that the corporation sold tickets to trips to and from New York, at its office in Bremen, to two aliens who, when arriving at New York, were immediately deported back to Germany. Under such circumstances, as stipulated by the Immigration Act of 1907,[44] it was illegal to charge for the return trip of any such alien, which Nord Deutscher Lloyd did.[45]

1) The action was no doubt of a criminal character. The illegal act was itself characterized as a misdemeanor[46] and the court referred to the "crime", which was to be punished.[47]

2) The contract was made in Bremen, *i.e.*, the tickets were sold there. The money that was charged for the return trip was collected and initially retained in Bremen. As money carries no earmarks, the refusal to return the money charged could just as easily be localized to the office in Bremen as to the office in New York. The services of the steamship company were partly performed within the United States.

3) The jurisdictional criteria coincide with that of the *American Banana* case (which is also cited): "[T]he defendant cannot be indicted here for what he did in a foreign country."[48] At the same time the court held that the law at the place of the making (*lex loci contractus*) did not govern as to the

legality of a contract — which is in accord with the *American Tobacco* case and certain indications in the *American Banana* case.[49]

Hence, it was the localization of the act that determined jurisdiction (see *supra* p. 68). If by contract, conditions are created that are operative within the United States — *e.g.*, the contract is to be performed there, in whole or in part, or is otherwise in force there — the rights and duties of the parties to the contract would likewise be operative there. Consequently, a refusal to return the money, charged for the return trip, to alien passangers while in New York — a payment that, of course, should have been made by the New York office of the German company — could be punished in the United States. This is how the court probably reasoned. *American Banana*, thus far, stood firm.

4—6) Of no relevance here.

5.3.4 The Pacific & Arctic case

U.S. v. Pacific & Arctic Railway & Navigation Co., et al,[50] involved, as defendants: 1) three corporations operating steamship lines, two of them between Seattle in the state of Washington and Skagway in Alaska, and the third between Vancouver (outside the United States) and Skagway; 2) a wharf company in Skagway; and 3) four corporations operating connecting railways and lines of steamships from Skagway, over the boundary line into Canada and thence along the Youkon riversystem to Dawson in Canada. (These latter four corporations — three of which were alien — were owned, controlled and managed (mainly) jointly). The defendant corporations were, *inter alia*, charged with having restrained and monopolized the transportation business between the aforesaid ports and the cities in the Yukon river valleys, by mutual exclusive arrangements, rate-fixing and discriminatory pricing. (Sherman Act.)

1) The Court clearly characterized the action as criminal. It searched for a "criminal purpose", found it, and stated: "We are dealing with an indictment which charges a criminal violation of the antitrust act, and of that the criminal courts have cognizance . . .".[51] It also belivied the character of the action, as compared to civil actions, to have some relevance in a jurisdictional perspective, as will appear below (under 3).

2) The agreements were probably made in the United States,[52] as the instigating corporatings behind these were of U.S. origin, but were partly enforced outside the United States where the line of transportation crossed the U.S.-Canadian boarder. Thus, part of the acts done in furtherance of

the agreements must have occurred outside the United States, such as the selling of tickets in foreign offices at fixed rates.

3) The *jurisdictional criteria* are, to begin with, those of *American Banana*. To the defendants' argument that, as part of the transportation route was outside of the United states, the antitrust law did not apply (citing *American Banana*), the Court replied: The agreements were entered into with the purpose of exercising control "over transportation *in* the United States, and *so far*, is within the jurisdiction of the laws of the United States, criminal and civil. If we may not control foreign citizens or corporations operating in foreign territory, we certanly may control such citizens and corporations operating in our territory, as we undoutedly may control our own citizens and our own corporations."[53] Hence, insofar as the anti-competitive operations could be localized to United States territory, the Sherman Act did apply. The Court also attracted attention to the absurdity in denying jurisdiction merely because part of the transportation was foreign: a similar argument could have been brought before a Canadian court and thus no country would be able to acquire jurisdiction, should the argument prevail.[54] Somewhat disguised, one finds another jurisdictional prerequisite. The combination, the Court said, "was a control to be exercised over transportation in the United States . . .".[55]

How are the jurisdictional criteria, applied by the Court, to be defined? The contract or combination was directed towards U.S. transportation and commerce. In this sense, it probably "affected" U.S. commerce, if not interstate commerce, then at least foreign commerce. "Affect", as utilized here, denotes it seems a mere relation, a nexus,[56] not a result or an actual effect. It is insufficient here for jurisdictional purposes that a combination is set up, whether within or without the United States, and that acts are performed in furtherance of it within the United States; the combination itself must relate to U.S commerce. This conclusion may seem highly theoretical, it is agreed. Nevertheless, it is necessary to ramify and specify the significance of the term "affect" at this early stage. As the case law develops and commentaries emerge, the meaning of the word "affect" will lose in precision.

4—6) Nothing in particular to note, except that U.S. and alien corporations were subject to the same legal principles without discrimination.

5.3.5 Thomsen v. Cayser

In *Thomsen v. Cayser*,[57] plaintiff Thomsen was a shipper compelled to economic hardships due to the freight rate policies of the defendants. These defendants, one alien and several U.S. corporations, had established a uni-

form freight rate — on the New York and the southern Africa line — including a "primage charge" subject to refund. One of the conditions for refund was that the shippers under "primage charge" employed the defendants' services exclusively. In other words, "loyalty" was required. In order to meet competition by new steamship companies entering the market, the defendants imposed further conditions, and withheld, or threatened to withhold, the money to be refunded, thereby attempting to secure the strings of loyalty. (Sherman Act, Section 1.)

1) The action was brought under the Sherman Act, Section 7, to recover threefold damages for injuries suffered in business and property by reason of anything forbidden by the Act. Furthermore, the plaintiff specifically requested the recovery of the amount in excess of what was a reasonable freight rate. In this respect, thus, the case resembles *American Banana*[58] and would in Justice Holmes' view be characterized as a civil action. Although the Court in the case at hand did not expressely characterize the action as civil, the aformentioned factors and the Court's reasoning as to these, with particular weight given to the individual harm inflicted,[59] at the least, do not indicate a deviation from *American Banana*. Moreover, whereas Justice Kenna, who spoke for the Court both in *U.S. v. Pacific & Arctic Railway & Navigation Co.*[60a] and *Thomsen v. Cayser*, emphasized the public injury sustained and the criminal nature of the action in the former case, no such attributes were found in the present case.

But then again, as the Court's reasoning reached the jurisdictional issue (see below), *Pacific* was cited as the foremost precedent. This suggests that Justice Kenna made — as in *American Banana* — no distinction between *tort* and *criminal* actions for jurisdictional purposes.

2) It was contended that the combination was formed, *i.e.*, the agreements between the steamship companies were concluded, outside the United States (in London). And it may be that some acts done to enforce and to refine the combination occurred without U.S. jurisdiction (*e.g.*, threats to withhold repayments). Still, assuming that such acts are at all open to localization, whatever acts done in furtherance of the agreements outside the United States, were *equally* done within the United States. Thus, for instance, the "primage charge" system was, *inter alia*, directed towards U.S. shippers and U.S. consignees and was effective regarding a steamship line, which was in part run in American waters and to and from American ports. The withholding of the refund money could, in addition, as we have seen in *U.S. v. Nord Deutscher Lloyd*,[60b] have taken place at the offices of the companies (or at those of their agents)[61] in the United States.

3) As may have been noted, the fact situation very much resembles that of *U.S. v. Pacific & Arctic Railway & Navigation Co.*,[62] and so does, consequently, the jurisdictional criteria, especially as Justice Kenna wrote the opinion in both cases. In the present case, Justice Kenna accepted the phrasing of the lower court: "As was said by the circuit court of appeals, the combination affected the foreign commerce of this country and was put into operation here."[63] (Citing *Pacific.*) Therefore, the combination was within the Sherman Act. The law at the place of the making of the contract, was, again, not controlling. It was immaterial. The interposition of the word "affected" was not an innovation with regard to jurisdictional criteria. It simply stated the fact that a combination, although formed in a foreign country, is subject to the U.S. antitrust laws if it is directed towards or in some way encompasses U.S. foreign commerce and, in addition, acts in pursuance of that combination are carried out in the United States. Here, as in the *Pacific* case (see *supra* p. 74), "affect" probably denoted no more than a nexus, or a relation; nothing of an actual result was required.[64]

4—6) Nothing of relevance here.

5.3.6 U.S v. Hamburg — Amer. P.F.A. Gesellschaft

In *U.S. v. Hamburg — Amer. P.F.A. Gesellschaft*,[65] a New York court, relying partly on *Thomsen v. Cayser*,[66] refined and developed the "affect" requisite. The facts presented there, were similar to those of *Thomsen v. Cayser*: the traffic between the United States and ports of foreign countries was restrained by anticompetitive measures, such as market divisions, receipt-pooling, etc. The Court stated: "As the contract directly and materially affects the foreign commerce of this country by being put into effect here, it is immaterial where it was entered into ... The vital question in all cases is the same: Is the combination to so operate in this country as to directly and materially affect our foreign commerce?" (Citing *Thomsen v. Cayser*).[67] The agreement in restraint of trade affected U.S. foreign commerce, as its operation necessarily would divert a part thereof, the Court explained further. It was "directly" and "materially" affecting that foreign commerce, because part of it was to be carried out in the United States — the agreement contemplated the solicitation of business, the making of contracts of carriage, the taking on board of passengers, etc., within the territory of the United States: "It requires acts to be done in this country; such acts are as material and essential as those to be performed abroad, and the part of the contract requiring the cannot be separated from the remainder."[68]

A closer analysis of *U.S. v. Hamburg — Amer. P.F.A. Gesellschaft* and especially the lines quoted, displays that the Court in that case did not look for actual acts performed within the United States. It suffices for jurisdictional ends, the Court seemed to suggest, that the agreement contemplated such acts: the agreement was partly intraterritorial because, said the Court ... "it is to be carried out in part in the United States".[69] The vital question was whether the combination "*is so to operate* in the United States as to affect its foreign commerce".[70] And when citing *Thomsen v. Cayser* the Court quoted: "[The combination] affected the foreign commerce of this country and *was to be* put into operation here."[71] However, the quotation made was incorrect. The last part of the sentence should read: "... and *was put* into operation here."[72] The extra words inserted by the Court in *U.S. v. Hamburg — Amer.* ("to be") illustrate the point the Court tried to make: the Sherman Act also covers contracts that, without having actually been performed in the United States, have a sufficient *potential* to be so performed.[73] In this, the case clearly differs from those hithero mentioned. Contracts or combinations that are directed against the U.S. market can thus be reached at an incipient stage.

5.3.7 The Sisal Case

In *U.S. v. Sisal Sales Corp.,*[74] three U.S. banking corporations allegedly organized and financed U.S. corporations (*inter alia,* Sisal Sales), formed and furnished money to a Mexican buying and selling company (the corporations mentioned so far were made defendants) and persuaded the governments of Mexico and Yucatan to pass discriminatory legislation, all with a view to acquiring complete dominion over the sisal production abroad, the importation of sisal into the United States and its sale within the United States. Subsequently an exclusive-dealing agreement was entered into between the Mexican company ans Sisal Sales. As a result, and after two unsuccessful attempts, competition in the sisal market was abolished, excessive prices were arbitrarily fixed, and other corporations were forced out of the market. (Sherman Act, Sections 1 and 2, and the Wilson Tariff Act, Sections 73 and 74).

1) This was a Government action wherein an injunction was sought, which would prevent the concerned corporations from taking further action in pursuance of the alleged arrangements. The Court did not regard the action as civil — once, it even spoke of "punish[ment] for offences against our laws"[75] — but for a further characterization one looks in vain (that is, if

the single use of the term "punishment" is not to be decisive).[76] The Government did not seek punishment, it sought regulation.

2) The necessary agreements were concluded within the United States.[77] These were, in part, made effective in the U.S. by the organization of U.S. corporations, by price-fixing operations, etc. Moreover, the exclusive importer of sisal was a U.S. corporation, which by virtue of the bankers' combinations obtained monopoly within the United States. On the other hand, the solicitation of favourable laws, the revival of the Mexican company by conveying monetary resources to it, and the securing of that companys' monopoly status, while they may have been initiated in the United States, reasonably must have occurred abroad. The promise to sell exclusively, made by the Mexican company, and acting in accordance with that promise, was not so easy to localize.[78]

3) The jurisdictional criteria corresponded with those applied in the *American Banana* case. In that case (see *supra* p. 68) the acts complained of were performed in a foreign country where they were permitted. "Here", the Court concluded in the *Sisal* case, "we have a contract, combination, and conspiracy entered into by parties within the United States and made effective by *acts done therein* ... The United States complain of a violation of their laws *within their own territory* by parties subject to their jurisdiction".

American Banana was, thus, distinguished. Anticompetitive conduct within the United States was found sufficient to establish jurisdiction. The Court duly acknowledged the occurence of some acts in foreign countries. But the Government did not, in the first place, pray for relief on the ground of those acts, as did the private plaintiff in *American Banana*. The Government sought an injunction to correct the "forbidden results" brought about by the defendants within the United States[79], *i.e.*, the complete monopoly in the sisal market.[80]

5.4 Summary of the early case law

Despite evident individual traits in the cases thus far, enough common denominators are perceivable so as to make it fruitful for drawing some general conclusions regarding the early case law *in toto*. The primary object is to ascertain whether, to what extent and in what way the courts of the United States are influenced by principles of international law, regarded as a whole, in the determination of whether a specific restraint is covered by the antitrust laws of the United States. (For different approaches, see *supra*

p. 57 f.). The instrument will be the same method of examination as utilized thus far.

1) None of the cases stood for the proposition that the characterization of the action, as civil, administrative or criminal, has any bearing on the question of jurisdictional scope. On the contrary, some of the cases indicated that distinctions between for instance a civil and a criminal action are immaterial when fixing the reach of the Sherman Act. (See e.g *American Banana* and *Thomsen v. Cayser*). In no case was the particular action characterized specifically for international law purposes, *i.e.*, whether the action is civil, administrative or criminal against the background of international law principles (assuming these principles vary depending on what character the action has).[81]

Where a characterization was conveyed, it seems to have been based exclusively on *domestic* law: where a private party sues for damages the action is civil (tort); where the Government sues, the action is either administrative (or civil)[82] or criminal. True, the courts may have reasoned that an action which is civil or criminal under domestic procedural and substantive rules, is also such for international law purposes. But is it so by pure coincidence or by virtue of logical nessecity? If by logical nessecity, one has assumed that the characterizations given in the U.S. courts have universal applicability, and that, for instance, a treble damage suit is regarded as civil in countries with far less restrictive antitrust laws than in the United States.[83] Whatever the implications of such a viewpoint, in none of the cases hitherto mentioned has the court seriously examined the basis for characterizing an action as civil, administrative or criminal from an international law angle, in order to establish whether the basis coincides with the controlling apects in domestic law, *i.e.*, the rationale for characterizing a treble damage action as civil and other actions as administrative or criminal.

2) Despite the immediate relevance, as we shall see under 3) below, the courts, as a rule, have not wholeheartedly subjected the international restraints, and their particular components, to a process of localization, except as to the agreements in which the restraints may have originated (especially regarding *American Tobacco, Pacific & Arctic* and *Thomsen v. Cayser*). The courts have generally been fully content with conclusionary statements and, at the same time, omitted to expose the underlying analyses.

3) In deciding whether a restraint containing foreign elements falls within the ambit of the Sherman Act, the courts have, as a starting point, inquired where the restraint was performed (without any particular stress on exacti-

tude). In those instances, where the whole restraint has been performed within (or was operated in, or was put into operation in) the United States, the courts have assumed jurisdiction without further deliberation. Where part of the restraint has been carried out within the United States, or to be precise, where it has been carried out at least as much within as without the United States (see, *e.g.*, *Pacific & Arctic, Thomsen v. Cayser* and *the Sisal Case*), jurisdiction has likewise been assumed. (Again, however, the localization has "generally" lacked precision.) *U.S. v. Hamburg — Amer.* is an exception. There, the *potentiality* of a restraint being performed within the United States was held sufficient for jurisdictional purposes. (The restraint was "so to operate" or was to be "carried out in part" within the United States.

In addition to the rule that the place of perfomance determines jurisdiction, some courts seem to have required a specific nexus between the restraint and U.S. commerce. In *Pacific & Arctic* the court spoke of a combination as "a control to be exercised over" U.S. commerce.[84] In *Thomsen v. Cayser*, it was said that the restraints "affected" U.S. foreign commerce,[85] and in *U.S. v. Hamburg — Amer.* the wording was: "directly and materially affect".[86] Throughout these cases, "affect" has probably connoted no more than a relation (a pure nexus); an actual result was not searched for. Throughout these cases, the required "affect" has formed a *complement* to the principle of *lex loci delicti*. "Affect" alone has never constituted a sufficient basis for jurisdiction. The place of the making of the contract, finally, has, without exception, been considered to be immaterial.

4—5) As far as possibly can be ascertained, the courts have, in applying the substantive antitrust rules, not treated alien corporations differently from U.S. corporations, nor have they applied more lenient antitrust rules in foreign commerce cases, as distinguished from interstate commerce cases. On the whole, no distinctions at all have been indicated in this respect.

6) Mainly due to difficulties in detecting the final judgment in the individual case, nothing can be concluded generally about the remedies designed in the early case law. *American Banana* and *Thomsen v. Cayser* involved treble damages. In the former case, jurisdiction was denied, In the latter, damages were probably awarded. In *Pacific & Arctic* the Government sought punishment, a request *probably* complied with. In *Sisal* and *American Tobacco* the Government's prayer for relief contained regulative measures, injunctions, etc. In the latter case the injunctions were limited in scope with respect to alien corporations; they were in force against the acts

and omissions of the alien corporations only insofar as these related to the interstate or foreign commerce of the United States. Thus, if any conclusion can be drawn from this, the remedy seems to be coterminous with the jurisdictional standard established above.

5.5 The Alcoa Case

U.S. v. Aluminum Co. of America[87] ("Alcoa") featured in its principal part, Alcoa's — a U.S. corporation — domestic market behaviour and allegations were advanced (not accepted by the Court) to the effect that Alcoa and its own Canadian creation, Aluminium Limited ("Limited"), tactily agreeed not to compete. Our major concern will, however, rest upon the Court's view of Limited's activities abroad. Limited was, thus, a Canadian corporation organized by Alcoa in 1928. Limited and Alcoa had the same controlling stock holders. Their head directors were related and they initially (until 1931) had common officers. Limited, in addition, maintained executive offices in the United States. Notwithstanding this intimate relationship between the two companies, none of Limited's anticompetitive practices, to be described below, were attributed to Alcoa.[88]

In pursuance of an agreement entered into between Limited (and several European corporations — a French, two German, one Swiss and a British corporation) in 1931, "Alliance", a Swiss corporation, was formed. "Alliance" was the incarnation of a scheme — the purpose of which was to allot production of aluminum ingot among the signatories of the agreement. By a new agreement in 1936 — the agreement ultimately condemned by the Court — "Alliance's" function was changed and specified to embrace a roalty system, by which each signatory's production in excess of its quota, rendered it liable to pay progressively scaled royalties to Alliance. Imports into the United States were "tacitly" included in the quotas. Moreover, it was agreed "in silence" that aluminum ingot not disposed of was to be bought back by "Alliance" at a fixed price. (Sherman Act, Section 1.)

1) Save some minor indications to the effect that the Court might have characterized the suit as criminal — the Court spoke of "punisment",[89] it cited criminal cases in a critical context[90] and it imposed a rule of jurisdiction, applicable to both criminal cases and tort cases — nothing of substance was provided that would support one characterization or the other. The Government, when instituting the action, mainly sought injunctive relief, not punishment. Nevertheless, one may safely assume that the Court

did not regard the action as being civil. The Court seems to have had another starting point.[91] The choice was between the administrative and criminal categories.

There is one aspect of the case, however, which may be decisive in this regard. As will be mentioned below under 3), the Court placed a heavy burden of proof upon the defendant, specifically regarding the burden of proving that the restraint complained of had no actual effects on U.S. commerce (prior to the Court's finding of an intent to affect such commerce). The fact that the Court, without further consideration, applied this rule of evidence, might point to the conclusion that the Court characterized the Sherman Act to be of an administrative, rather than criminal nature in this case. One finds it hard to believe that such a burden of proof can be laid upon defendants in criminal cases.

2) Both of the aforementioned agreements were concluded abroad: since all contracting parties were alien corporations (but note: only Limited was made a defendant) there was no apparent reason to either discuss, negotiate or sign the agreements on American territory.[92] Adherence to the agreements and their realization was not that easy to localize. The restraints were on production. Restraints on production, set — in the long run, depending on stocks, etc. — limits on the volume of sales. Consequently, sales to the United States were fettered. But how does one localize a promise not to sell to the United States or to sell only a limited amount.[93] What factors should be decisive; whether you sell FOB or CIF (abroad or a U.S. port), whether you have an independent distributor in the United States or a distributor who is an affiliate, subsidiary or agent, etc?

Whatever the solution to that problem may be, the Court in Alcoa found no activities within the United States. The conduct complained of and attributed to Limited took place abroad.[94]

3) Hence, the jurisdictional issue was whether anticompetitive acts committed outside the United States are subject to the Sherman Act. In light of the *American Banana* case and the cases that followed, the answer would apparantely be in the negative, *i.e.*, that in the absence of conduct within the United States or acts that form an integrated part of a domestic scheme,[95] jurisdiction could not be assumed. But the Court, though formally relying on these cases, shifted ground and managed to produce an affirmative answer. In his opinion (and the Court's), Judge Learned Hand initially invoked the rule of jurisdiction expressed in the First Restatement of the Conflicts of Laws: "If consequences of an act done in one state occur in another state, each state in which any event in the series of act and

consequences occurs may exercise legislative jurisdiction ..." (§ 65).[96] The jurisdictional rules of Conflict of Laws, in Judge Hand's view, were not identical with, but *corresponded* to, the limitations imposed by international law om jurisdiction. Well aware of the existence of these, Judge Hand then applied the stated rule to the specific facts in the case: "[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."[97]

The Court confronted obstacles, however. First, whereas the Restatement rule apparently regarded — at least primarily — "consequences" as something caused a person (injuries of some sort, see § 65 Comment a.), the facts in the case exposed an agreement that may have restrained a nation's foreign trade (imports of aluminum ingot). Secondly, while jurisdictional rules of Conflict of Laws generally correspond to those of international law, the rule invoked here did not quite seem to fit into this pattern.

The Court explained: "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 Africa, 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."[98]

The first obstacle, the discepancy between the Restatement rule and the facts of the case, was surmounted without one wasted word. The second was handled more delicately; it made the Court pause for a moment and call for an additional resource. The Restatement rule was relevant but not sufficient to match international law considerations, and thus a supplementary rule was inserted. This rule is not easy to identify, nor is its origin easily fixed. The Court itself referred to the "doctrine that intent may be a substitute for performance in the case of a contract made within the United States ...".[99]

Fugate[100] seems to suggest that the Court here alluded to another rule of the first Restatement, namely that "[i]f a promise is made in one state to perform an act in another state, which, by the law of that state, is at the time known to the parties to be illegal, the promise is illegal by the law of the first state ..." (§ 347, Comment a.). An illustration: If A and B agree in state X to purchase liquor in state Y, which is, by the parties, known to be illegal there but not in X, the contract is illegal by the law of state X.

Thus, the rule corresponds with the general choice of law rule stated in § 347, that the law of the place of contracting determines whether a promise is illegal, void, etc.

Observed closely, however, neither rule is pertinent to the case at hand. Limited and the other parties to the 1931 and 1936 agreements did *not*, nor did they intend to, perform any acts within the United States, partly because it was not agreed upon. This the Court admitted. No promise was made, involving performance within the United States. Furthermore, it is questionable whether § 347 could have been invoked at all in an antitrust suit — criminal or administrative (regulatory) — instituted by the Government against a private party, as a basis for the Court's jurisdiction therein.[101] Finally, § 347 is a choice of law rule.[102] It directs the Court, applying it, to choose the law of the place of contracting when it comes to determining voidability, legality, fraud, etc., in contract cases. When the Court has so chosen, § 347 provides a secondary rule: By the law of the state of contracting, a promise to perform a knowingly illegal act outside that state is deemed to be illegal. In the present case the Court did not choose the law of the place of contracting; that was considered out of the question: "we are concerned only with whether Congress chose to attach liability to the conduct outside the United States ..."[103] Thus, if the general rule is not applied, how can the secondary rule be?

What then is hidden behind the doctrine that "intent may be a substitute for performance ..."? Intent to do what? To perform an act? Where? Within the United States? That would, again, be an anomaly. Any acts performed or intended to be performed, were performed outside the United States , which as we have seen, the Court presumed. Or did the Court have in mind an intent to produce consequences within the United States? An agreement does not by itself produce consequences. Only conduct in furtherance of an agreement can do so. Such conduct took place — according to the Court — outside the United States. Was it thus an intent to produce consequences of conduct, outside the United States, that the Court referred to? But would not such an intent already be comprehended by the jurisdictional rule (§ 65) stated above: one that does an act in one state that causes consequences in another is subject to the jurisdiction of the second state, as well as the first? The Court did not seem to think so.

While jurisdiction could not be assumed on consequences alone, nor on the doctrine by which "intent may be substituted for performance", a combination of these two was believed to suffice: "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 ex-

ports, unless its performance is shown actually to have had some effect upon them."[104] The intent to produce consequences *within* the United States was thus transformed to an intent to *affect* U.S. imports or exports. And the Court continued: "Where both conditions are satisfied, the situation certainly falls within such decisions as United States v. Pacific & Arctic R & Navigation Co. ... Thomsen v. Cayser ... United States v. Sisal Sales Corp. ... [and U.S. v. Nord Deutscher Lloyd]".[105] Jurisdiction in those cases rested, as we have seen,[106] primarly on activities within the United States. It consequently takes a great deal of legal construction to place the "intent" and "affect" language withing the framework of these precedents. The Court provided some: "It is true that in [these precendents] 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 mean; besides, only human agents can import and sell ingot."[107] (Note, with "persons held liable" the Court apparently only reffered to those corporations or persons, in the precedents mentioned, who were not in allegiance to the United States, *i.e.*, the alien corporations and the foreign individuals involved.) Here, in the lines quoted, intent was substituted for performance and intent to affect U.S. imports was substituted for performance of acts within the United States (that affect such trade). As long as there is an intent to affect U.S. imports (or exports), the Court seemed to argue, it makes no difference whether or not you send agents to the United States to materialize the intent; for the purposes of jurisdiction, acts localized to the United States are in themselves irrelevant. However, such acts were obviously relevant in the earlier case law. In all of the aforementioned cases, acts within the United States were essential not only for the sake of jurisdiction, but also for a workable illegal scheme; without such acts, no restraint on U.S. foreign trade would have been possible, and on that ground, jurisdiction was safely assumed.[108]

Yet, whatever the underlying reasoning, its logical strength and its foundation was in the case, an innovative (whether in fact or only ostensibly) jurisdictional formula was advanced and this fact is persuasive enough for the following discussion. Moreover, the appropriateness and practicality of the formula may be independent of its precise legal ramifications. Hence, accepting the jurisdictional formula as it is — *intent to affect coupled with an actual effect upon U.S. foreign trade*[109] — the task remaining is to elaborate some of its elements.

The *nature of the intent* required is, to begin with, not clear. First, one must not confuse this *jurisdictional* element with the intent required for a

substantive violation.[110] Judge Hand was only discussing the former. The latter was not examined; it was self-evident. The agreements existed and the signatories were presumed to be conscious of what they were doing. No more was needed in order to show an intent to commit the illegal at (restraint of production, indirect pricefixing, etc.). That intent did not however, suffice for jurisdictional purposes: "Both agreements", said the Court, "would clearly have been unlawful, had they been made within the United States", and were unlawful, "though made abroad if they were intended to affect imports and did affect them."

Jurisdictional "intent" was thus to lead a separate life. But what about the nature of this requisite and how is it to be proved? The contents of the 1936 agreement were quite revealing: that the general restriction upon production would have an effect upon imports must have been expected, the Court concluded, "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 [signatories] had supposed that it would, or at least might, have that effect."[111] And further: "[A] depressant upon production which applies generally may be assumed, ceteris 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."[112] An intent to affect U.S. imports was required. The goverment had to prove that the parties to the agreement directed it towards U.S. imports with the aim of affecting them.[113] This was done by the production of evidence of the agreement itself. Direct evidence of the defendant's state of mind was not essential. Intent was inferred from the defendant's conduct. From the established fact that there was an agreement, the purpose of which was to allocate production by quotas, and from the fact that United States imports were included in this quota system, the Court inferred that the defendant intended to affect United States imports. The fact that the agreement was not solely directed towards United States imports, but towards the imports of other countries as well, was immaterial. A reasonable man in the defendant's position would have believed that the particular result ("effects on imports") was substantially certain to follow, the Court probably deliberated. The parties to the agreement not only appreciated that there was a risk that United States imports would be affected; this effect or result was part of their calculation. They desired "effects". Otherwise the agreement would have been merely an "idle gesture". Intent is broader than desire. It also encompasses, as we have seen, those results which are reason-

ably believed to be substantially certain to follow from a particular act.

The remaining question is: Intent to do what? The answer seems to be: Intent to affect imports, or more precisely, intent to cause a decrease in imports, as is concluded below.[114]

As to the *nature of the effect* required, the case is silent but for a few indications. It is silent, due to the fact that after the intent to affect imports was proved, the burden of proof shifted to Limited which was unable to prove that the restraint did not affect U.S. imports and was, therefore, deemed to lose the case. But from what Limited should have proved to dismantle the burden, as the Court saw it, inferences can be made.[115] Limited could have proved, that the *volume* of imports was unaffected by the restraint, that the volume of imports was what it would have been in absence of the restraint, or that the U.S. market continued to attract goods despite the restraint, by showing, for instance, that imports into the United States were not in fact — though formally — included in the restraint (that royalities were willingly paid to Alliance to continue the import trade or that the impact occured elsewhere). It takes little imagination to realize that the burden imposed was a heavy one. Yet, if only a fraction of a prospect of proving that imports were unhampered existed, this element of effect would differ from that applied in *interstate* commerce (substantially affect), according to which volume is immaterial and the restraint itself may prove conclusive.[116] That volume is relevant according to the Alcoa-formula, is also evident from the following passage in the opinion: "[T]he [Sherman] 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"[117] It is not just a matter of showing a relation between the restraint and imports or exports. An actual negative result and, since the burden of proof shifted, the non-existence of an actual negative result must be proved.[118]

4) The Court in Alcoa did not apply more lenient substantive rules, even though it was confonted with the conduct of alien corporations outside the United States. Suppression of production is as unlawful as price-fixing, *i.e.*, illegal *per se*, the Court concluded, referring to the doctrine of *Socony-Vacuum Oil Co. v. U.S.*[119]

5) The Court was concerned solely with the activities of alien corporations when formulating the jurisdictional criteria ("persons not in allegiance to" the United States).[120] Does the Court's reasoning apply equally to U.S. corporations and individuals? The Court did not express any opinion on this. One could speculate that the specific attention paid to intricate inter-

national complications evidence that Court would have responded differently, should merely U.S. corporations have been involved; in such a case, the jurisdictional standard would differ from that of Alcoa. In this, however, there is no support in the language of the Sherman Act. Moreover, references made to cases in which no distinction between U.S. and alien were suggested, could indicate that the Court did not have a differentation in mind.[121]

6) Limited was subjected to an injunction barring its participation in any similar cartel agreement in the future. In the final judgment, five years later,[122] a decree was issued ordering he common stockholders of Alcoa (adjudged to have monopolized U.S. commerce) and Limited to dispose of their shares in one or the other company within ten years time. The voting rights attached to the Limited shares were to be exercised by a trustee up to the time of such sale.

5.5.1 Some general conclusions

The scope of the earlier case law was, it seems, too narrow to fit the fact pattern of Alcoa. A change, or at least modification, was required. Apart from finding for the defendant, Judge Hand could have proceeded along either of two routes in order to adapt, in theory, to the then existing jurisdictional doctrine. First, since the common denominator of the precedents, in assuming jurisdiction, was acts localized to the United States, Judge Hand could have chosen to find such acts by construction, *i.e.*, by claiming that affecting U.S. imports was equal to acting within the United States and thus that the defendant in fact performed acts therein. He could have developed the point by arguing that the restraint on production accompanied the goods imported into the United States, and that it became mature and took effect therein by virtue of lesser competition leading to increased prices and conceivably deteriorated quality. Hence, he could have argued that the restraint on production was carried out in the United States through the medium of innocent intermediaries. But would not that be to strain the current doctrine to the breaking point? Not necessarily, if seen against the background of such cases as, for instance, *People v. Adams*, which was decided in 1846.[123] There, an Ohio defendant who,without actually having left Ohio, had made false representations through an innocent agent in New York, whereby money was acquired fraudently in New York from a New York firm. The New York court, in procuring jurisdiction, held: "The fraud may have originated and been connected elsewhere, but it

became mature and took effect in the city of New York, for there the false pretenses were used with success ... The crime was therefore committed in the city of New York ... [the defendant] was indicted for what was done here, and done by himself. True, the defendant was not personally within this state, but he was here in purpose and design, and acted by his authorized agents ...".[124]

Liability was thus attached only to he conduct in New York and jurisdiction was founded solely upon that conduct. Judge Hand, however, chose the alternative route. He did not look for acts within the United States and he did not attempt to construe such. His standpoint was made clear at the outset: "[W]e are concerned only with whether Congress chose to attach liability to the *conduct outside* the United States ...".[125] Judge Hand's sole interest was to remedy the conduct abroad, and he therefore consulted the Sherman Act to learn whether it encompassed such distant acts. We already know the answer: provided acts abroad are intended to affect U.S. foreign trade and actually have some effect, they are covered. And note, if Judge Hand made any constructions, they were not made to localize acts to the United States, but to fit the new doctrine into the scope of the old one, without having to overrule any of the prior cases.

An additional vital question that emerges is whether the process of localizing acts continues to have any function when the jurisdictional formula of *Alcoa* — intended to affect and did affect — is applied. The answer is that it probably does not. True, Judge Hand did localize the acts of the defendants in Alcoa — and found none within the United States — but he did so essentially for the sake of argument and in order to establish the limits of the Sherman Act. Since the end result was that the Sherman Act covers restraints regardless of where they are performed, future localization of conduct for jurisdictional ends will serve no purpose. Moreover, the foreign commerce test itself does not presuppose such localization.

On the other hand, the Alcoa test may be seen as an alternative to the situations where acts are found within the United States (*e.g.*, in the *Sisal, Pacific* and *Thomsen v. Cayser* cases). If this is so, one test is applied when acts are localized to the United States, another when acts are localized to foreign countries.

5.6 The post-Alcoa case law

5.6.1 The National Lead Case

In *U.S. v. National Lead Co.*,[126] the defendants were three U.S. corporations, which in concert with corporations under their control and various alien corporations had trammelled the world channels of commerce in titanium pigments (used, *e.g.*, in paint). Numerous agreements were entered into, which, *inter alia*, divided the world market, granted exclusive cross-licences and secured exclusive interchange of technology and know-how. The ultimate objective was to eliminate competition, and, in this, they succeeded.[127] (Sherman Act, Sections 1 and 2.)

1) The United States Government requested an injunction to restrain the alleged violations of the Sherman Act and certain ancillary remedies to make the court's mandate effective. The Supreme Court characterized the proceeding as civil.[128] The purpose of the proceeding and the final decree was not punishment but to retain effective and fair enforcement of the law through prohibition of further performance of the agreements. But there is no indication as to what relevance this characterization had, as far as the jurisdictional issue was concerned.

2) The world-wide restraint was, as mentioned, maintained through a network of agreements. Where these were formed was not altogether clear, although the Court[129] concluded that some of them were entered into in the United States. However, the record showed that a few of the agreements were made between alien parties which were not defendants in the case. Lacking personal jurisdiction over these parties, the Court did not have the option of ruling on their agreements.[130] The Court's concern was only directed towards agreements to which any of the defendants were parties, *i.e.*, agreements entered into between any of the three U.S. corporations and any other corporation. Acts in furtherance of such agreements, where one of the parties was a U.S. corporation, could have been localized to the United States as well as to any other country in which a contracting party was incorporated. This is true, since the agreements held *mutual* obligations to conduct business in a specific manner. Hence, for instance, the mutual obligation of territorial division, in an agreement between a U.S. and an alien corporation, could have been localized either to the United States or to the alien corporation's country of origin (or maybe even to a third country, all depending on what factors one considers decisive when localizing a promise — and the conduct in accordance with it — to limit the business to a certain territory).[131]

3) The jurisdictional criteria were intimately linked to those applied in the early case law.[132] The Court initially ascertained that U.S. foreign commerce was affected: "Clearly this combination affects ... the foreign commerce of the United States. No titanium pigments enter the United States except with the consent of [National Lead] ... No titanium pigments produced by [National Lead] may leave the ports of the United States for points outside the Western Hemisphere."[133] The word "affect" apparently was inserted to denote an actual result,[134] but was not further analyzed. Immediately thereafter the Court searched for acts within the United States and found such: "The object of the Government's attack is a conspiracy in the United States affecting American commerce, by acts done in the United States as well as abroad. The *Sisal* case was the pertinent analogue, not *American Banana*.[135]

4—5) The international implications of the case, it seems, had no effect on the Court's choice of substantive antitrust principles. As probably would have been done in an exclusively domestic case, the Court refused to yield to the rule of reason; it refuted the defendant's argument that the combination had proved beneficial to the public by advancing the art, by increasing production and by decreasing prices, and that therefore no public injury was at stake, stating: "[T]he major premise of the Sherman Act is that the suppression of competition in international trade is in and of itself a public injury ...".[136]

6) In the final decree,[137] provisions were framed aimed at restraining the defendants or any of their existing or future agents from continuing their conduct in defiance of the Sherman Act, whether in furtherance of the existing or future agreements. These provisions were directed only against the defendants. But as a natural side effect, the alien parties to the agreements (not defendants) were likewise affected; the prospect of that indirect result did not, however, move the Court, since attention paid thereto would "paralyse the enforcement of the law in all cases where one or more of the parties to the conspiracy was an alien corporation ...".[138]

5.6.2 The Incandescent Lamp Case

In *U.S. v. General Electric Co.*,[139] the prime contention of the Government was that General Electric (GE) monopolized the incandescent lamp industry in the United States.[140] GE had, in a major effort to safeguard its dominant position in the United States, alone and in combination with others, forced anticompetitive business conditions upon actual and poten-

tial competitors, distributors, etc., thereby circumscribing their field of action. In its endeavour, GE was armed with several persuasive arguments: for instance, the dominant position it already enjoyed in cardinal areas (*e.g.*, in the lamp base industry) — a refusal to deliver was the underlying threat here — and the crucial patents that the company possessed (the licences of which were annexed with elaborate restrictions).

In order to maintain its dominance in the United States and with a view to protecting the U.S. market from foreign intrusion, GE employed its wholly owned foreign subsidiaries as the medium for developing an effective cartel system in Europe that would make home territories inviting to the alien manufacturers. This cartel system was erected through the "Phoebus" agreement,[141] concluded in 1924 with a renewal in 1941, which in essence divided the territory outside the United States and Canada into "home countries" (exclusive areas for the local manufacturer). In pursuance thereof, International Electric Company (IGE) — a corporation intimately related to and owned by GE[142] — managed to effect individual licence agreements with essentially all of the signatories to the Phoebus agreement and requiring the subsidiaries and licensees of the parties to respect the territorial limitations. The United States was for all material purposes exclusively reserved to IGE. One of the signatories to the Phoebus agreement was Philips of Holland. A licence agremeent between Philips and IGE, including the aforementioned provisions, was signed in 1919 with a continuance in a 1931 agreement. A supplementary agreement was concluded in 1937. On account of this, Philips was made a defendant (the only alien corporation among the 12 defendants) on the ground that Philips restrained U.S. foreign commerce and that it conspired with GE in the latter's domestic monopolization scheme.[142a] (Sherman Act, Sections 1 and 2). In the analysis that follows only Philips and its activities will be discussed.[142b]

1) As to the character of the proceedings, the Court revealed nothing of substance.[143]

2) To be localized were the agreements in which Philips was a party and Philips' conduct in accordance with the anticompetitive provisions in these agreements. The Phoebus agreement was formed, amended and renewed outside the United States, formally, by alien corporations only. In substance, however, GE and IGE were, as the Court found, parties to the agreement by virtue of their interlocking relationship and the fact that IGE controlled several of the formal signatories to it. The licence agreements between IGE and Philips were likewise entered into abroad (at least

according to Philips contentions — which were not rebutted).[144] The agreement heretofore mentioned required Philips to limit its business to a certain territory (Holland, Belgium and Luxemburg),[145] and although the Phoebus agreement did not expressly prohibit a party to the agreement from entering the United States, the combination of the Phoebus agreement and the licence agreements had such a barring effect.[146] The agreements thus required Philips to remain passive, and to abstain from competing in the exclusive territory of IGE.[147] Philips was also to accept prices established by IGE on goods sold in non-exclusive territories.[148]

Is it possible to localize such passivity? What factors are decisive? Does the fact that Philips did not export — to a certain degree — the pertinent goods to the United States prior to the formation of the agreements, have any bearing?[149] But Philips did not merely remain passive, the Court reasoned. It contributed actively, through the agreements, to assisting GE in isolating the U.S. market from foreign intruders.[150] To remain passive in face of certain market conditions, is one thing; to remain so, due to contractual requirements is quite another, the Court concluded. Still, whether the performance of Philips is considered as an active contribution or mere passivity, the localization of either proves equally difficult.[151] The Court, it seems, did not pause to localize the acts of Philips, less perharps because of the aforementioned difficulties involved in such a task, more presumably because the process of localization was regarded as immaterial.

3) In establishing the jurisdictional criteria, the Court relied on the *Alcoa* case.[152] An intention to affect and actual effect were thus the relevant requisites that formed the point of departure in the Court's reasoning. But the Court went beyond that and refined the *Alcoa* standard.

Whereas Philips insisted that the Sherman Act could apply to alien corporations acting abroad only when (A) they have wilfully intended to restrain trade, (B) their action has had or is having a direct and substantial effect upon U.S. trade, and when (C) such an effect was the principal purpose or one of the principal purposes of their action,[153] the Court retorted that it was sufficient that Philips was aware (knew of or should have been aware of the consequences of its acts): "Philips knew full well that its activities ... were dictated by [General Electric]. If it did not know it should have known ... that they were a substantial contribution to the scheme whereby the domination of General Electric over the United States market of incandescent electric lamps would be perpetuated and competition thwarted."[154] In addition, actual knowledge of the United States antitrust laws seem to have been required.[155] Ignorance as to whether U.S. antitrust

laws in fact were affected was, on the other hand, held not to be a good defense.[156]

What then are the distinguishing features between the view of Philips, on the one hand, and the view of the Court, on the other, as to the accurate jurisdictional test. The answer is far from plain, since, to begin with, the Court did not draw a sharp line between jurisdictional and substantive rules.[157] Thus, for instance, Philips suggested (under (A) above) that if the Sherman Act were to apply, a wilful intent on Philips' part to restrain U.S. trade, would have to be found. This is exactly what the Court found: "[Philips] very apathy to the impact of its real relationship with General Electric upon those laws was an indifference to them that amounted to a willingness to be a party to a breach of them."[158] At the same time the Court emphasized that the intent need not be specific, for a person, it indicated, is presumed to intend the normal consequences of his acts.[159]

All this, it seems, is primarily related to the issue of whether Philips *substantively* violated the Sherman Act, an issue to be held separate from the jurisdictional issue. "Restraint of trade" is a technical term that implies effect on *competition*. There is no doubt that Philips, by virtue of its contractual relations with IGE, whether with or without justification, fettered the competition, and intended to do so, although perhaps not specifically. For Sherman Act to cover, however, something else has to be added, just as the Court in *Alcoa* added the requisites of intent to affect and actual effect on U.S. foreign *commerce* (not competition). Here, again, Philips was of the opinion that the *principal purpose* of its conduct was not to affect U.S. trade, but to protect the property right involved in the contracts (patents, trade secrets, etc.). Therefore the Sherman Act could not be applied.[160] It may be assumed that this was a jurisdictional argument, and thus that a *principal purpose* to affect is to be compared with the *intent* to affect language in *Alcoa*. Yet, the Court apparently regarded Philips' argument as an attempt to justify the restraint, that is, to characterize the restraint as reasonable,[161] and never in fact paused to consider the validity of the argument from a jurisdictional point of view. When the Court eventually delivered its views of the "intent" requisite, it did so, it seems, independently of the argument advanced by Philips. Philips, the Court concluded, knew or should have known that it contributed to GE's domestic anticompetitive scheme.

However, as may be noticed, even this statement lacks a clear-cut distinction between the jurisdictional and the substantive issues: what Philips knew or should have known was that it assisted GE to thwart *competition* in the United States.[162] (Compare *Alcoa's* intent to affect U.S. *imports* or *exports*).

As to Philips' third argument, that it must be proved that Philips' activities had a direct and substantial effect upon U.S. trade (see above under (B)), the Court replied: "Even though there is no showing as to the extent of commerce restrained, [Philips] deleteriously affected commerce by entering into the agreements with IGE . . .".[163] By its conduct, Philips produced effects on U.S. commerce, effects not exactly estimated, but nevertheless of a negative character. Here, at least, the resemblence with the requisite in *Alcoa* is obvious (actual effect), although the burden of proof did not fall on the defendant (Philips) as in *Alcoa*, but on the plaintiff (the Government).[164]

4—5) The Court applied the same substantive rules irrespective of whether the domestic conduct of GE (or any other U.S. defendant) or Philips' overseas activities were scrutinized.[165]

6) In a subsequent final judgment, four years later, detailed and highly penetrating provisions were worked out aimed at preventing further restraints and restoring competition in the U.S. market. Relevant agreements were declared terminated and injunctions against the performance of such were issued. The defendants, including Philips, were ordered to dedicate their patents on lamps and lamp parts to the public and grant non-exclusive licences to anybody applying for it on lamp machinery.[166] As to Philips, it was understood that only its United States patents were included.[167] Furthermore, any defendant, except Philips, was directed to convey a grant of immunity to anyone requesting it, with respect to lamps and lamp parts produced or sold in the United States. Philips was excluded from this provision not by virtue of its alien origin or any particular consideration paid to the possible international implications, but because the relief was regarded as unnecessary, as not contributing to the restoration of competition in U.S. commerce.[168] Contrary to the Government's proposal, which was to include Philips together with the other defendants in a broad general injunction, a separate and distinctly narrower injunction was designed for Philips, enjoining it from entering into agreements with any U.S. corporation in the relevant market which provided that Philips either refrain from exporting to or producing in the United States, or that the other contracting party refrain from exporting from the United States, lamps, lamp parts, etc. The Court explained: "[A]pplication of [the broad] provisions in the light of [Philips'] foreign manufacturing would complicate its existence beyond the necessities of this judgement."[169]

A similar narrower provision was shaped for Philips regarding the future access of Department of Justice to Philips' records, documents, reports

and interviews. Hence, only such records, etc., that may be located in the United States in Philips' possession and interviews with persons, related to Philips, staying in the United States, were to be accessible.[170] Anything more extensive would have been impractical in view of the international complications likely to arise, the Court seemed to have argued, while remaining cognizant of the change of picture, were Philips to enter the United States market.[171]

Still, the most significant provision designed for Philips, and Philips alone, in view of the stated complications, was the provision intended to protect Philips from being "caught between the jaws" of the final judgment and the operation of laws in foreign countries. This provision provided: "Philips shall not be in contempt of this judgment for doing anything outside of the United States which is required or for not doing anything outside the United States which is unlawful under the laws of the Government, province, country or state in which Philips or any other subsidiaries may be incorporated, chartered or organized or in the territory of which Philips or any such subsidiaries may be doing business.[172]

All in all, the Court exposed a thourough awareness of the delicacy of the matter — Philips being an alien corporation, doing business in another country in which different laws operated to safeguard another economic and political system — and acted accordingly.

5.6.3 The ICI Case

U.S. v. Imperial Chemical Industries, Ltd., et al.[173] involved a division of the world market in chemical products, in particular nylon, polyethylene and explosives.[174] The principal corporations pulling the strings were — as the Court found — Imperial Chemical Industries (ICI, a British corporation) and E.I. DuPont deNemours and Co. (DuPont, a U.S. corporation).[175] These corporations, both of which were defendants in the case, constructed a network of agreements wereby patents, know-how and processes were exchanged and exclusive territories allocated. Thus, for instance, an agreement entered into in 1929 assigned to DuPont the North and Central American market exclusive of, *inter alia*, Canada, it assigned to ICI the BritishEmpire, also exclusive of Canada, and it provided that the remainder of the world be non-exclusive.[176] The Court did not regard the allocation of territories as a lawful exercise of patent rights. On the contrary, the Court concluded, the exchange of technology served as a direct instrument to cloak and conceal a division of markets. Moreover, ICI and DuPont established and maintained jointly owned foreign companies in

the non-exclusive areas — in Canada, Chile, Argentina, Brazil, etc. — some of which operated as vehicles for the division of trade between ICI and DuPont within certain assigned territories.[177] (Sherman Act, Section I).

1) Suit was brought under Section 4 of the Sherman Act to restrain and prevent alleged continuing violations of the Sherman Act. The Government did not choose to prosecute the defendant corporations, but requested a remedy that would be designed to correct the effects of the alleged restraint and restore competition in the relevant market. When complying with the government's request, the Court, speaking through Judge Ryan, carefully emphasized that its sole intention was to cure and not to punish past violations.[178]

2) As to the localization of the restraints, the Court displayed no interest. Whether the agreements were concluded within or without the United States, was of no significance, the Court seemed to have reasoned and, therefore, no inquiries with respect to *loci contractus* were made. True, the Court noted that conferences in which ICI and DuPont discussed and prepared the agreements were held within as well as outside the United States, that one of the agreements was drafted in London, etc.,[179] but did so apparently without reference to the jurisdictional issues.

In a 1929 agreement, ICI and DuPont undertook, *inter alia*, to refrain from intruding into each others exclusive territories and to surrender already existing business in the exclusive areas of the other party.[180] As has been discussed at some length above,[181] mere passivity (or omission) is not easily localized. Here, however, the promise to avoid entrance into the reserved market of the other was coupled with a vow to act positively, which implied not only withdrawal of supply, etc. in order to attain the intended exclusiveness of the existing markets, but also an active market behavior in the future.[182] If desirable, one might be able, without stretching the imagination too far, to localize such positive acts, as, for instance, the withdrawal of business.[183] Thus, ICI's witdrawal of business from the United States, may have been localized to the United States.

Likewise, the formation of joint companies in Canada, South America and elsewhere may have been considered to be acts done in the place of formation or, in the alternative, if the acts are done pursuant to an agreement, where the agreement was signed, concluded, etc.[184]

In sum, it is probable that ICI performed acts in the United States, depending, of course, on which criteria are employed in localizing the acts. The Court, in the case under review, however, did not provide such criteria — it was disinterested in localizing the acts at all. Yet, when it came to the

securing of subject matter jurisdiction, the Court maintained, as we shall see, more than once that the defendants had committed acts in the United States, still without attempting to specify those acts.[185]

3) Subject matter jurisdiction as to the crucial agreements between ICI and DuPont was not discussed; the law seems to have been settled in this respect.[186] As to the arrangements involving the joint companies, the Court added a little more substance, but at the same time displayed some difficulty in choosing the correct jurisdictional formula. There were three choices: the jurisdictional formula established in the *Alcoa* case that a restraint is covered by the Sherman Act, although committed abroad, if it was intended to affect and did affect U.S. trade;[187] the one applied in *National Lead* that presupposed the performance of acts within the United States combined with an effect on U.S. trade;[188] and the one formulated in *Timken*[189] which merely required a showing of direct and influencing effect on U.S. trade. The Court it seems, chose to apply all three of these formulas, the first two, however, in order to sustain a substantive violation and only the third for the purpose of procuring subject matter jurisdiction.[190] Thus, the following lines were quoted from *National Lead* and found particularly appropriate as a basis for jurisdiction: "The object of the government's attack is a conspirancy [entered into] in the United States affecting American commerce, by acts done in the United States as well as abroad".[191] In this context, it became vital to localize both the agreements and the acts in pursuance thereof to the United States, an objective thus far neglected (as stated above).[192] Yet, the Court believed the quotation to be quite sufficient, which left the vast findings of facts to speak for themselves.

4—5) The antitrust rules applied to temper anticompetitive practises in the domestic field were enforced coextensively and with the same vigour with respect to the foreign defendant. ICI and DuPont were thus subject to the same antitrust scrutiny, as they would have been, would their restraints have been wholly domestic.[193]

6) The remedy was calculated to effectively prevent a continuance and revival of the agreements and understandings between ICI and DuPont, but at the same time only such provisions were meant to be designed which were reasonably necessary to accomplish correction and adjustment of a dislocated competitive situation. Hence, injunctions were issued prohibiting agreements and arrangements between the defendants, which would tend to limit U.S. commerce. DuPont was prohibited from making any agreements, with anybody, which would restrain DuPont's exports any-

where in the world.[194] The Court further decreed compulsory licensing with respect to then existing patents and improvements thereof, on a reasonable roalty basis, including however only such of DuPont's patents and ICI's *United States* patents which were elements in their common arrangements.[195] British patents and other foreign patents issued to ICI were left untouched, with two significant exceptions: 1) ICI was directed to grant immunity, *i.e.*, to refrain from asserting rights, under those foreign patents which corresponded to the United States patents made subject to compulsory licensing,[196] and 2) British nylon patents, which ICI had aquired from DuPont in 1946, were ordered to be reassigned to DuPont.[197] As to the former provision, the Court acknowledged: "We recognize that substantial legal questions may be raised with respect to our power to decree as to DuPont's foreign patents as well as those issued to ICI ... Our power ... [to decree] is limited and depends upon jurisdiction in personam; the effectiveness of the exercise of that power depends upon the recognition which will be given to our judgement as a matter of comity by the courts of the foreign sovereign which has granted the patents in question". But in the same context the Court proclaimed: "It is not and intrusion on the authority of a foreign sovereign for this court to direct that steps be taken to remove the harmful effects on the trade of the United States."[198]

Soon enough, and not unexpectedly, the British courts responded. A third party — British Nylon Spinners (BNS) — who was not before the U.S. court, had been granted exclusive licence to the nylon patents in 1947 by ICI. This British company moved rapidly to protect its rights. It sought and obtained in the British courts, *inter alia*, an interlocutory injunction restraining ICI from assigning to DuPont any patent rights acquired under the 1946 agreement, a similar permanent injunction and an order for specific performance of the exclusive license agreement of 1947 between ICI and BNS. The British courts also made ample comments on the jurisdictional issues.[199] This facet, an aftermath of the ICI case, will be further examined *infra* in part two.[200]

As in *General Electric*,[201] a saving clause was incorporated, although far narrower in scope. The decree directing ICI to grant immunity under the British patents was subjected to the operation of the British statutes and to be proscribed by such action as the British comptroller of patents might take.[202]

In addition to the provisions reagarding the general agreements and the patents, divestiture was directed as to three of the jointly owned companies. In the alternative, reorganization by severance into separate enterprises was ordered.[203] ICI and DuPont were also enjoined from reselling

any product through these companies, or, if the alternative was employed, through any reorganized segment of them in which the other would have an interest,[204] all with a view to raising a barrier between the dealings of ICI and DuPont.

5.6.3.1 Some general conclusions

The ICI case does not offer much guidance in jurisdictional matters. For clear-cut jurisdictional criteria one searches in vain. While the Court displayed awareness of the *Alcoa* principle,[205] it did not manifest that it had absorbed the underlying reasoning of *Alcoa*. Though the commission of acts within the United States became a basic element in the jurisdictional formula, the intricate task of localizing such acts was avoided. The significance of the ICI case lies far more in the Court's decree. In molding the provisions of that decree, the Court performed a scrupulous balancing act considering, on the one hand, the necessity of reconstructing a restrained market condition, and, on the other, the limits of the power to regulate the affairs of alien defendants in foreign markets. This cautious approach is primarily evidenced by the fact that ICI was on the whole subjected to less stringent provisions than DuPont. But even here the prerequisites for issuing decrees to alien defendants, with respect to their behaviour in foreign markets, were either not stated or stated in a blurred fashion. So, for instance, the Court declared as to the British patents: "Our power so to regulate is limited and depends upon jurisdicton in personam ...".[206] Yet, in another instance it stated: "We are directing that these defendants take definite action to remove restraints of trade placed upon the commerce of the United States. This is done, not by reason of the fact that the Government has been able to 'catch' the defendants and to bring them within the jurisdiction of the court, but because their concerted act have, in part, been committed here and the result of their agreement has directly affected our trade and commerce."[207] What then is decisive for the limits of the power to decree? Is it personal jurisdiction, subject matter jurisdiction, both or neither?[208]

5.6.4 Sanib Corp. v. United Fruit Co.

In *Sanib Corp. v. United Fruit Co.*,[209] Sanib, a producer of dehydrated banana powder and other banana products, brought suit against United Fruit, the largest U.S. importer of bananas. These two U.S. corporations had both erected dehydraton plants in Honduras, Sanib in 1937 and United

in 1946. Until 1946, United had provided Sanib with "reject bananas" — an essential factor in Sanib's production — but from that time on, United basically refused to supply Sanib, even though it had ample stores available, and thereby eliminated Sanib as competitor. (Sherman Act, Sections 1 and 2).

1) The plaintiff sought treble damages (totalling over 3 mil. dollars). The nature of the action was regarded as civil, as sounding in tort.[210]

2) United refused to deliver rejects pursuant to a intra-enterprise conspiracy between United and its subsidiaries, particularly one operating in Honduras.[211] Assuming that the rejects were previously purchased from United's banana plants in Central and South America (including Honduras), close parallels to the *American Banana* case emerge.[212] In that case, as we have seen, the restraints of the United Fruit were localized to Costa Rica. Although the types of restraints in these two cases were different, there does not seem to be any reason for differentation for purposes of localization. The Court, however, thought otherwise: "The conspiracy and the acts in furtherance of it 'were conceived, carried out and made effective' partly in the United States and partly in Honduras".[213] In what way the acts were performed in the United States or what criteria decided the localization of such acts, the Court did not disclose.

3) Subject matter jurisdiction was swiftly secured as, the Court concluded, "the ageement in the execution of which [the acts] were done, obviously was intended to and in fact did affect the interstate and foreign commerce of the United States."[214] *Alcoa*, thus, was found to be the pertinent analogue.[215] *American Banana* was distinguished.[216]

The novelty in the case under review was that both interstate and foreign commerce were held to have been affected. On account of this, one would assume, the interstate commerce test could have been applied[217] (providing it differs from the foreign commerce test). The Court, however, did not seek guidance in the interstate commerce case law, but limited its inquiries to the foreign commerce cases.[218]

4—6) Nothing of relevance to note.

5.6.5 U.S. v. R.P. Oldham Co.

In *U.S. v. R.P. Oldham Co.*,[219] five U.S. corporations, three of their officers and a U.S. subsidiary of a Japanese corporation were indicted for conspiracy to restrain commerce in Japanese wire nails on the West Coast of

the United States. The defendants were allegedly engaged in an arrangement with all of the Japanese exporters of wire nails whereby wire rod was furnished only to such manufacturers of wire nails that supplied the co-conspiring exporters.[220] These exporters in turn shipped the wire nails to the defendant U.S. importers among whom territories were allocated and purchases and prices designated with respect to the U.S. West Coast. As a result, competition was thwarted and prices were stabilized. (Sherman Act, Section 1).

1) This was definitely a criminal action. The defendants were indicted. The Court also recognized that the Sherman Act, being a criminal statute at least in this instance, must as such be construed more strictly than a civil statute, as far as jurisdictional matters were concerned.[221]

2) A conspiracy, based upon one or more agreements, was formed, as the defendants contended, in Japan. Acts committed pursuant to the conspiracy, such as the imposed restrictions on the supply of wire rod, the channelling of wire nails to the aforementioned Japanese exporters, would also clearly have to be localized to Japan. Other acts — market allocation, price designation, etc. — were on the other hand probably performed in the United States. In the view of the Court, however, the localization of acts was irrelevant: "[A]ssuming, arguendo, that the conspirancy at least 'has its situs' in Japan and that most acts in furtherance of the conspiracy have been done in Japan, this does not deprive the court of jurisdiction ...".[222] Jurisdiction was, thus, to be based on other criteria, irrespective of where the acts were performed, or whereto they could be localized.[223]

3) *Alcoa* was followed anew, at least it so appears.[224] Jurisdiction was obtained as the conspiracy was "alleged to operate as a direct and substantial restraint on interstate and foreign commerce of the United States."[225] The *situs* of the alleged act were, as we have seen, of no importance.

Three particulars are noteworthy here: a) Evidentiary difficulties were held not to divest a court of jurisdiction. Jurisdiction may be assumed on the basis of mere allegations.[226] b) The restraint on *commerce* (not competition) had to be direct, a requirement tantamount to the element in the interstate commerce test ("in" commerce).[227] The restraint on *competition* (the conspiracy) must have been implanted directly in the line of commerce between a foreign country and the United States (foreign commerce).[228] c) In addition, the restraint or affect on commerce must have been substantial. It is not clear whether it was an actual effect (as in *Alcoa*)[229] or merely a relation (as in the interstate commerce test),[230] that the Court hereby alluded to. Since *Alcoa* was not strictly adhered to — the requisite "intent"

was, for instance, passed over in silence — the lodestar of the Court has to be searched for elsewhere. While the cases cited, in support of the reasoning, all concern foreign commerce, it seems as if the primary source of inspiration lay in the interstate commerce case law. (As to the accuracy of this, see *supra* at p. 57 ff.).[231]

5.6.6 In re Grand Jury Investigation of the Shipping Industry[232]

Here, the Government — in a pretrial phase — petitioned for a grand jury indictment,[233] accusing over one hundred U.S. and alien shipping corporations of violating, *inter alia*, the Sherman Act. Numerous subpoenas *duces tecum* were issued directing these corporations to produce various documents for the use of the Grand Jury.[234] Several of the served corporations filed a motion to quash (set aside) the subpoenas.

The shipping corporations allegedly entered into agreements and formed conferences, thereby instituting, among other things, deferred rebate systems, "fighting rates", equalized rates for different lines, and exclusive agencies, with a view to eliminating competition in the shipping trade between Mexican, Japanese and European ports (the "Cotton Trade").[235]

1) This was clearly a criminal action.[236]

2) The agreements claimed to be illegal were concluded with respect to trade from ports in a foreign country to ports in another foreign country. Nothing was revealed as to where these agreements were entered into, and yet the Government contended that a few of them were either made, planned or signed in the United States and that certain agreements were administered from there. No specific assertion was made to the effect that acts in pursuance of the agreements were performed in the United States. However, the Government interposed that bookings were made for loadings of cotton at Mexican ports and that other actions were taken from offices in the United States, maintained by some of the shipping lines. Thereby, the Government reasoned, at least parts of the agreements were carried out within the United States. Some of the meetings of the conferences were also alleged to have been held in the United States.[237] Yet, the pivotal restraints were imposed on traffic outside the United States and on agents not located in the United States.

3) The jurisdictional question was whether the restraints "affected" the foreign commerce of the United States. Viewing the circumstance that American grown cotton may be transported from Arizona into Mexico in

the future and be shipped out of Mexican ports, that there may have been plans to that effect, and considering the aforementioned contacts with U.S. territory, the Court reached an affirmative conclusion.[238] However, the foreign commerce of the United States was "affected" only in the sense that there was a relation between the agreements and U.S. commerce — there were some contacts — and not in the sense that such commerce actually had decreased (or increased) as a result ot the restraints, even though the Court noted a potential threat to that effect. *Alcoa*, as we can see, was not the guide. It is doubtful whether any other foreign commerce case was.[239] This may be explained by the fact that the Court probably made a distinction between what was required in order to retain jurisdiction in a grand jury investigation, and what was required in a subsequent court proceeding. The Court seemed to have reasoned that, for a grand jury to acquire jurisdiction, the fulfillment of a more relaxed standard would suffice. This is because one of the functions of the grand jury is to ascertain whether the evidence presented would warrant jurisdiction, or, in the words of the Court: to determine whether "the agreements entered into by the shipping lines in the Cotton Trade do have a 'substantial anticompetitive effect on our foreign commerce'."[240]

4—6) Nothing of relevance.

5.6.7 The Continental Ore Case

In *Continental Ore Co. v. Union Carbide Corp.*,[241] Continental Ore brought a treble damage action against Union Carbide, one of Union Carbide's subsidiaries and Vanadium Corporation of America. All parties involved were U.S. corporations. Continental alleged that it had been eliminated from the vanadium business, *inter alia*, as a proximate consequence of Union Carbide's restrictive practices in Canada. Specifically one of Carbide's subsidiaries, appointed as the exclusive wartime agent of the Canadian Government, had, as alleged, at the direct order of its parent, maneuvered Continental out of the Canadian market. Considering that the Canadian Government was, in some respects, engaged in the alleged activities, the question arose, whether the acts of the Canadian subsidiary (which were attributed to Union Carbide) were shielded from the Sherman Act. The Court, relying on the *Sisal* case, did not think so. "As in Sisal", the Court elucidated, "the conspirancy was laid in the United States, was effectuated both here and abroad, and respondents are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign

government".[242] That some of the acts complained of occurred abroad was held immaterial.[243]

5.6.8 The Swiss Watch Case

U.S. v. The Watchmakers of Switzerland Information Center, Inc. briefly involved allegations of a broad combination and conspiracy engaged in since 1931 by Swiss and U.S. manufacturers and sellers of Swiss watches and watch parts, including their trade associations, to restrict, eliminate and discourage the manufacture of watches and watch parts in the United States, and to restrain United States imports and exports of such products.[244]

5.6.8.1 General background

Prior to 1931, the principal part of the Swiss watch industry (subsequently substantially all of it), primarily composed of thousands of small enterprises specializing in the manufacture of a particular part or class of parts for watches and of companies assembling these parts into completed watches, organized itself in one of the following three associations: Federation Suisse des Associations de Fabricants d'Horlogerie ("FH"), Ebauches S.A. ("Eubaches") and L'Union des Branches Annexes de L'Horlogerie ("UBAH").[245]

This reorganization of the Swiss watch industry, initiated and assisted partly by the Swiss Government, had its roots in the grave economic crisis which the Swiss watch industry experienced in the beginning of 1920. Pursuant to the establishment of the three associations, which in itself was insufficient to solve the economic problems, these three entered into a series of agreements designed to encourage the export of complete watches rather than separate parts, and to protect and develop the Swiss watch industry by safeguarding it from foreign competition. Subsequently — in 1931 — the so-called Collective Convention was formed, an agreement renewed in 1936, 1941, 1946, 1949, and in 1954. (The Collective Convention of 1949 constituted the basis of the complaint).

The Swiss watch industry was at the time the largest producer of watches in the world and wholly self-sufficient as to watch parts and watchmaking machinery. It exported approximately 95 % of its production (more than half of all Swiss exports) and the United States was the largest single export market (95 % of the United States' imports of watch products and 75 % of its import of watches, or 10 mil. units, came from Switzerland). Only 20 % of the watches sold in the United States were manufactured there. (U.S. exports amounted to 200.000 units).[246]

5.6.8.2 The alleged restraints

The alleged restraints had their origin in or occured as a direct or indirect consequence of the Collective Convention, which in substance provided that the signatories of the Convention were prohibited from a) exporting watch parts from Switzerland for manufacturing purposes except under very limited and controlled circumstances; b) manufacturing watches and watch parts outside Switzerland and from furnishing watchmaking machinery, tools, dies and models and other types of financial, technical and managerial assistance to watch manufacturers outside Switzerland; and c) dealing in watch products manufactured by persons other than signatories of the Convention.[247] The Collective Convention was executed by Ebauches, UBAH and FH and each of their members including, *e.g.*, Bulova, Benrus, Wittnauer-Geneva, Gruen S.A. (subsidiaries of U.S. corporations with principally the same name) as well as Eterna A.G. (which controlled a U.S. subsidiary). Breaches of the Convention could be penalized, and violations of its provisions by any foreign affilate of the signatories could result in loss of membership. From time to time, complementary measures were allegedly taken and numerous agreements were made to effectutate the Convention and to carry out its intentions. Thus, for instance, the United States parent companies of Bulova, Gruen and Benrus agreed to either limit of terminate their U.S. manufacture of watches and to buy watches and watch parts solely from Switzerland.[248] To further restrict manufacturing operations in the United States, the sale of Swiss watchmaking machines was severely limited, at times to non-existence. In the latter situation, leases were made but only under very strict conditions.[249] The Swiss associations executed "cartel agreements" with members of the British, German, anf French watch industries respectively, which in substance prohibited these from purchasing watch parts from any persons other than Convention signatories and from selling watch parts which they purchased or produced themselves.[250] Exclusive distribution agreements were entered into between members of the Convention and their U.S. affiliates the main object of which was to prohibit watch exports from the United States and watch imports from any country other than Switzerland. Dealers in Swiss watches not adhering to the regulations or acting in non-conformity with FH, were blacklisted and ultimately boycotted by FH members and their affiliates, although the U.S. affiliates frequently disregarded the lists.[251] (Sherman Act, Section 1.)

5.6.8.3 An analysis

The complaint was filed in New York in 1954[252] against, *inter alia*, the fol-

lowing: FH, Ebauches, Eterna A.G. and Montres Rolex S.A. (also a Swiss corporation) together with their U.S. subsidiaries, Gruen S.A. and the U.S. parents of Gruen S.A., Bulova and Benrus; Wittnauer-Geneva; the American Watch Association and eleven other American corporations.[253] In addition, a multitude of American Swiss (and other alien) corporations were named as co-conspirators. (Sherman Act, Section 1.)

1) Procedurally the action was civil. The Government did not request that the defendants be punished, but that they be perpetually enjoined from maintaining the combination and that steps be taken to sever relationships with the Swiss watch industry in order to relieve the burdens on U.S. commerce. To accomplish this, meticulous decrees had to be modelled, as we shall see below. Whether the action schould be characterized as civil or regulative from an international law point of view, the Court did not discuss; nor did it discuss the relevance of such characterization.[254]

2) The Court established that many of the acts of the defendants in furtherance of the Collective Convention took place in the United States without, however, specifying them. In addition, it claimed that some of the agreements, again without specification,[255] were entered into within the United States where they were unlawful. It is probable that the Court was alluding to, for instance, the restraining and curtailing of manufacturing operations in the United States, the exclusive distribution agreements containing such promises as not to export from the United States and not to deal outside an allocated territory, and the blacklists circulated in the United States and held to be binding upon the American defendants.

The Collective Convention itself and the bulk of the agreements concluded in pursuance of it, clearly, had their *situs* in Switzerland or elsewhere outside the United States (the "cartel agreements", some of the leasing agreements pertaining to the watchmaking machinery, etc.). Furthermore, most of the acts in furtherance of these agreements were surely performed outside the United States.

Nevertheless, a significant part of the acts (were not) localized, as, for example, the refusal to sell watchmaking machinery of a certain kind, the undertakings of the Swiss (British, German and French) watch industries not to sell or resell watch parts, or to do so only to each other, to purchase such products solely from each other, to refrain from giving manufacturing assistance, etc. to third parties and only to sell watch products to a certain U.S. distributor. Once again the issue was raised, but never really attended to, whether the act of refraining from performing certain acts, which otherwise *might* have been performed and might have been so in the

United States, can under any circumstances, be localized to the United States, provided the passivity is solely on the part of alien corporations.[256]

3) Subject matter jurisdiction was acquired with respect to all of the activities of defendants,[257] irrespective of the localization of the acts committed, on the laconically stated ground that the agreements and actions taken pursuant to these "substantially affected" or operated as a direct and substantial restraint on, or merely "affected" United States trade and commerce, interstate as well as foreign.[258] The Collective Convention, the Court added, "was intended by the defendants to and did affect and relate to" the operations of U.S. corporations in the United States imports, exports, sales, use and distribution of watch products.[259] It was "directed towards" the United States.

The jurisdictional criteria summarized seem to resemble those of *Alcoa* — intended to affect (or directed towards) and did (substantially) affect United States commerce — with two reservations: a) It is uncertain whether "affect" was meant to denote actual effect or merely a relation (between the restraint and U.S. commerce).[260] As quoted above, the Convention did, as the Court's formulation was, both "affect" and "relate to" U.S. commerce. The fact that these two notions were held separate, indicates that by "affect" actual effect was suggested. On the other hand, no inquiries were made as to which "actual" effect the restraints had on U.S. imports, exports, etc.[261] b) Both interstate and foreign commerce were affected in the instant case (in *Alcoa*, merely foreign commerce). This brings forth the previously discussed problem regarding whether the interstate commerce or foreign commerce test shall take precedence, assuming, of course, that they are distinct.[262]

4—5) The arrangements devised by the defendants and the activities in pursuance thereof, were subject to a legal scrutiny which in all essentials corresponds to that employed in any domestic case.[263] Thus, what would have been a *per se* offense in a domestic case, was treated as such in this case as well. Moreover, the fact that some defendants were foreigners, did not particulary concern the Court. All defendants were measured with the same legal yardstick.

6) An initial final judgment was entered in the beginning of 1964. While appeals to the Supreme Court were pending, the Swiss and the United States governments carried on negotations regarding the provisions of the judgment. These negotiations, in which the Swiss Government urged that the provisions be modified, resulted in a renewed hearing before the District Court, where modifications agreed upon by the two governments were sub-

mitted.[264] The remaining defendants concurred in the proposed changes, consented to a dismissal of their appeals and waived their rights to appeal the modified judgment. The "Modified Final Judgment" was entered on February 3 1965,[265] the core of which were the following revised paragraphs, which provided that nothing in the judgment were to be deemed to prohibit "any defendant", FH member or any other person from:

(1) Performing any act in Switzerland which is required of it under the law of Switzerland;
(2) Refraining from any act in Switzerland which is illegal under the law of Switzerland;
(3) Taking any joint or individual action, consistent with the applicable law of the nation where the party taking such action is domiciled, to comply with conditions for the export of watch parts from Switzerland established by valid ordinances, or rules and regulations promulgated thereunder, of the Swiss Government;
(4) Taking any joint or individual action required by the scheme of regulation of the Swiss watch industry based on Article 31 bis of the Swiss Constitution, with respect to imports of watch parts into Switzerland other than from U.S. companies;
(5) Advocating the enactment of laws, decrees or regulations or urging upon any Swiss governmental body, department, agency or official the taking of any official action;
(6) Furnishing to the Swiss Government or any body, department, agency or official thereof, its independent advice or opininon when requested to do so.[266]

In the same section a new paragraph was inserted, Subsection (L), stipulating that the Swiss Government, or any of its agencies, should not, in any regard, be limited or circumscribed in its sovereign right and power, especially in matters pertaining to its domestic or foreign commerce or to the making and application of regulations with respect to the watchmaking industry or any part thereof.[267] Another provision in the initial judgment enjoining membership on boards and committees taking actions (or omitting to take actions) when the action (or omittance) is contrary to or inconsistent with any of the terms of the judgment and ordering FH to issue regulations, coupled with penal provisions, that would prohibit its members from engaging in activities prohibited by the judgment, was ultimately deleted.[268] A broad and sweeping section in the initial judgment which, in substance, enjoined FH and Ebauches from enforcing, performing or renewing any provision of the Collective Convention that restricted any *signatory* from producing, selling, exporting, purchasing or importing watch products from a non-signatory, or from furnishing aid to any person outside Switzerland engaged in such business, was altered so as to be

applicable to provisions in the Convention (or in "the cartel agreements") only to the extent they restricted *U.S. imports or exports*, production, distribution or sales *within the United States* of the named products.[269] Other provisions were likewise confined to be applicable only insofar as they related to United States domestic or foreign commerce,[270] or simply narrowed down to comprehend only the actual defendants or some of them.[271]

A motivating factor for these modifications was, *inter alia*, the expectation that they would be advantageous from the standpoint of American foreign policy.[272] For there was a threat, as the Swiss Government appearing as *amicus curiæ* pointed out at the last hearing on these modifications, that the judgment in its initial form would intrude upon the sovereignty of Switzerland and vital Swiss concerns with respect to its watch industry, a vibrant part of the Swiss economy.[273] (As an *ultima ratio regum*, the representatives of the Swiss Government threatened to take the case to the International Court of Justice in the Hague). As the Court itself remarked, the modifications would "prevent any situation from arising such as occured in other litigation in the past when there was belivied to be a possible conflict between a decree of a United States court and the sovereignty of a foreign nation". (Citing the *ICI* case and its aftermath, the *British Nylon Spinners* case.[274]

5.7 Summary of Alcoa and its aftermath

Alcoa,[275] and many of the cases that followed, deviated from the early case law and took a new jurisdictional course. New jurisdictional criteria were invoked. The traditional place of the wrong rule was substituted for the "intent to affect and did affect" formula. This is the general picture. A more detailed scrutiny reveals that traditional notions were not so easily wiped out, and when they were, they were not replaced by a consistent and coordinated set of new notions. (The method of examination remains unchanged, see *supra* p. 65 and 78).

1) Any characterization of an action was made strictly within the framework of domestic procedural or substantive legal principles without regard to the international law aspects of the cases, with the possible exception of *Alcoa*.[276] No court seems to have recognized that a connection between the character of a suit and international law may exist. (Compare the summary, *supra* p. 79).

2) Where, by chance, restraints were localized, it was done in a conclu-

sionary fashion and coupled with a very scantily worded reasoning. (Compare *supra* p. 79). True, to the extent that the localization process loses its function (as it probably did in *Alcoa*[276]) one cannot except a different order. But even in those cases where this process was maintained, the lack of a thorough and systematic localization is evident.

3) Notwithstanding the manifest impact of the *Alcoa* formula — intent to affect and did affect — upon the jurisdictional thinking of subsequent courts, *Alcoa* was not strictly adhered to. On the contrary, the general impression given is that the principle basis for jurisdiction shifted from case to case — *i.e.*, the jurisdictional criteria varied — and that confusion accompanied the jurisdictional reasoning.

Thus, in at least two of the cases following *Alcoa* (*National Lead* and *Continental Ore*)[277] each of which were reviewed by the Supreme Court, the *situs* of the restraint was still held decisive for issues of jurisdiction (the restraint was "effectuated" or "acts were done" both in the United States and abroad).[278] These decisions rested on *Sisal*[279] rather than on *Alcoa*. (See also the *ICI* case, *supra* p. 98).

Practically all of the cases have required that U.S. foreign commerce be affected, so as to make the Sherman Act cover the restraints. While some courts merely required "affect",[280] others spoke of a U.S. commerce that has been "deleteriously" or "substantially"[281] affected, others again sought a "direct and influencing effect"[282] or a "direct and substantial restraint"[283] on such commerce. The diversities in the expressions used may at first sight seem slight; substantial or deleterious may after all connote the same status. If the change of modifiers is of minor significance, the fact that the term "affect" (or "effect") was understood differently from case to case has to be given more serious consideration. While *National Lead, In re Grand Jury Investigation* and the *Swiss Watch* case seemingly equated "affect" and nexus or relation, other cases, such as *Alcoa, General Electric* and *Sanib*, used the word "affect" in a result-oriented sense, *i.e.*, to imply an actual effect upon United States trade.[284] However, the courts never made a close inquiry into the actual effects on U.S. trade (at least no such inquiry has been presented).[285] The requisite "intent", advanced in *Alcoa*,[286] was strictly applied only in the *Swiss Watch* case,[287] *General Electric*[288] and *Sanib*.[289] In these instances, "intent" has merely implied that the defendant knew or should have known that U.S. foreign trade actually was affected. Other cases have not, at least not explicity, required an intent (*National Lead, Continental Ore, Oldham, Timken* and *In re Grand-Jury Investigation*).[290] This divergency cannot be explained, as has occa-

sionally been done in the doctrine, by the fact that the latter cases referred to solely involved U.S. corporations, while *Alcoa* and the other cases involved alien firms,[291] inasmuch as both *Sanib* and the *Swiss Watch* case subjected alien as well as U.S. corporations to the same requisite intent.[292]

4—5) As in the early case law, the substantive antitrust rules have been applied coexistensively to U.S. and alien corporations, irrespective of whether there were other foreign elements involved in the case, or not.

6) If the jurisdictional criteria laid down may seem obscure and the reasoning in support of jurisdiction scantily worded, the remedies as outlined in the final decrees have, on the other hand, generally been elaborately and cautiously moulded, particularly as regards alien firms and their future management in the country of their creation as well as in other countries, including the United States. Attention has, in this respect, been paid to the laws in force in foreign countries, whereby, in some instances, a "saving clause" has been attached to the final decrees to "save" a corporation from being caught between the conflicting laws of two or more countries (see, *e.g.*, *General Electric*, the *ICI* case and the *Swiss Watch* case).[293]

Moreover, the individual provisions in the final decrees have been carefully formulated, in what seems to be a constant awareness of the limits of the powers of United States courts to interfere in the policies of other countries, to direct persons outside the United States to conduct their business in accordance with a desired model, and to punish them for acts "committed" outside the United States; an awareness, in other words, of the policy clashes in the international sphere that may result and of possible international law principles regulating these issues. (The *ICI* and the *Swiss Watch* cases are good examples of this).[294]

Thus, what may seem as an absence of express international law considerations in the jurisdictional reasoning, accompanying the courts' assumption of subject matter jurisdiction, has partly been remedied — if remedied it should be — when the final decree has been designed. It may well happen, in the course of this approach, that a court, having secured jurisdiction, finds itself completely unable to issue orders or injunctions of any kind, for purposes of curing market conditions, due to considerations of the aforementioned nature. Under such circumstances, is it expedient to aquire subject matter jurisdiction in the first place? Should not the whole set of international law considerations be invoked already when subject matter jurisdiction is assumed. Although *Alcoa*[295] contains such consider-

ations in an early phase, the other cases, however, are silent and have essentially resorted to a mechanical application of jurisdictional formulæ.

5.8 Recent case law

5.8.1 Pacific Seafarers, Inc v. Pacific Far East Line Inc.[296]

In this fairly recent case, Pacific Seafarers, Inc. and Seafarers, Inc. (hereinafter "PSI"), two U.S. corporations operating United States flag vessels, manned by American crews, instituted a suit for treble damages against 21 American shipping lines, and two conferences to which these lines belonged, for being engaged in a conspiracy to destroy plaintiff's business of carrying cement and fertilizer cargoes from Taiwan and Thailand to South Vietnam. The South Vietnamese imports were financed (but not owned or directly arranged) by the U.S. government — through the Agency for International Development (AID) — provided, *inter alia*, that at least half of the financed cargo was shipped under U.S. flag. Transportation was also paid for by AID when the shipping was done by American-flag vessels. The defendants — competitors for this business — allegedly first sought to erect legal barriers to prevent PSI from aquiring the business, and when they failed in that endeavor, they dropped their prices and subsequently drove PSI out of the market (Sherman Act, Sections 1 and 2).

1) The question of characterization and its relevance was not considered. The impression is given that the Court, though aware of the international implications involved in the case, did not attach significance to the character of the suit as a basis for consideration of such implications.[297]

2) The defendants' decision to drop prices was taken at a conference meeting held in the United States. Other acts, committed prior to that meeting, occurred outside the United States. All of the agreements and activities complained of were effectuated outside the United States, more specifically, in the flow of shipping commerce between Taiwan, Thailand and South Vietnam. The Court, however, did not reflect upon these matters; no independent significance was attached to the place of performance.[298]

3) Relying on the decisons in *Alcoa, Timken, ICI, Sisal*, and other foreign commerce cases, the defendants urged that their conduct was not subject to the Sherman Act, since there was no substantial effect on United States commodity imports or exports, or transportation to or from the United States. The defendants were, in their view, not engaged in United States

foreign commerce, nor had any part of their activity affected United States foreign commerce.[299]

The Court, unable to agree with the defendants, advanced various elaborate reasons. At the outset, the Court stipulated the premise that U.S. foreign commerce could not be restrained unless the *plaintiffs* were engaged in such commerce. Having found that the sale of American flag shipping services to foreigners itself was a form of United States foreign trade, on the ground of its "substantial and on-going nexus" to the United States,[300] the Court went on to examine the remaining criteria for subject matter jurisdiction. Mindful of the limits that the principles of international law may set on the exercise of jurisdiction under the ægis of the Sherman Act,[301] the Court expounded: "If [the 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."[302]

"Nexus" again was the keyword. This requisite was availed of in two phases. In the first, it was used to ascertain whether the trade in which the plaintiff was engaged, *generally* could be said to have such contacts with United States as to be characterized as U.S. foreign commerce (see above). Here, in the second phase, the question was rather, whether the United States has such significant interest (so-called American characteristic), in the specific market at issue, as to uphold an application of the Sherman Act. The Court by defining the market as involving the transportation of AID-financed cargoes, as entirely a product of the United States policy of subsidizing its merchant marine, a market in which this AID policy was a *conditio sine qua non* and where all participating parties had to be American (see above), a market, thus, where the American characteristic was dominant, found no hindrance in concluding that the requisite *nexus* was present.[303] The specific market was furthermore deemed to be within the province of American concern,[304] on the ground that it was regulated by U.S. law implemented by AID.[305]

It appears that *Alcoa* was disregarded. Assuming that "nexus" was a synonym of "affect", then actual effect was unnecessary. "Intent to affect", the Court surmised, meant nothing other than that persons are presumed to intend the natural consequences of their actions. Therefore ,the "intent" test had to be "supplemented" by more useful objective criteria, such as American contacts and nexus.[306]

Within the realm of the requisite nexus, the Court considered any significant American interest in the specific trade restrained, not merely "the

mechanical circumstances of effect on commodity exports or imports".[307] What exactly is significant and what is not, is, it seems, to be determined on a case-by-case basis.

4—6) Nothing of relevance.[308]

5.8.2 The Occidental Petroleum Case

In *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*,[309] a suit for treble damages and an injunction was brought by "Occidental" against "Buttes" and others. All parties involved were American corporations (or officers of such) in the oil business. Defendants were charged with instigating an international dispute over sovereign rights to a portion of the Persian Gulf — allegedly covering the richest area of the plaintiffs' concession — by having "induced and produced" foreign governments (or instrumentalities of such) to take various actions, with the end-result that the plaintiffs were forced to abandon their oil rights. (Sherman Act, Sections 1 and 2).

1) While the Court, no doubt, characterized the action as one sounding in tort containing only civil (private) remedies,[310] it seemingly did not consider whether the characterization was of any moment from an international law standpoint.

2) All acts complained of were obviously performed outside the United States (the plaintiffs did not contend otherwise).[311] The Court's attitude toward the place of performance was, however, one of total indifference, at least as far as jurisdictional matters were concerned.

3) Subject matter jurisdiction was conferred with express reference to the antitrust doctrine and, in particular to *von Kalinowski*, who, in reviewing the foreign commerce case law, concludes that "[t]he better view would seem to be that any effect that is not both insubstantial and indirect will support federal jurisdiction".[312] On the ground that the defendants allegedly interfered[313] with the plaintiffs' business of extracting oil and importing it into the United States, the Court found a "direct" effect on U.S. foreign commerce, an effect in itself sufficient to justify jurisdiction.[314] The defendants' assertion that the effect must be one that is "substantial[ly] anti-competitive" was rejected, as resting on a misinterpretation. "Substantial anti-competitive effect", the Court explained, is a prerequisite to substantive violations, not an element of jurisdiction.[315]

4—6) The case was dismissed on other grounds. (The act of state doctrine was invoked.)[316]

5.8.3 Todhunter-Mitchell

Todhunter-Mitchell & Co., Ltd. v. Anheuser-Bush, Inc.[317] involved, *inter alia*, a territorial restriction imposed by the defendant Anheuser-Bush — the largest beer-brewer in the United States — on its authorized wholesalers located in Miami and New Orleans. The plaintiff Todhunter-Mitchell, a Bahamian corporation and a strong competitor to defendant's only wholesaler in the Bahamas (Bahama Blenders), had for a period of time attempted to purchase a particular brand produced by Anheuser-Busch, but was repeatedly refused delivery. Therefore, price competition in the sale of the particular brand was eliminated and the continued monopolistic position of Bahama Blenders was assured. (Sherman Act, Section I).

1) Plaintiff sought injuctive relief and treble damages. (A private action — civil remedies.)[318] The case is silent as to any other relevant aspects.

2) There were no explicit agreements concluded between Anheuser-Busch and its wholesalers with respect to the refusal to deal with the plaintiff, but only the "unequivocal and emphatical" directives from Anheuser-Busch and the wholesalers' compliance with these directives. The directives, no doubt, must be localized to the United States, but where shall the acts committed in accordance with these, *i.e.*, the refusals to deal be localized? Is a refusal to be localized to the country of the corporating refusing or that of the corporation being refused?[319] While this may seems problematic, the Court did not hesitate in determining that the "conspiracy" implied acts done in the United States and not in a foreign jurisdiction.[320]

3) Again, as in *Occidental*, *von Kalinowski* was referred to.[321] The formula of "an effect not both insubstantial and indirect" was held to be controlling. A territorial restraint was imposed by the defendant which "directly affected" the flow of the defendant's beer out of the United States and the Bahamas.[322] *Alcoa* was cited but not strictly followed.[323] *America Banana* was distinguished: the place of performance was within the United States. An impact within the United States and upon its foreign trade was found in the case under review, but not in *American Banana*.[324]

4—5) No distinctions.[325]

6) An injunction was granted enjoining the defendant from restraining any of its wholesalers from selling the defendant's products on customary and nondiscriminatory terms to the plaintiff. Damages were awarded.[326]

5.8.4 Fleischmann Distilling

In *Fleischmann Distilling Corp. v. Distillers Co. Ltd.*,[327] United States distributors of imported Scotch whiskey brought an action against a British distiller and two of its wholly-owned British subsidiaries ("Distillers") after having been replaced as Distillers' exclusive distributors. The complaint alleged that Distillers had required the inclusion of unreasonably short terms (the longest was two years) and short notices of termination (60 days up to three months) in the distributorship agreements between the plaintiffs and Distillers. These provisions, the palintiffs claimed, were components of a larger scheme to restrain trade in the U.S. market through price-fixing, monopolizing, etc. (Sherman Act, Section 1.)

1) This again was a private action. The court did not discuss the character of the action from an international law viewpoint.

2) The larger conspiratorial scheme was very vaguely defined, and consequently, it was not and could not, be localized. Its alleged instruments,the agreements and their specific provisions, however, as the Court acknowledged, had their *situs* in the United Kingdom: they were executed and performed there as far as the British corporations were concerned (their brands were sold f o b United kingdom ports), payment was made and title to the goods passed in the United Kingdom. Moreover, the ageements expressly provided that they were to be governed by the law of England. These factors, however, were held irrelevant with respect to subject matter jurisdiction.

3) Reading the complaint in the light most favorable to plaintiffs, the Court noted that the production and distribution of Scotch whiskey embodied a "continuous stream of commerce among the States and with foreign nations" and that the "acts, practises, contracts, combinations, and conspiraces ... occurred in or directly affect commerce among the States and with foreign nations".[328] The intent requirement in *Alcoa*[329] was held to be satisfied by the rule that a person is presumed to intend the natural consequences of his actions.[330] In the instant case the intent to affect U.S. commerce, the Court concluded, was inferrable from the assignment of exclusive distributorship rights in the United States.

4—6) There were no distinctions made between U.S. and alien corporations. Nor was any distinction made as to which substantive rules should apply in foreign commerce cases as opposed to domestic cases.[331]

5.9 Summary of the recent case law

The principle according to which the place of performance controls jurisdiction, a principle once introduced in the foreign commerce field in *American Banana*,[332] seems to have been forever done away with. The sole remnant from the early case law is the stipulation that subject matter jurisdiction must rest on a nexus between the restraint alleged to be illegal and U.S. commerce, whether foreign or interstate.[333] *Alcoa*,[334] which initiated this new development, is in this sense still very much alive and, consequently, the process of localizing acts has been given less significance. Other aspects of Alcoa and the cases following immediately thereafter, such as the courts' position as regards characterization of the action, substantive legal principles in cases with domestic contra foreign elements (corporations) and the modelling of the remedy, as summarized *supra* p. 110 ff.), are equally pertinent in the context of the recent case law.

The foreign commerce formula applied in *Alcoa*, is, however, if construed strictly, slowly fading away. New formulæ have been developed, partly inspired by the interstate commerce case law, partly by statements in the doctrine based on a review of the foreign commerce case law from *American Banana* onward.[335] Apart from *Pacific Seafarers,*[336] the recent cases seem to have assumed jurisdiction when the particular restraint at issue is either "in", "directly affecting" or "substantially affecting" United States foreign or interstate commerce. Assuming that "in" and "direct" both imply an immediate nexus to United States commerce (see *supra* p. 38 f.), that they are therefore, in this regard, substitutes,[337] the formula adds up to one which , at least formally, corresponds exactly to the formula applied in the interstate commerce case law, namely "in or substantially affecting" interstate commerce. Upon a closer examination it becomes clear that the correspondence is not merely formal. The component "in" is accordingly interpreted to mean that the restraint is directly related to U.S. commerce in that it is applied to the flow of goods and services between the United States and foreign countries (see *Occidental, Todhunter-Mitchell* and *Fleishmann*, where the restraint was directly applied to the flow of oil, beer and whiskey respectively).[338] The other component, "substantially affecting", comes to the fore when the restraint is not "in" commerce but still has a sufficient nexus to such commerce, irrespective of, however, whether commerce has increased or decreased due to the restraint. (See *supra* p. 41 f.).

The incongruity with *Alcoa* is plain.[339] True, it might be argued that the requisite "intent" in Alcoa is a paraphrase of "directly affecting" (or *vice*

versa) and that in order to establish whether a restraint directly affects U.S. commerce one must inquire about the intent of the defendants. Yet that would be to overlook the fact that "intent" in *Alcoa* was related to actual effects upon United States exports or imports (the non-existence of which was to be proved by the defendants). Here, the question is merely whether the restraint has an immediate nexus — is to be directly applied to U.S. commerce. The jurisdictional criteria in *Alcoa* were result-oriented, while here a mere nexus is sought.

Looking back at the four approaches to the possible interpretations of the jurisdictional limits of the antitrust laws outlined above (p. 57 f.), it seems as if the development has slowly moved from the first approach, where a foreign commerce test was conceived which was separate from the interstate commerce test, to the second or fourth approach, where the foreign commerce test was envisaged as being identical with the test applied in interstate commerce case law. In the first approach, international law considerations were considered to be silently incorporated in the foreign commerce test itself, while in the second or fourth, these considerations were to be held separate from the test and to be brought forward in a secondary stage, either because the law made that a condition for jurisdiction or as a result of the courts discretion. The foreign commerce test has, in other words, after having been a specific test with individual standards, gradually adopted the guise of the interstate commerce test. This fusion, one would think, should have produced a balance consisting of the international law considerations, formerly implanted in the foreign commerce test. But when examining the recent case law, one finds that the courts assume the jurisdiction without any discussion of the possible implications of international law. Here, apparently, none of the approaches mentioned apply.

Unaffected by these conclusions is *Pacific Seafarers*, a case which lives a life of its own. There the court avoided the "mechanical circumstances of effect"[340] — though the rationale behind this is somewhat unclear[341] — and based its jurisdiction on a set of American characteristics (factors tying the American interest to the trade involved), which taken together constituted a sufficient nexus. Furthermore, in *Pacific Seafarers* international law aspects were interwoven into the court's search for American characteristics, as compared to interests of other nations.

5.10 The Timberlane case, an innovation

In a sense *Timberlane Lumber Co. v. Bank of America*[342] has all the necessary qualities, as *Alcoa* once had,[343] to become the foremost precedent in the foreign commerce field. For in *Timberlane*, an entirely new approach is introduced pursuant to a thorough analysis of the foreign commerce case law and the concomitant commentaries in the literature. The shortcomings of the earlier case law, in particular the lack of attention paid to the international complications, could thereby, the court believed, be rectified.

The facts, as alleged, can be summarized as follows:

Timberlane, an experienced U.S. corporation in the lumber business, had recently entered the Honduran market in search of sources of lumber, and had invested considerable sums in realizing its intentions.

A Californian corporation, Bank of America, and its wholly owned subsidiary — operating a branch in Honduras — as well as several employees of the Bank, conspired to prevent Timberlane from milling lumber in Honduras and exporting it to the United States, thereby maintaining control of the Honduran lumber export business in the hand of a few individuals backed by the bank.

Steps were taken in order to paralyze the Timberlane's operations in Honduras. Thus, court orders were obtained, partly under false pretenses, which involved the arrest and imprisonment of one of Timberlane's managers and which, through means of an embargo, precluded sales of Timberlane goods.

1) The case was brought to court by private parties — among them Timberlane — claiming damages and alleging violations, *inter alia*, of Sections 1 and 2 of the Sherman Act. The action was one sounding in tort, hence civil. A *civil* violation of the antitrust laws was at hand. According to the Court the antitrust laws were of a civil nature, in this instance.[344]

However, there is no reason to stress the characterization given by the Court, since it merely discussed the characterization from a domestic, procedural angle and not in an international law context.[345]

2) The Court found that most of the activity, covered by the complaint, took place in Honduras.[346] The defendants activities included the inducement of Honduran courts and authorities to produce court orders crippling Timberlane's operations, to arrest and imprison Timberlane's manager in Honduras and to cause a temporary, complete, shutdown of Timberlane's business in Honduras. The Court also surmised that the most direct economic anticompetitive effect was on Honduras. The whole conspiracy, however, including the aforementioned activities, which lead towards the pre-

vention of Timberlane's milling lumber in Honduras and exporting it to the United States, may have been directed from the United States, according the Court.

Still, the attention paid by the Court to the localization process was incidental. As will be seen below, the Court attached no independent significance to the fact that most of acts complained of were carried through in Honduras, which is also reflected in the casual way in which the Court localized the acts, the effects and the conspiracy.[347]

3) When it came to establishing the jurisdictional criteria, the Court elaborated at considerable length, an analysis that encompassed many of the commentaries in the doctrine as well as the relevant case law. Analysing the commentaries and the precedents, the court acknowledged that there is some extraterritorial jurisdiction under the Sherman Act, that the Sherman Act may reach activities of aliens as well as American citizens in other nations.[348] But the Act is not all-embracing. There is a point, the Court realized, at which 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.[349] As the statutory terms themselves are much too imprecise to provide guidance and since no definition, in the Court's view, is supplied by international law, the task falls upon the courts to determine what that point is. The Court concluded, however, that thus far the courts of the United States lack the necessary consensus on the limits of jurisdiction and therefore offer no definite directives. Likewise, the opinions of the commentators are too multifarious.

Although taking due notice of the views of the courts and the commentators,[350] the Court moved along its own path. It found the frequently proposed effects test to be poorly defined, unclear and incomplete. Incomplete, the Court reasoned, mainly because it fails, at least expressly, to consider the interests of other nations involved, as much as it fails to take into account the full nature of the relationship between foreign actors and the United States.[351] The concern for other nations and their citizens, and for international notions of comity and fairness, requires an explicit articulation. The application of mechanical tests such as "direct and substantial effects" does not suffice.

To remedy this imperfection the Court introduced a *tripartite analysis*.[352] In the first part of the analysis the Court asked: Is the alleged restraint covered by the Sherman Act, that is, does the Court have subject matter jurisdiction? Here the Court found it sufficient to require that there be *some* effect — actual or intended — on American foreign commerce in order to

legitimately exercise subject matter jurisdiction under the antitrust laws. The first question is simply: Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States? In the second part of the analysis the stated question is: Is the effect of such a magnitude so as to present a cognizable injury to the plaitiffs and, therefore, a *civil violation* of the antitrust laws. Finally, there is the additional question, unique to the international setting, of whether United States interest and concern — including the magnitude of the effect on American foreign commerce — is sufficiently strong, *vis-à-vis* those of other nations, to justify an assertion of extraterritorial authority. The problem here is, the Court reasoned, not whether any of the sections in the antitrust laws applies to the alleged restraint, but rather if, as a matter of international comity and fairness, the extraterritorial jurisdiction of the United States, already given in the first analysis, *should* be asserted to cover the restraint.[353] What the Court really suggested was an evaluation and balancing of the relevant considerations in each case, a weighing of interests in an international context.[354]

The *elements* to be *weighed* included the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of the corporations involved, 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 an explicit purpose to harm or affect American commerce, the foreseeability of such an effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad. By evaluating these variables, conflicts due to differences in law or policy or national interests, could be provided against, the Court presumed.

Applying the tripartite analysis in the case at hand, the Court first concluded that the Sherman Act in fact covers the resraint complained of:"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."[355] The Court thus established subject matter jurisdiction. Secondly, the magnitude of the alleged effect was, such as to appear to be sufficient to state a claim of civil violation of the Sherman Act. Reaching the third part of the analysis, the Court noted that most of the acts complained of took place in Honduras, although the conspiracy as a whole might have been directed from the United States,

and that Honduras was probably the country most directly affected by these acts.[356] Since, however, no comphrensive analysis of the relative connections and interests of Honduras and the United States was presented in the lower court, the case was remanded without further inquiries.

5.10.1 Some conclusions

In entirely separating the jurisdictional formula applied from the international law considerations — notions of comity and fairness — attended to in this case, the approach introduced by the *Timberlane* court implies a marked contrast to earlier case law. Going back to *Alcoa*,[357] for instance, one finds that the court there first discussed the influence of principles of international law upon the case, and then formulated the foreign commerce test that should govern the jurisdictional issue (the "intent and effect" formula), with special regard paid to these principles. In the *General Electric* case, again, a wholly different solution was presented when designing the remedy in order to avoid a conflict of interests.[358] As the instant court fully recognized, the American courts have often, in fact, displayed a regard for comity and the prerogatives of other nations.[359] This regard has, however, probably been silently incorporated in the jurisdictional formulæ applied. The requirement for a "substantial" effect, for instance, implies a great deal of flexibility, giving room for additional international considerations. The intent requirement suggested by the court in *Alcoa*[360] is another example of an attempt to broaden the courts' perspective, as is foreseeability,[361] saving clauses[362] and the drawing of a distinction between American citizens and foreigners.[363]

It seems as if the approach chosen by the *Timberlane* court has a more functional and pragmatic character when compared to the various formulas recommended in earlier case law and by legal writers.[364] The failure to articulate the relevant considerations of international law in addition to the standard effects analysis tends to be costly, for it is more likely that they will be overlooked or slighted in interpretating past decisions and reaching new ones. Moreover, mere formulæ have a tendency to be technically treated and mechanically applied by the courts and thereby possibly cause neglectance of these other elements. Or they may serve a conclusionary function, products of a silent line of thoughts, and thereby overshadow the actual reasoning of the courts. Placing emphasis on the qualification that effects be "direct" or "substantial" is also risky, for these terms have a meaning in the interstate commerce context which may not coincide with those applied in foreign trade cases.[365]

In contrast, the tripartite analysis in *Timberlane* proposes clarity and flexibility, it necessitates plain language where the interests of the concerned parties are evaluated and attended to.

In this way *Timberlane* case is an innovation. Nevertheless, in spite of its highly enlightening construction, *Timberlane* leaves some questions unanswered. The Court did, for instance, not pause to penetrate the exact nature of the effect criteria. What the Court required was that there be *some* effect on U.S. foreign commerce for the Sherman Act to cover, but no indications on how strong an effect is required were enclosed.[366] And when citing approvingly, on the one hand, the courts opinion in *Pacific Seafarers*,[367] *inter alia*, stating that "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"[368] and, on the other hand, forwarding the requisite "direct economic" effects (on foreign commerce),[369] the Court seems to have caused a contradiction.

As discussed earlier,[370] affect can either denote a mere nexus (relation) *or* an actual result, not both at the same time. The Court did not seem to know which foot to stand on. The momentary confusion may, however, be due to the fact that the foreign commerce test in *Timberlane* was divided into three parts,[371] the first of which might require an actual effect and the third an analysis of the connection between the parties, the restraints and the nations involved. If that is the case, there still remains the question: How strong of an effect is required? "The Sherman Act is not limited to trade restraints which have both a direct and substantial effect on our foreign commerce", the Court suggested,[372] at the same time concluding that a restraint which affects or was intended to affect U.S. foreign commerce is covered by that Act. The exact nature of the effect required was not revealed. The court in *Timberlane*, being a court of appeals, had, it is true, no ground for examining the comity question — weighing of factors (interests) — and the effect criteria more closely. After having provided for general guidelines with respect to the comity question, the case was remanded for an analysis *in concreto*. Unfortunately no such quidelines were provided regarding the effect requisite.[373]

Moreover, the Court's idea of the concept "extraterritorial" seems somewhat cloudy. An extraterritorial application is at hand, the Court argued, when the Sherman Act is extended to reach acts outside United States territory ("extraterritorial conduct" as the Court chose to term it).[374] The concept "extraterritorial" is however, as we shall wee below,[375] empty if not coupled with criteria for the localization of an act to one country or

the other. Such criteria were not provided.

Finally, the requisites of the second part of the analysis are confusing. Is it the *restraint* or is it the *effect* of the restraint that must be of a certain magnitude so as to be cognizable as a violation of the Sherman Act, or both? In one part of the opinion the Court spoke of the magnitude of the restraint, and in another part, the magnitude of the effect.[376]

All in all, however, in spite of its slight imperfections, *Timberlane* brings more clarity to the foreign commerce area than the bulk of the earlier case law.

5.11 The impact of the Timberlane case

5.11.1 Mannington Mills, Inc. v. Congoleum Corporation[377]

In this case, the plaintiff Mannington Mills, Inc — an American manufacturer of floor covering — brought an antitrust action against another American manufacturer, alleging that the latters's foreign patents were secured by fraud and that the enforcement of the fraudulent foreign patents restricted its foreign business and the foreign commerce of the United States. (Sherman Act, Section 2).

1) Both parties were private American companies. The plaintiff sought damages and injunctive relief. Procedurally the action was civil. As to the character of the action from the viewpoint of international law, the Court was silent.

2) The alleged fraud of various patent offices took place abroad as did the enforcement of the fraudulent foreign patents. "The challenge here", the Court observed by way of introduction, "is the conduct by an American corporation in a foreign country, arguably legal there, and the issue is whether that activity is answerable in the courts of the United States".[378]

3) Applying the *Timberlane* approach, the Court first concluded that it had subject matter jurisdiction: "It can no longer be doubted that practices of an American foreign commerce are subject to the Sherman Act."[379] The fact that the defendant was American was thus held significant, although not decisive, for purposes of subject matter jurisdiction. In determining whether the Court *should exercise* jurisdiction the Court set forth a balancing-of-interests test, which included the following factors:

1 Degree of conflict with foreign law or policy;
2 Nationality of the parties;

3 Relative importance of the alleged violation of conduct in the United States compared to that abroad;
4 Avialibity of a remedy abroad and the pendency of litigation there;
5 Existence of intent to harm or affect American commerce and its foreseeability;
6 Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
7 If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
8 Whether the court can make its order effective;
9 Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and
10 Whether a treaty with the affected nations has addressed the issue.[380]

However, the Court did not itself perform an interest-analysis. (The case was remanded for further analysis). Still, it did emphasize the importance of considering the patent policies of the foreign states involved: "Many of these policies could be frustrated by a decree of an American court which, in effect, declares the foreign patent invalid both by American standards and as it may affect American commerce."[381] A judgment against the defendant, the Court further foresaw, "would have direct and ripple effects abroad." Judge Adams, concurring, adopted a sligthly different approach. He opposed the distinction made by the majority between the question whether the court *had* jurisdiction and whether ot *should exercise* this jurisdiction. "[I]do not agree", Judge Adams argued, "that a court may conclude that it is invested with subject matter jurisdiction under the Sherman Act but may nonetheless abstain from exercising such jurisdiction in deference to considerations of international comity".[382] Such considerations, he suggested, "are properly to be weighed at the outset when the court determines whether jurisdiction vel non exists, or in fashioning the decree."[383] In balancing the interests in the specific case, Judge Adams gave particular weight to the fact that the defendant was American, that there was no foreign law that either prescribed or compelled the defendant to perform the activities complained of, that the activities were masterminded and directed from the United States, and that they were intended to affect its American competitors' export markets.

4—5) Nothing of relevance.

6) The case was remanded for further analysis in accordance with the balancing-of-interests approach.

5.11.2 Dominicus Americana Bohio v. Gulf & Western Industries, Inc.[384]

Plaintiff, an American and a number of American and Dominican Republic corporations (including Dominicus Americana Bohio), brought action against, *inter alia*, two American corporations (including Gulf & Western Industries, Inc.) and two corporations from the Dominican Republic, alleging that the latter had monopolized tourist facilities in the Dominican Republic. (Sherman Act, Sections 1 and 2).

1) The action was procedurally civil. Plaintiff, a private party, sought damages and injunctive relief.

2) While the anticompetitive practices complained of may have partly been directed from the United States, the actual activities characterized as the monopolization of tourist facilities took place in the Dominican Republic. The Court, however, did not particularly seek to localize the anticompetitive conduct, although it, in executing the balancing-of-interest tests, noted that the fact that some of the anticompetitive conduct occurred in the United States militated in favour of subject matter jurisdiction.[385]

3) The balancing-of-interests approach invoked in the *Timberlane* case and *Mannington Mills* was considered controlling. "[T]he effects test alone", the Court reasoned, "is inadequate, because it fails to take into account potential problems of international comity ... Accordingly, the proper standard is a balancing test that weighs the impact of the foreign conduct on United States commerce against the potential international repercussions of asserting jurisdiction."[386] As regards the question whether to adopt the majority approach in *Mannington Mills*, distinguishing the issue whether jurisdiction exists from the issue whether it should be exercised, or the approach of Judge Adams (concurring in the same case),[387] merging these two questions, the Court was hesitant. Still, the ten factors listed in *Mannington Mills* were invoked as a basis for the interests-analysis.

Again, however, the Court did not execute an interests-analysis. It merely pointed out some facts it believed operated in favour of jurisdiction, such as the fact that many of the defendants and of the plaintiffs were United States corporations, that some of the conduct had occurred in the United States, that the services alleged to be affected by the monopolization were used by Americans and the fact that it was possible for the Court to make its order effective against the American defendants.[388]

4—6) Nothing of relevance.

5.11.3 *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.; National Union Electric Corp. v. Matsushita Electric Industrial Co., Ltd.; In re Japanese Electronic Products Antitrust Litigation*[389]

In these consolidated actions, the American plaintiffs alleged that the defendants, principally Japanese manufacturers of consumer electronic products (but also two American companies), were, or had been for more than two decades, participants in a conspiracy aimed at the methodical destruction of the United States domestic consumer electronic products industry. The defendants were charged with, *inter alia*, having artificially lowered the export prices, with having attempted to monopolize the American market, with having discriminated in prices among American purchasers, and with having acquired domestic companies in violation of the merger provisions in the Clayton Act (Section 7). (Sherman Act, Sections 1 and 2; Wilson Tariff Act, Section 73; Robinson-Patman, Section 13(a)).

1) The action was procedurally civil. While the Court did not explicity discuss the character of the antitrust laws from the viewpoint of international law, it did indicate that it, as a matter of international law, considered the laws as being criminal in nature. When discussing the applicability of international law, the Court found that the jurisdictional principles developed within the scope of international criminal law were controlling, as regards the economic regulatory matters, however, the territorial principle (in its subjective or objective interpretation) exclusively.[390]

2) Although the Court found that some of the acts complained of occured in the United States, the Court did not attempt to localize the anticompetitive conduct in general for purposes of subject matter jurisdiction; it concluded, without further examination, that the bulk of the conduct was foreign.

3) Discussing at length the *American Banana* (which it deemed obselete) and the *Alcoa* cases, in light of the foreign commerce case law in general, the Court eventually came to the conclusion that *Alcoa in combination with* the *Timberlane — Mannington Mills* doctrine were controlling. In determining whether to assume subject matter jurisdiction or not, the Court held, it would look for a general intent to affect the United States commerce, some actual effect on that commerce, *and* facts relevant for the interests-analysis as outlined in *Mannington Mills*.[391]

Hence, *Mannington Mills* was not entirely followed. Since that case involved American parties on both sides, it was considered distinguishable.[392]

The Court concluded: "[T]he American antitrust laws do extend to conduct abroad by foreign corporations, at least when that conduct is intended to affect United States interstate or foreign commerce, when it actually has such an effect, and when a balancing of considerations of international comity leads the court to exercise that jurisdiction."[393]

On procedural grounds, however, an interests-analysis was not carried out.

4—6) Nothing of relevance.

5.11.4 In re Uranium Antitrust Litigation. Westinghouse Electric Corp. v. Rio Algom Ltd.[394]

In this case, Westinghouse Electric Corp. ("Westinghouse"), an American corporation, brought action against 20 American and 9 foreign corporations, alleging that these had conspired to fix the price of uranium in the world market. The background was briefly as follows.[395] In 1975, a multitude of suits were brought against Westinghouse (*i.e.*, the plaintiff in the instant case) by electric utility companies for breaches of contracts for the supply of uranium. The contracts were fixed price contracts subject to modification only on account of increases in the cost of living. In its defence, Westinghouse responded, *inter alia*, that performance of the contracts had been rendered commercially impracticable due to a dramatic (eightfold) price-increase on uranium the cause of which, it alleged, was a world wide uranium producers cartel, including among others American, British, Canadian, Australian and South African companies. An unsuccessful attempt was made to obtain evidence of this cartel from abroad.[396] Documents received by Westinghouse in 1976 from a private environmental organization displayed, however, that producer meetings had taken place. Shortly thereafter Westinghouse filed an antitrust suit in Chicago, seeking two billion dollars in damages trebled, plus attorneys' fees. (Except a very limited suit against an American company, the Antitrust Division of the Department of Justice took no action). The nine foreign defendants, although served with process, chose not to appear in court. In 1979, therefore, the District Court granted a motion for entry of default judgment against the defaulting defendants. On appeal, the governments of the affected foreign states filed briefs as *amici curiæ*, questioning the jurisdiction of the United States courts over the foreign defendants and their activities (the present case).

In the meantime, the Westinghouse suit had generated a great deal of

foreign reactions and counter-actions. In 1980 the British Parliament passed the Protection of Trading Interests Act, aimed at neutralizing, or at least mitigating, the effects of American antitrust law.[397] Counterlegislation was also enacted in other states. In Canada, a bill was introduced (Bill C — 41, July 11, 1980) proposing extensive provisions, designed to limit the effects of the application of American antitrust law. The bill has not yet (Oct. 1982) been passed.

Connected to the Westinghouse uranium litigation were also several cases involving discovery requests and the production of documents located abroad. (Sherman Act, Section 1).[398]

1) Again we have here a civil action — a private party seeking damages. The character of the antitrust laws, or the suit as such, from the perspective of international law, was not discussed.

2) The alleged anticompetitive conduct — the conspiracy to fix prices — took place both abroad and in the United States, the Court concluded, by reason of the fact that the prices were agreed upon, as alleged, at meetings held both within and without the United States.

3) The jurisdictional approach was basically that of *Timberlane* and *Mannington Mills*. The jurisdictional issue was viewed as twopronged: 1) does subject matter exist; and 2) if so, should it be exercised.

As to the question whether subject matter existed, the Court found the *Alcoa* case still to be controlling.[399] According to *Alcoa*, a United States court has jurisdiction when the foreign conduct complained of has *intended* effects on American commerce. Applying the Alcoa "intended effects" formula, the Court found difficulty in concluding that there was subject matter jurisdiction. The "intended effects" formula was not further elaborated. It seems, however, that the formula should read: "intended, actual effects".

As to the question whether jurisdiction should be exercised, the Court deviated from *Timberlane* and *Mannington Mills* as regards relevant factors to be considered in the interests-analysis. In granting the requested default judgment, the District Court (the court below) had considered three factors:[400]

1 the complexity of the present multi-national and multi-party action;

2 the seriousness of the charges asserted; and

3 the recalcitrant attitude of the defaulters (the court pointed to the fact, as alleged, that one of the defaulters had torn up the complaint in the presence of the process server).

By considering these factors and not the ten factors listed in *Mannington Mills*, the Court concluded, the District Court did not abuse its discretion. The Court explained: "First, the *Mannington Mills* factors are not the law of this Circuit. Second, even assuming their adoption by this Court, the circumstances here are distinct from those found in Timberlane and Mannington Mills."[401] The distinguishing factor was in essence that in *Timberlane* and *Mannington Mills* the defendants appeared and contested the jurisdiction of the court, while in the present they did not appear but chose to present their case through "surrogates". "[S]hockingly to us", the Court remarked, "the governments of their defaulters have subserviently presented for them their case against the exercise of jurisdiction."[402]
4—6) Nothing of relevance.

5.12 Conclusions concerning the post-Timberlane case law

The *Timberlane* approach was adopted and elaborated in *Mannington Mills*. The question whether there *is* subject matter jurisdiction under the antitrust law, the suggestion was, must be distinguished from the question whether it should be exercised. The second question, a question of comity, involves the balancing of factors or interests, including the interests of the affected foreign state(s) and the affected individual. While the basic approach of *Timberlane* — the method as such — seems settled, its content and application in the specific case clearly is not. The post-*Timberlane* case law displays too many variations. Not settled, and wholly unclear, is the question what factors shall be considered within the scope of the weighing-of-interests process. The *Timberlane* court proposed one set of factors; the court in *Mannington Mills* another. The court in the *Westinghouse* case, again, declared that the *Mannington Mills* factors were not the law of the Seventh Circuit. Unclear is also how the interests-analysis shall be conducted, and the weight to be given each single factor. One may even doubt whether the weighing of interests approach is law, or whether it is merely a question of judicial discretion. The statement made by the *Westinghouse* court seems to indicate the latter.

Unclear is further the relation between the two questions whether jurisdiction exists and whether it should be exercised. Judge Adams, concurring in *Mannington Mills*, suggested that the question whether subject matter jurisdiction exists must encompass a balancing of interests-analysis. The court in *Dominicus Americana* chose not to do determine the issue, and the court in the *Zenith Radio* case concluded that subject matter jurisdiction exists when the foreign conduct has actual and intended effects *and* when

a balancing of considerations of international comity leads the court to exercise that jurisdiction. This conclusion, the court in the latter case believed, was compelled by the fact that the defendants were *foreign* in contradistinction to the situation in *Timberlane* and *Mannington Mills*. The *Westinghouse* court, however, clearly separated the question whether jurisdiction should be exercised from the question whether it exists. Only the former question, the court there seemingly suggested, involves a balancing of factors test. Controlling, as regards the determination of the question whether jurisdiction exists, has generally been the effects-formula applied in the *Alcoa* case, or variations thereof. Considering that this effects-formula — intended and actual effects — in itself, implicitly, holds a weighing of state interests and the interests of the affected individual, it would seem as if the *Timberlane* approach, especially as developed in the post-*Timberlane* case law, involves a twofold interests-analysis, of which the first part is implicit and the second explicit. Indeed, the two questions whether jurisdiction exists and whether it should be exercised touch upon the same issues. The court's reasoning in the *Zenith Radio* case is illustrative. Since the defendants in the case were *foreign*, the court argued, the question whether jurisdiction exists shall encompass both the application of an effects formula and a balancing-of-interests test.[403] One of the factors to be considered in the latter test, however, as the court itself pointed out, is the *nationality of the parties*. The same court further noted that the substantiality of both the effect and the intent (elements of the effects-formula) are taken into consideration in the balancing process.[404]

5.13 Summary of the foreign commerce case law

When reviewed, the foreign commerce law, from *American Banana*[405] to *Timberlane*,[406] shows but little continuity. If anything is certain about the foreign commerce test, it is that it changes from time to time, and from case to case. The strict doctrine, laid down by Justice Holmes in *American Banana*, implying that American law cannot extend to conduct beyond American borders, has in fact, if not expressly, been overruled and replaced by the principle of effects. Although the change is gradual, *Alcoa*[407] marks something of a new dimension. Prior to Alcoa, the place of conduct ruled jurisdiction. A restraint transpiring outside the United States could not, according to that principle, fall withing the ambit of the Sherman Act. At least part of the restraint had to be implemented within the United States for the Sherman Act to cover (at least as much within as without the United States). This is well typified by the *American Banana, Thomsen v.*

Cayser,[408] *Pacific & Arctic, Sisal* and the *Nord Deutscher Lloyd*[409] cases, all of which were delivered by the Supreme Court. *American Tobacco*,[410] however, is silent in this respect. The only case deviating from this general rule is *U.S. v. Hamburg-Amer.*,[411] which held that the potentially of a restraint being carried out within the United States is sufficient to constitute jurisdiction; but it was based upon an erroneous interpretation of *Thomsen v. Cayser*.[412] (Moreover, the Supreme Court had no option to review these aspects of the case, as the case was reversed on the ground of mootness). While the *locus delicti* had such significance in he early case law, the place of contract (*locus contractus*) was held to be immaterial. Jurisdiction could not, according to this view, turn on such accidental circumstances as the place of the creation or signing of a contract.

In some of the cases in the early case law an additional, *complementary*, requisite was advanced for jurisdictional purposes. The requirement was that there be a nexus between the restraint and American commerce, specifically that American commerce be "affected" in some way.[413] It should be noticed, however, that throughout these cases the requisite "affect" has merely denoted a *relation* between the restraint complained of and American commerce, not an actual result. (In *Pacific & Arctic*,[414] for instance, the court described the restraint as a "control to be exercised over" U.S. commerce). The "affect" requirement thus implied that the restraint at issue in the specific case encompassed U.S. commerce, that U.S. — interstate or foreign — goods or services were involved. In none of the cases has the court made inquiries in terms of actual economic effects upon U.S. imports or exports. Such inquiries were not, it seems, presupposed in any jurisdictional analysis.

With *Alcoa*[415] new jurisdictional criteria were born. The traditional "place of wrong" rule was substituted for the "intent to affect and did affect" formula. Traditional notions were not, however, so easily wiped out. In at least two of the cases following *Alcoa* (*National Lead*[416] and *Continental Ore*[417]), both reviewed in the Supreme Court (while *Alcoa* was not), the *situs* of the restraining acts were still held decisive with respect to jurisdiction. These decisions rested on the *Sisal* case,[418] rather than *Alcoa*. In other cases, again, the impact of Alcoa was more manifest (*e.g.*, *General Electric*,[419] the *Sanib*[420] and the *Swiss Watch*[421] case). In practically all of the cases, including *National Lead* and *Continental Ore*, the requisite "affect" has been present. While some courts have merely required that U.S. commerce be "affected", others have assumed jurisdiction when such commerce was "deleteriously" or "substantially affected", or subject to a "direct and influencing effect", or a "direct and substantial restraint".

The divergent expressions may, when compared, seem fairly equivalent. The change of modifiers such as "substantially" and "deleteriously" may be of minor significance. A closer study of the "affect" requisite reveals divergences, however.

While the courts in *National Lead*,[422] *In re Grand Jury Investigation*[423] and the *Swiss Watch*[424] case seemed to equate "affect" and nexus or relation, which thus far is in line with the early case law, the courts in *Alcoa*,[425] *General Electric*[426] and *Sanib*[427] regarded the requisite "affect" in a result-oriented sense. What the courts in the latter casess required was an actual effect, an effect to be concretely estimated and evaluated. Rarely or never, though, has an inquiry regarding the actual effects upon U.S. commerce been presented. On the contrary, in *Alcoa* the burden was placed upon the defendant to prove the non-existence of actual effects after the court had found an intent to affect — probably a burden too heavy for any defendant to bear.[428] The import of the words "substantial", "deleterious", "direct" and "influencing" has not been pronounced. The words should, of course, be seen in their entire context, against the background of the facts of each specific case. Still, when no directives are offered as to which facts, of all of those present in a case, lead to the conclusion that an effect is "substantial", etc., one does not become much wiser. Little is added to our knowledge if it is implied that insignificant effects fall outside the scope of U.S. antitrust law. (Substantial effects are covered, non-substantial are not). In the end, the meaning of these qualifiers has to be developed in case by case analysis.

The requisite "intent", initially introduced in Alcoa, has, in principle, only been applied in *General Electric*, the *Swiss Watch* and the *Sanib* cases. In these instances, "intent" has been construed to imply that the defendant knew or should have known that U.S. foreign trade was actually affected. In other cases this requirement has not been restated.

In the recent case law (*i.e.*, from *Pacific Seafarers*[429] — decided in 1968 — and onward) the "place of wrong" rule had no significance at all. The sole remnant from the time of *American Banana*[430] was the requisite of nexus ("affect"). Even *Alcoa*, it seems, was leading a languishing life.

Apart from *Pacific Seafarers*,[431] jurisdiction in recent cases was assumed when the particular restraint at issue was either "in", "directly affecting" or "substantially affecting" U.S. foreign or interstate commerce. In applying these concepts in this field, the foreign commerce test has been brought into a close correspondence with the interstate commerce test.[432] The first two components, "in" and "direct" — seemingly substitutes — imply that the restraint falls within the ambit of the Sherman Act since it is

directly related to U.S. commerce, which means that it is applied to the continuing movement of goods between the United States and foreign countries. The third alternative component — "substantially affecting" — plays its part when the restraint is not "in" commerce but still has a sufficient nexus to such commerce, whether or not, however, the restraint has caused an increase or decrease of commerce.

Again, too few guidelines are attached to these formulæ. Their actual significance can be ascertained only by guesswork. Their future application will have to depend upon a thorough analysis of the court decisions with respect to foreign as well as interstate commerce. Since, however, as we have seen, the foreign commerce cases lack both continuity and consistency, such an analysis seems double-edged. Another insuffiency is that most of the cases have been decided by lower or appelate courts. The Supreme Court of the United States has had too few oppurtunities to state its views on the jurisdictional issues.[433]

When examining the foreign commerce case law in the light of the four approaches outlined in 4.3 above, one realizes that the U.S. courts have, through the years, shifted from the first approach, which presupposes an independent foreign commerce test separated from the interstate tests, to the fourth approach which assumed identical tests. The result of this fusion has been that considerations of international complications likely to arise have been set aside.

Unaffected, in part, by these conclusions is *Pacific Seafarers*[434] (*certiorari denied* by the Supreme Court), where the court,avoiding the "mechanical circumstances of effect", based subject matter jurisdiction on a set of American characteristics — weighing the American interests in the trade involved against the interests of other nations.

Unaffected is also *Timberlane*.[435] Here the jurisdictional formula was separated entirely from relevant international law considerations (notions of "comity and fairness"). The analysis was divided into three parts: first, does the alleged restraint affect, *or* was it intended to affect U.S. foreign commerce; secondly, is the restraint of such a magnitude as to be cognizable as a violation of the American antitrust laws; and third, as a matter of international comity and fairness and in light of the interests of the nations and the parties involved, should the extraterritorial jurisdiction of the United States be asserted to cover the restraint. In this tripartite analysis, the second part seems to have no relevant place in a jurisdictional discussion. It deals rather with the question of whether there is sufficient ground to state a claim of substantive violation of the antitrust laws. (As to the distinction, see *supra* p. 35). The other two parts, *together*, it is believed,

form the requisites necessary to establish subject matter jurisdiction. To be sure, there is some doubt as to the exact implications of the word *should* in the third part. The word indicates that no court is obliged — by international law or the antitrust laws — to make an analysis of opposing interests, that the analysis lies rather within the court's own discretion, exercised with due respect for the role of the executive and for international notions of comity and fairness.[436]

With *Timberlane*, the first step was taken towards a new paradigm in foreign commerce law. The balancing-of-interests test laid down in the Restatement (2nd) of the Foreign Relations Law and the "jurisdictional rule of reason" proposed by Brewster (among others) are amalgamated into an abstract rule, the concrete application of which, however, is still to be awaited.[437]

In the early case law, when jurisdiction was restricted principally to conduct within the United States, the courts faced no difficulties when working out the *remedies* in the specific case. But after *Alcoa*,[438] when jurisdiction was extended to cover worldwide anticompetitive conduct, the courts endeavoured to mold the remedies cautiously in awareness of the complications likely to arise if foreign interests were to be disregarded. "Saving clauses" were, for instance, inserted in the final decrees,[439] in order to prevent a defendant from being caught between the court orders and the laws of his home country, and, thus, to protect the legal rights of the individual.

Throughout the foreign commerce case law, the *process of localizing the conduct* — whether relevant or not — has been put in the margin. True, acts have been localized, but always in a conclusionary fashion, with the exception of some of the earlier cases, without accompanying directives as to the significance of the localization.

Throughout the foreign commerce case law, little or no attention has, likewise, been paid to the *question of characterization*. The courts have not, for right or wrong,[440] bothered to give the specific action, nor the antitrust law invoked, a characterizaton — as being civil, administrative or criminal — for purposes of international law. In a few cases, characterization has been provided, but then mainly, it seems, whithin the realm of domestic procedural law.

Finally, in no case has the possibility been considered of applying less restrictive *substantive* antitrust rules in cases with international implications, nor has discriminatory treatment between U.S. and foreign corporations in this respect ever been suggested.

Notes, Chapter 1, Section 5

[1] See further *infra*.

[2] See *supra* p. 57 f.

[3] See *supra* p. 58.

[4] Corporations hereinafter referred to as *alien* (or sometimes *foreign*) are such that are seated (incorporated, registered, etc.) outside the United States.

[5] A separete discussion of the views of the commentators will follow the study of the case law.

[6] 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909).

[7] Sherman Act, Section 7, which was superseded and later repealed by the Clayton Act, Section 4. This latter section is applicable to the "antitrust laws" defined and enumerated in Section 1 of the Clayton Act, namely the Sherman Act, the Wilson Tariff Act and the Clayton Act (including Robinson-Patman Act, Section 2 but *not* Section 3).

[8] Costa Rica had *de facto* jurisdiction (Costa Rica was allowed to administer the territory), while *de jure* the territory was Panamanian — originally a part of the United States of Columbia; but Panama revolted and became an independent republic in 1903.

[9] United Fruit either acquired the business and property of , or a controlling amount of stock in competing companies, or made restraining contracts with them, fixing prices, etc.

[10] Leading authorities in the field of U.S. Conflict of Laws cite the American Banana case as an example of an application of the traditional rule of Conflict of Laws, namely that the place of the wrong (tort) decides what law governs.(See the Restatement (1st) of Conflict of Laws, §§ 377—383). See e.g. Leflar, 317 ff.; Ehrenzweig, 543 f., n. 18 and 19;

Justice Holmes, who was at the time vigorously advocating the place of the tort rule and a leading parttaker in the attacks against the *lex fori* rule, had previously delivered opinions on which the American Banana case rested in part: See Slater v. Mexican Nat. R. Co., 194 U.S. 120, 48 L.Ed. 900, 24 S.Ct. 581 (1904) and Walsh v. New York and New England R.R., 160 Mass. 571, 36 N.E. 584 (1894). The former case is cited in American Banana in a critical phase (see 213 U.S., at 356), where the place of the tort rule is stipulated: "[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." The rationale of the place of the tort rule — fairness to the tortfeasor — is also touched upon by Justice Holmes (*id.*, at 356), when he claims that it would be "unjust" to treat the actor according to the law of the forum rather than to the law of the tort. The fact that the damages are tripled does not necessarily make the proceedings penal (criminal). See Prosser, Law of Torts, 9 ff. The treble damages provision has been regarded by the Supreme Court as remedial rather than penal. (See e.g. Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, at 396—397 (1906). Furthermore, the American Banana case has in later cases been characterized as civil rather than criminal (see e.g. U.S. v. Bowman, 260 U.S. 94, at 98, 43 S.Ct. 39, 67 L.Ed. 149 (1922)). Also see Huntington, v. Attrill, 146 U.S. 657 (1892) and Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918). Also see Zwarensteyn, 124 f.; the same, The Foreign Reach of the American Antitrust laws, 3 Am. Bus.L.J. 163, at 170 ff. (1965); Simson, Gary J., The Return of American Banana: A Contemporary Perspective On American Antitrust Abroad, 9 J.Int.L. & Ec. 233, at 236 (1974); Notes and Comments, Extraterritorial Application of the Antitrust Laws: A Conflict of Laws Approach, 70 Yale L.J. 259, at 264 (1960).

[11] 213 U.S., at 357—359 (the latter part of 357).

[12] 213 U.S., at 356—357 (the former part of 357).

[13] See the general reasoning *id.*, at 355—356, where the fundamental jurisdictional principle and its exceptions are stated. The general reasoning is applied to the Sherman Act and the specific case at 357 and the following pages.

[14] This appears from that part of the opinion where the general principles of jurisdiction in the international sphere are outlined: References are made to both criminal and tort cases, without distinction. And when the foremost principle is set forth, reference is made to a tort case (see *supra* n. 10 — Slatter v. mexican Nat. R. Co.). Moreover, the reach of the Sherman Act is discussed generally without attention paid to whether a criminal or a tort proceeding was instituted. (The Court regarded the first provisions of the Sherman Act as being criminal — see 213 U.S., at 357 — if relied on as such). See e.g. Snyder, Earl A., Foreign Investment and Trade: Extraterritorial Impact of United States Antitrust Law, 6 Va.J.Int.L. 1, at 32 (1965).

[15] 213 U.S., at 359. ("A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law.").

[16] "[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done ..." (213 U.S., at 356). And further: "We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the [Sherman Act] so far as the present suit is concerned ... For again, not only where the acts of the defendant in Panama or Costa Rica not within the Sherman Act, but they were not torts by the law of the place, and therefore were not torts at all, however contrary to the ethical and economic postulates of that statue." (*Id*, at 357).

That these limitations, in the court's view, are imposed by international law and "comity" is evident from the following passage: "For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent." (*Id.*, at 356). The jurisdictional criteria is, as indicated *supra*, n. 12, the same in a private suit for treble damages (under Section 7 of the Sherman Act) — a tort action, as characterized by the Court — as those for criminal antitrust proceedings (under, for instance, Sections I and 2 of the same act).

But Justice Holmes was not advocating the rule that the law of the place of making governs the validity (and legality) of contracts. (*Id.* at 356): "This principle [that the legality of an act shall be determined by the law of the country of the acting] was carried to an extreme in Milliken v. Pratt, 125 Mass. 374, 28 Am.R. 241 (1878)." See also Justice Holmes in Union Trust Co. v. Grosman, 245 U.S. 412, at 417, 38 S.Ct. 147 (1918).

[17] See *id.*, at 359; As to these acts, the Court had no "ground for supposing that [they were] unlawful in the countries where the purchases were made."

[18] Basically, however, the localization of an agreement should meet the same difficulties as in the Conflict of Law theories.

[19] See *supra* n. 15.

[20] See e.g. Ellis , J.J.A., Extraterritorial Application of Anti-Trust Legislation, 17 N.T.I.R. 51, at 52 (1970). Some scholars, however, entertain the view that effects on U.S. foreign trade were absent or were not shown, implying that had only such existed or been proved, jurisdiction would have lain. See e.g. Rollings, C., The Extraterritorial Application of American Antitrust Law and the Export Expansion Act of 1971, 5 Int. Law & Pol. 531, at 532 (1972); Fugate, at 30 ff., 37 and 40 ff.; Trautman, D., in Brewster, at 318 f. Yet, such opinions seem to miss the point. Even if effects had existed or been proved, the Sherman Act would have lacked the substantive scope. Justice Holmes did, it is true, recognize that in exceptional cases juris-

diction could be based on effects ("[i]n cases immediately affecting national interests ...", such as criminal correspondence with foreign governments, *id.* at 356). A year later, in *Strassheim v. Daily* (221 U.S. 280, at 285, 31 S.Ct. 558, 55 L. Ed. 735 (1910)), Justice Holmes, at the first sight somewhat surprisingly, stated: "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." And reference was, *inter alia*, made to the *American Banana* case. Mark, however, that the reference only goes back to the general reasoning in *American Banana* outlined at p. 356, not to the specific case or holding as such. It is a reminder of the exceptional cases concerning national interests, noted immedialtely above. Reference is further made in *Strassheim v. Daily* to the classic case of shooting across the boarder (Simpson v. State, 92 Ga. 41, 17 S.E. 984, 22 L.R.A. 248, 44 Am.St.R. 75 (1893)). Justice Holmes was fully aware of these exceptions to as he framed it, "the general and almost universal rule" that the law of the place of the act, *lex loci delicti*, controls. But he did not consider the Sherman Act to constitute such an exception in the *American Banana* case, against the background of international law and the intent of Congress. (*Id.* at 356—357). (*Strassheim v. Daily* is furthermore a domestic case, without international complications). Thus, had there been any effects on U.S. foreign trade (as there probably were), these would have had no relevance as to the jurisdictional issue. *Cf.* Mr Justice Holmes in Mulhall v. Fallon, 176 Mass. 266, at 268, 57 N.E. 386, at 387 (1900): "It is true that legislative power is territorial, and that no duties can be imposed by statute upon persons who are within the limits of another state."

See e.g. W.B. Hunting, Extra-territorial Effect of the Sherman Act: American Banana Company versus United Fruit Company, 6 Ill. L. Rev. 34 (1911—12).

But see Timberg, S., Extraterritorial Jurisdiction under the Sherman Act, 11 The Record of the Association of the Bar of the City of New York 101 (1956), at 103.: "Is there a persuasive legal distinction between the two situations, or was Justice Holmes a legal schizophrenic on this subject? I think the latter to the case ...".

Also see Zwarensteyn, at 124.

[21] To be precise, it was an affirmance of a dismissal in the lower courts. (166 Fed. 261, 2d Cir. 1908).

[22] See e.g. Smit, H., International Aspects of American and Netherlands Antitrust Legislation, 5 N.T.I.R. 274, at 279 (1958); Whitney, W.D., Sources of Conflict Between International Law and the Antitrust Laws, 63 Yale L.J. 655, at 659 (1954); Attorney General's Report, 67, n. 8; Krumbein, 13 f. But see Brewster (at 68), who seeks to confine the precedential import of the case by narrowing the holding to certain facts. Brewster concludes that the case was dismissed mainly due to the failure on the part of the plaintiff to "demonstrate the connection between the acts complained of and the injury for which recompense was sought." Relying on the opinions of the lower courts (166 Fed. 261, at 264, 2d Cir. 1908) he argues that since the acts that caused the principal damage were immune from complaint — while performed by a foreign government — nothing much was left for the plaintiff to base his action on. The remaining allegations were too "indefinite " and "uncertain" to constitute a separate demand. By invoking the act of state doctrine, the Court "wiped out" the plaintiff's case. Had there only been moore manifested "private" acts, jurisdiction — even on account of effects of such acts — might have been assumed, Brewster seems to reason.

However, if the Sherman Act does not cover any of the acts complained of (including the persuasion of the Costa Rican Government to seize the plantation and the railway), there is no reason to bring forth the act of state doctrine, were that not an supplementary ground. In the *American Banana* case the Court clearly considered that none of the acts where within the Sherman Act (*id.* at 357), and it did so because it believed the "almost universal" rule to be that the law of the place of the wrong controlled, a rule which Congress, in a case of doubt, must be regarded to have adopted. And then the Court delivered the supplement: "[N]ot only were the acts of the defendant in Panama or Costa Rica not within the Sherman Act, but they were not

torts by the law of the place, and therefore were not torts at all ...".

Thus, if the Sherman Act did not cover, it was irrelevant for the sake of that statute whether the acts complained of were lawful or unlawful where they were done. (See Rahl, at 56, disclosing a different opinion). But, in addition, none of the acts in fact were unlawful where done, *i.e.*, under the laws of Costa Rica (or Panama): "[W]e have no ground for supposing that [the United Fruit's outbidding of competitors, including American Banana] was unlawful in the countries where the purchases were made." And further: "[W]e are of opinion that [the complaint] alleges no case under the act of Congress [the Sherman Act], *and* discloses nothing that we can suppose to have been a tort where it was done." (*Id.* at 359, emphasis added).

Moreover, if we assume for a moment that the acts not affected by the act of state doctrine (the prevention upon American Banana to purchase) did not constitute a separate complaint (as Brewster suggests) and that on that ground the case was dismissed. Where did the issue of subject matter jurisdiction come in? There are two possibilities: either that jurisdiction already was assumed when the case was dismissed on the said ground, or that the ground itself was jurisdictional. Since the former possibility lacks all logic — it rests on the presumtion that Justice Holmes accepted at one stage what he denied at another (we as Zwarensteyn, at 124, take exception to the statement that Mr Justice Holmes suffered from legal schizophrenia, see Timberg, S., Extraterritorial Jurisdiction under the Sherman Act, 11 The Record of the Association of the Bar of the City of New York 101, at 103 (1956)) — only the latter will, briefly be discussed. Subject matter jurisdiction was, according to this, not assumed since the plaintiff was unable to present sufficient proof of injuries suffered on business or property within Costa Rica (see Brewster, 68) from the independent *private* acts of the defendant. But proof of injuries is also a substantive question. The jurisdictional and the substantive issues are thus intermingled.

Does subject matter jurisdiction in foreign commerce cases, accordingly, depend on proof of injuries? (In interstate commerce, as we have seen, it does not. Proof of the act itself — from which conclusions as to nexus between the act and the interstate commerce can be drawn (induction) — is sufficient: see e.g. Burke v. Ford, 389 U.S. 320, *supra* p. 41). Theoretically it might. (See *supra* p. 41 ff.). As a practical matter, more feasible routes are, no doubt, available. (See *infra* p. 177 ff).

[23] See e.g. The Restatement (2d) of Foreign Relations Law, §§ 41 ff. See further *infra* p. 583.

[24] See further *infra* p. 163 f.

[25] See further *infra* p. 164.

[26] 221 U.S. 106, 31 S.Ct. 632, 55 L.Ed. 663 (1911).

[27] Just to note that there was a second by the same name, see American Tobacco Co. v. U.S., 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946).

[28] 221 U.S. 106, at 149—150 sections 2—4, 6—8.

[29] See e.g. Zwarensteyn, (46—48 and 54 ff.), who probably would have characterized the action as administrative, since the remedy in his view is regulatory and since the Government instituted the action and sought the remedy. But see *infra* p. 101 ff., the *Oldham* case where the action was characterized as criminal.

[30]Omissions to export from a foreign country are naturally hard to localize. Does it, for instance, make any difference if prior exports are made F.O.B. (free on board) or C.I.F. (cost, insurance, freight) in a foreign port, or C.I.F. (or C.F.) a U.S. port? See e.g. the discussion in the ILA-Report, 1972, Hunter, I., Specific Application to Anti-trust Matters of General Principles of International Law Governing the Assumption and Exercise of Jurisdiction, p. 156 ff. and Raymond, J.M., A New Look at the Jurisdiction in Alcoa, 61 Am.J.Int.L. 558 (1967). See also *infra*, p. 132 ff.

[31] But see Bloch, H., Extraterritorial Jurisdiction of U.S. Courts in Sherman Act Cases, 54 ABA J. 781, at 782 (1968), who claims that the Court found a "substantial impact" of the contracts made in Great Britain "on the United States tobacco market" which brought the conspiracy within the purview of the Sherman Act. As to this conclusion: There is nothing in the Court's opinion in the almost 90-page long case that would even come close to a wording such as "substantial impact". The point was argued by the Government, but not discussed by the Court.

[32] 213 U.S. 347 (1909), see *supra* n. 15.

[33] 221 U.S. 106, 31 S.Ct. 632, 55 L.Ed. 663, at 665, 667 and 670 (1911).

[34] *Id.* 55 L.Ed., at 670 (emphasis added). See also at 684 (221 U.S., at 153).

[35] 221 U.S., at 184 ff.

[36] 221 U.S., at 149 and 154.

[37] The remedy is no doubt overdimensioned and unnecessarily so. By its wording it seeks to restrain and prevent all acts, done by the foreign corporations, in furtherance of the combination (in all its parts). A refusal to export to France, for instance, by Imperial (as promised by the agreement) would fall into that category. And so would probably a refusal by British-American to sell to the United Kingdom. But does United States have any interest in prohibiting such refusals, and is it necessecary? If the U.S. corporations are prevented from fulfilling their part of the deal by the U.S. courts, why should the foreign corporations keep the agreement?

[38] 191 F. 371.

[39] *Id.* at 381—383.

[40] *Id.* at 418 (in a note to the case).

[41] See *supra* n. 16.

[42] 223 U.S. 512, 32 S.Ct. 244, 56 L.Ed. 531 (1912).

[43] *Supra* n. 15.

[44] Section 19 of the Immigration Act of 1907 (34 Stat. at L. 898, 904, chap. 1134, U.S. Comp. Stat. Supp. 1909, pp. 447, 458).

[45] Nord Deutscher Lloyd retained the money in possession until the day of the indictment. See 223 U.S., at 513 and 518.

[46] *Id.* at 513—514.

[47] *Id.* at 517—518.

[48] *Id.* at 518.

[49] *Supra* p. 67 ff.

[50] 228 U.S. 87, 33 S.Ct. 443, 57 L.Ed. 742 (1913).

[51] *Id.* 228 U.S., at 89 and 105. Also see *infra* p. 101 ff. where the court in *Oldham* made a like characterization.

[52] This is, however, not definitely stated in the Court's opinion, but it is probable and the defendants did not contend otherwise. Also see Brewster, 69 and Reynolds, W.B., Extraterrito-

rial Application of Federal Antitrust Laws: Delimiting the Reach of Substantive Law Under the Sherman Act, 20 Vand.L.Rev. 1030, at 1036 (1966—1967).

[53] 228 U.S., at 106 (emphasis added).

[54] *Id.* at 105—106.

[55] *Id.* at 106.

[56] See *supra* p. 41 ff. as to the meaning of "affect" in interstate commerce.

[57] 243 U.S. 66, 37 S.Ct. 353, 61 L.Ed. 597 (1917).

[58] *Supra* n. 15.

[59] See e.g. 243 U.S., at 70, 72, 73, 88 and 89.

[60 a] *Supra* n. 50.

[60 b] *Supra* n. 42.

[61] The alien (German) company had an agent in the United States. (See 243 U.S., at 69.)

[62] *Supra* n. 50.

[63] 243 U.S., at 88. See the lower courts opinion 166 Fed. 251, at 253.

[64] But see for instance Timberg, S., Antitrust and Foreign Trade, 48 Nw. U.L.Rev. 411 (1953), at 419 ("... economic emphasis in the domestic illegal *effects* of those foreign acts") and Bloch, H., Extraterritorial Jurisdiction of U.S. Courts in Sherman Act Cases, 54 ABA J. 781 (1968), at 782, ("[the agreement]had substantial effect within the United States ..."). Also Fugate, 1st ed. at 52—53, seems to be looking for an actual effect (and finds it). The question is however: where do these learned scholars find actual effects; hardly in the case itself.

[65] 200 Fed. 806 (S.D.N.Y. 1911), 216 Fed. 971 (S.D.N.Y. 1914), *reversed* on ground of mootness, 239 U.S. 466, 36 S.Ct. 212, 60 L.Ed. 387 (1916).

[66] Part of the opinion of the lower courts in *Thomsen v. Cayser* (Thomsen v. Union Castle Mail S. S. Co., 166 Fed. 251, 92 C. C. A. 315, 2d Cir. 1908) was quoted.

[67] 200 Fed. 806, at 807.

[68] *Id.* Compare *supra* p. 72 f.: the *Nord Deutscher Lloyd* case.

[69] *Id.* (emphasis added).

[70] *Id.* (emphasis added).

[71] *Id.* (emphasis added).

[72] Compare *id.* at 807 and 166 Fed. 251, at 253 (2d Cir. 1908).

[73] Note Fugate, (1st. ed. at 39—40) who, in a decisive way, misquotes the case: "It has been noted that in the lower court opinion in the *Hamburg-Amerikanische* case, the court stated that it saw no reason to interpret the Sherman Act narrowly, 'as prohibiting only contracts which are to be performed within the territorial jurisdiction of the United States'." Fugate deletes the word "wholly" — from the original "performed wholly within" — and thereby changes the meaning of the sentence decisively from a jurisdictional point of view. (But see 2d. ed., 53 f.). *Cf.* 200 Fed. 806, at 807 (S.D.N.Y. 1911). That the combination in the case at hand implied the performance of acts both without and within the United States, the Court recog-

nized. And on the ground of the latter acts, the Court assumed jurisdiction. The Court did not wish to state that jurisdiction could be assumed on performance of acts outside the United States alone, and it did not so state. The conclusion that Fugate makes (at p. 40) is therefore partly false ("Thus it appears that it is the effect within the United States or upon United States foreign commerce which is the test rather than where the contract is made or where it is to be performed.")

[74] 274 U.S. 268, 47 S. Ct. 592, 71 L. Ed. 1042 (1927).

[75] 274 U.S. 276 (1927).

[77] 274 U.S. 272 (1927).

[79] 274 U.S. 271 (1927).

[81] See *supra* p. 57 ff.

[82] For a more comprehensive analysis, see *infra* p. 503 ff.

[84] *Supra* p. 73 f.

[85] *Supra* p. 74 ff.

[86] *Id.*

[87] 148 F.2d 416 (2d Cir. 1945).

[88] *Id.* at 441—442.

[89] "We should not impute to Congress and intent to punish all whom its courts can catch...". *Id.* at 443.

[90] See *infra* n. 97 and p. 88 f.

[91] "Did either the agreement of 1931 or that of 1936 violate § I of the Act? The answer does not depend upon whether we shall recognize as a source of liability imposed by another state." (148 F.2d, at 443). Would such a statement be possible in the case of a civil action? It probably would, but only on the ground that no other country's law was suggested to apply by either of the parties. See Heidemann, at 38.

[92] This is said in spite of Alcoa's controlling power over Limited. As noted *supra*, Limited's conduct in conjunction with the other corporations was not, as the Court saw it, induced by Alcoa.

[93] *Cf.* the similar situation in U.S. v. American Tobacco Co., 221 U.S. 106, *supra* p. 69 and in U.S. v. Sisal Sales Corp., 274 U.S. 268, *supra* p. 77, where alien corporations agreed not to deal, or deal exclusively, with the U.S. market.

[94] 148 F. 2d, at 443—444 ("conduct outside the United States"; "outside its borders").

[95] See e.g. the cases mentioned *supra* in n. 93.

[96] Restatement (1st) of Conflict of Laws, § 65, p. 97. See also § 425, Comment a (p. 502—503), and § 377, Comment a (p. 454—455). The former concerns criminal jurisdiction and the latter jurisdiction in tort cases. Both sections refer to the same rule, stated in Section 65.

A "state" is defined to comprehend any "territorial unit in which the general body of law is separate and distinct from the law of any other territorial unit." Thus any nation is included. See § 2 (p. 4—6), in particular Comment e.

[97] 148 F.2d. at 443, whereupon cases were cited to support the "settled" principle of law:

Strassheim v. Daily, 221 U.S. 280, at 284—285, 31 S.Ct. 558, 55 L.Ed. 735; Lamar v. U.S., 240 U.S. 60, at 65—66, 36 S.Ct. 255, 60 L.Ed. 526; Ford v. U.S., 273 U.S. 593, at 620—621, 47 S.Ct. 531, 71 L.Ed. 793. In the first case the issue was, *inter alia*, whether the state Michigan had jurisdiction over the criminal acts of defendant Daily, who was present in another state (Illinois). Daily had by false pretenses and by bribery of a Michigan state officer, obtained money from that state. In his efforts to deceive the Michigan state, Daily was partly active within the state. (See 221 U.S., at 284). See further on this case, *supra* n. 20.

In the second case, a New York court was considered correct in assuming jurisdiction over the criminal acts (false personation, with intent to defraud of an officer of the United States) of Lamar, when the personation was made by telephone to a person in New York from within or without New York. (240 U.S., at 65—66). Both of these cases now mentioned involved only persons domiciled in the United States. Mark also that both opinions were delivered by Justice Holmes, the author of the opinion of the *American Banana* case (*supra* n. 15. *Cf. supra* n. 20). In Ford v. U.S., a British vessel was seized on the high seas outside the U.S. West Coast (under the authority of a treaty between the United States and Great Britain — of May 22, 1924, 43 Stat. at L. 1761) and her officers — British subjects — along with two others were charged with violations of U.S. criminal laws (liquor-smuggling). The conspiracy was continuously in operation between persons in the United States and persons on the high seas adjacent thereto. There were four overt acts committed in pursuance of the conspiracy, whereof three were, by the time of the seizure, completed and took effect within the United States while the fourth failed of its effect only by reason of the seizure. Hence the conspiracy was directed to violation of the United States law by persons both within and without it acting in concert to effect a common unlawful plan. The Court stated generally: "[J]urisdiction exists to try one who is a conspirator whenever the conspiracy is in whole or in part carried on in the country whose laws are conspired against." As to the specific facts of the case the Court concluded: "The overt acts charged in the conspiracy to justify indictment ... were acts within the jurisdiction of the United States, and the conspiracy charged, although some of the conspirators were corporeally on the high seas, had for its object crime in the United States and was carried on partly in and partly out of this country, and so was within its jurisdiction ...".

To relate these three cases to the decision in Alcoa,one has to build bridges. And the Court in Alcoa so did, but where did the building-material come from?

[98] 148 F. 2d. at 443.

[99] *Id.*

[100] Fugate (1st ed.), at 37 and 42 ff.

[101] See the Restatement (1st) of Conflict of Laws, § 347 (p. 427—428), where the rule is stated under the title "Defenses", indicating that the rule is to apply to civil actions (contract) between private individuals.

[102] The rule does not regulate jurisdiction, especially not the jurisdiction of the country in which the contract was not made. It merely implies that by the law of the state where the contract was made, a contract is illegal if the promised performance of it in another state is illegal and the parties knew that it would be. The question whether the latter state has jurisdiction over the agreement or not, cannot be solved by this rule.

[103] 148 F.2d. at 443.

[104] *Id.* at 444.

[105] *Id.* See *supra* (in the given order) p. 73 f., 74 ff., 77 f., and 72 f.

[106] See the cases mentioned in *supra* n. 105 and the general conclusion at p. 78 ff.

[107] 148 F. 2d. at 444.

[108] Or was the construction an attempt to find activities within the United States? Compare Lord Campbell's statement in Reg. v. Garrett, (Dears. C. C. 232, 241, 169 Eng. Reprint, 707): "[I]f a man employ a conscious or unconscious agent in this country [referring to England], he may be amenable to the laws of England although at the time he was living beyond the jurisdiction." Thus, were the U.S. importers of aluminum ingot the "unconscious agents" of the alien contractors? (Compare Judge Hand's statement in Alcoa: "... besides, only human agents can import and sell ingot." That would, however, be to read too much of a contradiction into the opinion of the Court. As the Court itself proclaimed at the outset of the jurisdictional discussion (148 F. 2d, at 443): [W]e are concerned only..." with "... conduct outside the United States...".

Compare also the formulation of the essential principle afforded by Judge Caffey in the lower court (U.S. v. Aluminum Co. of America, 44 F.Supp. 97, at 283. S.D.N.Y. 1941): "The vital question in all cases is the same: Is the combination to so *operate in this country* as to directly and materially affect our foreign commerce." (Emphasis added.)

[109] As to proposed motives and background to the Alcoa decision, see e.g. Kronstein, H., Neue amerikanische Lehren zum Internationalen Privatrecht im Lichte des amerikanisch-europäischen Kartellkonflikts, in Festschrift für Martin Wolff (1952), p. 225, at 228, 229 and 230. Kronstein juxtaposes the decisions in *American Banana* (*supra* p. 67), and *Alcoa* and in a spirit of "retrospective realism" concludes, first, that the Court in Alcoa would never have reached this result, had it followed the *American Banana* doctrine; secondly, that the *American Banana* case must be seen in light of the general economic and industrial philosophy that Justice Holmes and his time embraced (few or no statutory limitations on the economic organization, an economic order, which, as a matter of power, had been molded by the majority). Justice Holmes believed, according to Kronstein, that each sovereign nation was free to decide and form its own economic system within its borders, regardless of the impact of this system on other nations. Thirdly, Kronstein concludes that Judge Hand, in his decision, was considerably influenced and guided by profound congressional investigations and hearings carried through anterior to the Alcoa case, which had convinced the Americans of the necessity of abandoning the implications of *American Banana* for a more offensive foreign trade policy — by emphasizing its own sovereignty — that would open up the world market. (See Truman Committe on Investigation of the National Defense Program, U.S. Senate, 77th Congress, 1st Session; Bone Committee on Patents, Hearings before the Committee on Patents, U.S. Senate, 77th Congress, 2nd Session).

See also Brewster, 72 f. ("Certainly it — the Alcoa decision — does not agree with the philosophy of Banana."); Krumbein, 18; Smit, 284, Simson, G.J., 237; Timberg, *supra* n. 64, at 419, Barnard, R.C., 101.

But see e.g. Fugate (1st ed.) at 29, 30 and 31 (discussed *infra* p. 168 ff., 177 ff.) and Rollings, C., 531 f.

[110] See e.g. Fugate (1st ed.), at 143 f.; Goldstein, E.E., International Patent and Knowhow Interchanges and the American Antitrust Laws, 4 Tex.Int.L.For. 42 (1968), at 44 f. (where the different types of "intent" are confused); Brewster, 64. But see Rahl, at 67 n. 37 (*cf.* Rahl, at 86 ff.).

[111] 148 F. 2d 444.

[112] *Id.*

[113] Said the Court when discussing the opinion of the lower court: "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 re-

striction upon production would have an effect upon imports, we cannot agree...". (148 F.2d, at 444).

[114] See e.g. Brewster, 66, 75 and 134 and Rahl, 86 ff (especially at 87), who seem to discern a specific intent.

Cf. Fugate (1st ed.), at 45 ff. and 53 f.; Bohlig, 50 f.; the same, Die Auswirkung des amerikanischen Antitrustrechts auf Patente und Patentlizensen im Ausland, 8/9 G.R.U.R. 421 (1959), at 429 f.; Antitrust Developments 1955—1968, 49; Antitrust Law Developments 1968—1975, 356 ff.

[115] 148 F.2d, at 444.

[116] See *supra* p. 41 ff.

[117] 148 F.2d, at 444 (emphasis added).

[118] It is uncertain whether Judge Hand intended to lay any stress on *loci contractus* for the purpose of jurisdiction (although it is clear that he did not give the fact that the contract was made outside the United States any *decisive* importance). The following lines are puzzling: "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." (148 F.2d, at 444). Assuming, *arguendo*, that Judge Hand did have in mind the actual conclusion of a contract, the signing of an agreement: how does that correspond to the decision in *American Banana* (*supra* p. 67)? It does not: "A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law." (213 U.S., at 359). Thus, it seems more likely that Judge Hand was not thinking of the making of the agreements as such, but alluded to the whole restraint, including the conduct in pursuance of the agreements.

[119] 148 F.2d, at 445. Compare also the lines quoted in n. 117, *supra*: "Both agreements..." etc. Judge Hand did not pause to consider the reasonability of the agreements. They would be unlawful with no further argument, were only the jurisdictional criteria to be fulfilled.

[120] 148 F.2d, at 443.

[121] See e.g. Brewster, 64 and 134. For a different view, see e.g. Rahl, 88.

[122] U.S. v. Aluminum Co. of America, 91 F.Supp. 333 (S.D.N.Y. 1950).

[126] 63 F.Supp 513 (S.D.N.Y. 1945), *modified and affirmed*, 332 U.S. 319, 67 S.Ct.1634, 91 L.Ed. 2077 (1947). The expression "The Court" as used hereinafter (as far as this case concerns) refers to the District Court of New York; when the Supreme Court is referred to, that will be noted.

[127] 63 F.Supp. 513, at 521.

[128] 332 U.S. 319, at 338 and 348.

[129] See *supra* n. 126.

[130] 63 F.Supp. 513, at 524 f., especially 525 n. 8.

[131] See *id.*, at 524. *Cf. supra* p. 72, 73, 74 and 77 (in the same context).

[132] *Cf. supra* p. 72, 73 and 77—79 (in the same context).

[133] 63 F. Supp. 513, at 522.

[134] See *supra* p. 74 and 77.

[135] 63 F.Supp. 513, at 525.

[136] *Id.* at 525. Also see *id.* at 524 and Fugate, at 132f. and 137 (1st ed).

[137] *Id.* at 532 ff.

[138] *Id.* at 525 n. 8.

[139] 82 F.Supp. 753 (D.N.J. 1949). Also see 95 F.Supp. 165 (D.N.J. 1950). The case is also known as the *Incandescent Lamp* case.

[140] The principal part of this mastodon case (including the remedy, over 200 pages long) centers around General Electric's domestic market behaviour.

[141] See 82 F.Supp. 753, at 827 and 835 f.

[142] About the relation between GE and IGE, see *id.* at 764 and 830 ff.

[142a] There were twelve defendants, all U.S. corporations except Philips from Holland. Why were there no other alien defendants before the Court? Philips was just one of several alien corporations that entered into agreements with IGE of the kind mentioned. It seems as if the only ground for attacking Philips alone, was that personal jurisdiction could not be obtained over any other corporation. It was a fortuitous circumstance that enabled the Court to secure personal jurisdiction over officers of Philips that had left Holland for the United States during the war, were at the commencement of the action, residing in the United States (as refugees) and thereby aviable to service of process.

[142b] The activities of the other defendants presented no jurisdictional problems.

[143] *But see* in the Final Judgment — 115 F.Supp. 835, at 843—844 — where the court moved with caution, in order to avoid branding the remedy as penal.

[144] 82 F.Supp 753, at 890.

[145] *Id.* at 885 f.

[146] *Id.* at 836, 843 and 887 ff.

[147] *Id.* at 835.

[148] *Id.* at 885, the 1919 agreement.

[149] See *supra* n. 30. Philips did export lamps to the United States anterior to the 1919 agreement, but due to a patent infringement action against it in 1916, it was forced to cease this export (being unable to secure a license from GE). See *id.* at 885, also 842 and 886.

[150] *Id.* at 889 f. The Phoebus agreement alone was not necessarily a wrong. That agreement in combination with the licence agreements was the object of the attack. *Id.* at 890.

[151] See *supra* p. 69 ff. the *American Tobacco* case, which presented a similar problem.

[152] *Supra* p. 81 ff.

[153] 82 F.Supp. 753, at 884 f.

[154] *Id.* at 891.

[155] *Id.* at 889 ff.

[156] *Id.* at 891.

[157] Neither did apparently Philips. *Id.* at 884—885. Also see Fugate (1st ed.), 144 f. and Rahl, 63.

[158] *Id.* at 891.

[159] *Id.*

[160] *Id.* at 884—885 and 889.

[161] *Id.* at 889. A complicating factor was that GE put forward the same argument as Philips, but to justify the restraint, *i.e.*, to characterize it as reasonable and hot for jurisdictional ends.

[162] But see Fugate (1st ed.), 46, who weems to be of a different opinion.

[163] *Id.* at 891.

[164] See *supra* n. 111 ff.

[165] *Cf.* for instance *id.* at 845 ff. and 889, as to the application of the rule of reason. See also *id.* at 891 as to the application of Section 2 of the Sherman Act.

[166] 115 F.Supp. 835, at 843 f.

[167] *Id.* at 846.

[168] *Id.* at 860—861.

[169] *Id.* at 851—852.

[170] *Id.* at 877.

[171] *Id.* at 878.

[172] *Id.*

[173] 100 F.Supp. 504 (S.D.N.Y., 1951). Also see 105 F.Supp. 215 (S.D.N.Y., 1952). Prior to this case, *U.S. v. Timken Roller Bearing Co.* (83 F.Supp. 284 (N.D. Ohio 1949)) *mod. and affirmed*, (341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951)) and *U.S. v. Minnesota Mining & Mfg. Co.* (92 F.Supp. 947 (D. Mass. 1950)) (also see 96 F.Supp 356 (D.Mass. 1951), were decided. Both of these cases encompass significant antitrust issues of a substantive nature — the former, antitrust law and patent and patent-licensing, antitrust law and trademarks, anti-competitive measures between a parent and its subsidiaries, antitrust and joint ventures etc., and the latter, the interpretation of the Webb-Pomerene Act, what does that Act allow, etc. — but contain little or nothing as to jurisdictional matters. In *Timken* the sole defendant (as named), a U.S. corporation, and a leading producer of antifriction bearings, entered into agreements with an English and a French corporation (named as co-conpirators and in which the defendant owned 30 percent and 50 percent respectively) whereby trade territories were allocated, prices were fixed, U.S. exports and imports were resticted and the defendant's trademark was licensed to the other contractors. The fact that the cartel agreements were made on foreign soil was considered immaterial. The agreements, the Court laconically concluded, "had a direct and influencing effect on trade in tapered bearings between the United States and foreign countries." (83 F.Supp., at 309). Additional comments were regarded as superfluous.

In *Minnesota Mining* the U.S. defendant corporations were involved in the creation of a U.S. export company under the Webb-Pomerene Act (see *supra* p. 61 ff.) and a U.S. holding company for the purposes of channeling the exports of U.S. producers of coated abrasives to certain parts of the world market, excluding, however, those foreign markets where their jointly owned foreign factories were established. Apparently, no jurisdictional issue arose, nor did any international complications.

Also see *U.S. v. United States Alkali Export Assn.* (86 F.Supp. 59 (S.D.N.Y. 1949)), in which jurisdiction with respect to a division of market territories between American and British companies was assumed on the ground that American companies did participate in the arrangements, and *U.S. v. The Bayer Co.,* Inc.,135 F.Supp. 65 (S.D.N.Y., 1955) which involved a world wide territorial division of the pharmaceutical market (in particular at p. 70—71, where the jurisdictional issues are — very ligthly — touched upon).

[174] See 100 F.Supp. 504, at 539.

[175] *Id.* at 508. Remington Arms Company, Inc., a Delaware corporation, was also a party before the Court, as were three individuals, all citizens or residents of the United States. Named as defendants, but not served with process, were also two British subjects.

[176] *Id.* at 538—539.

[177] *Id.* at 572 ff.

[178] See, e.g., 105 F.Supp. 215, at 222, 226 and 243.

[179] See, e.g., 100 F.Supp. 504, at 528, 533 and 538.

[180] 100 F.Supp. 504, at 539. This provision was later deleted in a 1934 amendment of the 1929 agreement (*id.* at 540). However, the Court considered this change to be merely fictitious (also at 540).

[181] *Supra* p. 69 and 92.

[182] 100 F.Supp. 504, at 532, 534, 540 and 542.

[183] There was, in addition, a patent pooling: United States patents of both companies were placed in the hands of DuPont; DuPont's British patents in nylon were assigned to ICI. Did such a pooling take place where the patents were issued or where the owner of the patents was living or had his place of bussiness, etc?

[184] See in particular 105 F.Supp. 215, at 237.

[185] A like double-sided approach the Court demonstrated when giving (remedial) directives to the defendants, which was done in part "... because their concerted acts have, in part, been committed [in the United States] ...". (105 F.Supp. 504, at 537). And further, the agreements were "... unlawfully made and consummated in part by acts of the defendants within our jurisdiction."

[186] Personal jurisdiction over ICI was obtained through the medium of ICI's U.S. subsidiary in New York. The parent (ICI) and this subsidiary were found to be so inextricably associated that every move of the latter was directed by the former (100 F.Supp. 504, at 511). See further on this *supra* p. 12 ff.

[187] See *supra* p. 82 ff.

[188] *Supra* p. 90 ff.

[189] *Supra* n. 173.

[190] As to the jointly owned companies and the purpose behind them, the Court announced: "We have found that not only were they intended to affect the export and import trade of the United States but that the limitations placed on duPont and other American companies on the exports to these jointly-owned companies and the restictions placed on these companies with respect to sales and exports by them to the United States did achieve the purpose and end for which they were organized." (100 F.Supp. 504, at 592, citing the *Alcoa* case — see *supra* p.

81 ff. — and specifically those parts in *Alcoa* where the jurisdictional issue was discussed: 148 F.2d 416, at 443—444.) Obviously the quoted lines were inserted to reach the conclusion that the arrangements with the joint companies was a *substantive* violations of the law, since the jurisdictional question was not brought up until later (*id.* at 593) when the Court disposed of the defendants' contention "... that the arrangements involving joint companies do not fall within the jurisdiction of the Sherman Act." (Citing *National Lead* — see *supra* p. 90 — and applying its jurisdictional formula.) This is either a misinterpretation of the jurisdictional reasoning in *Alcoa* or simply bad pedagogy. The Alcoa formula was certainly not meant to be a guideline for issues regading substantive violations. (The jurisdictional formula in *Timken* — see *supra* n. 173 — underwent a similar treatment.)

[191] *Id.* at 593 (*National Lead* at 525).

[192] *Cf.*, with respect to the remedy: 105 F.Supp. 215, at 228 and 237.

[193] See in particular 100 F.Supp. 504, at 592—593.

[194] Note that only DuPont and not ICI was subjected to such a prohibition. 105 F.Supp. 215, at 220.

[195] *Id.* at 222 ff. Similar provisions were worked out with respect to know-how. (*Id.*at 227.) Such United States patents belonging to ICI which were not licensed to DuPont, were, however, also brought within the ambit of the compulsory licensing provision.

[196] *Id.*, at 228. A similar provision was imposed in *National Lead* (U.S. v. National Lead Co., 63 F.Supp. 513, at 534, S.D.N.Y., 1945), where, however, only U.S. corporations were involved.

[197] *Id.* at 231—232. This provision was combined with a decree ordering all licenses thenceforward to be nonexclusive and free of import protections.

[198] *Id.*, at 229.

[199] See *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.* [1952] All E.R. 780, [1952]W.N. 469 and [1954] All E.R. 88, [1954] 3 W.L.R. 505. Also see e.g. Kahn-Freund, O., English Contracts and American Anti-Trust Law. The Nylon Patent Case, 18 Modern L.Rev. 65 (1955); Fugate (1st ed.), 87 ff.; Brewster, 242 f.

[200] *Infra* chapter XVI.

[201] *Supra* p. 91.

[202] 105 F.Supp. 215, at 230.

[203] *Id.* at 241—242.

[204] *Id.* at 241.

[205] *Supra* p. 82 ff.

[206] 105 F.Supp. 215, at 229.

[207] *Id.* at 237.

[208] The basic approach was likewise equivocal, as for example: "[W]e are not unmindful that ICI is incorporated under the laws of Great Britain, that its principal office and its activities are there centered and that it operations are dominated by British necessities. We do not presume to dictate the manner in which the affairs of ICI are to be conducted; whether the exports of ICI to the United States are to be continued to be restricted it to be determined by

those who direct its affairs and by the British authorities." (*id.*) Yet ICI was prohibited from distributing goods through the same companies as DuPont and to conclude restrictive agreements of the sort in question in the case, directed to grant immunity with respect to certain patents, ordered to sell out stock and to relinquish voting rights in certain companies, etc. And yet the Court emphasized: "That [some of]these measures direct the defendants to do certain things the effect of which is felt or realized beyond our borders is immaterial." (*Id.*, at 237 f.)

[209] 135 F.Supp. 764 (S.D.N.Y. 1955).

[210] An indication is that the Federal Rules of Civil Procedure were applied. *Cf.* what is said about the *American Banana* case, *supra* p. 67.

[211] Common ownership of two corporations would not insulate such corporations from the antitrust laws.

[212] *Supra* p. 67.

[213] 135 F.Supp. 764, at 766.

[214] *Id.*

[215] *Supra* p. 81.

[216] *Supra* p. 67. The distinguishing ground was that, according the Court in *American Banana*, jurisdiction was denied due to the act of state doctrine. As to this see the discussion *supra* p. 68 f, particularly n. 16, 20 and 22.

The decision, so the Court claimed, fell within the decisions in *Thomsen v. Cayser* and the *Sisal* case (*supra* p. 74 and 77). But do these cases fall within *Alcoa*, which was primarily followed by the *Sanib* court? (See *supra* p. 100).

[217] See *supra* p. 38 f.

[218] See *supra* . 55 ff. But see Rahl, 84.

[219] 152 F.Supp. 818 (N.D. Cal. S.D., 1957).

[220] The Japanese corporations were not, however, joined as defendants.

[221] 152 F.Supp. 818, at 822. The Court incidentally noted that the Supreme Court had no difficulties in applying the Sherman Act in two other *criminal* actions: *U.S. v. American Tobacco Co.* and *U.S. v. Pacific & Arctic Railway & Navigation Co.* (see *supra* p. 69 and 73).

[222] *Id.* at 822.

[223] The fact that the agreements were made in Japan and may have been lawful there, was of no moment, it did not make the agreements lawful in the United States. (*Id.* citing *American Tobacco*).

[224] *Supra* p. 81. *Alcoa* was cited in a crucial context (*id.* at 822), namely where the jurisdictional criteria were outlined.

[225] *Id.* Note that the Court spoke of restraint on commerce, not competition. The Court did not seek to establish whether there was a substantive violation of the Sherman Act; it was seeking to secure jurisdiction.

[226] *Cf. Alcoa supra* p. 82 ff.

[227] See *supra* p. 39 f. *Cf.* Rahl, at 63 ff.

[228] Or between states within the United States. Compare the discussion *supra* p. 59 f. on which test — the foreign commerce test or the interstate commerce test — is to take precedence when both foreign and interstate commerce is affected.

[229] *Supra* p. 81.

[230] *Supra* p. 39 f.

[231] Note also that the vigor of *American Banana* in antitrust actions was expressly called in question (see *supra* p. 67). The *Sisal* case was held to be controlling (*supra* p. 77).

The Court's point of departure is of condsiderable interest:

"At the outset, it should be made clear that there *is no attempt here to regulate Japanese commerce as such, or to indict Japanese firms or Japanese nationals*. Only American corporations and American national are named as defendants. The only commerce sought to be regulated is the importation and sale of wire nails on the West Coast of the United States. Surely this is within the jurisdiction of United States courts. Japanese firms and activities in Japan are considered only in so far as they relate to the precise charge, against American defendants, of a conspiracy in restraint of trade in the importation and sale of wire nails on the West Coast of the United States. Under the circumstances, it is absurd to say that principles of international law and comity of nations put the charges of this indictment within the exclusive jurisdiction of the Japanese courts, or require that Japanese law be applied." (*Id.* at 821, emphasis added, footnote omitted).

[232] 186 F.Supp. 298 (D.D.C., 1960).

[233] As the role of the grand jury institution in antitrust cases, see e.g. Areeda, at 43 f. and Sullivan, at 755.

[234] As to the implications of such subpoenas, see *infra* chapter XVI. Also see the present case at 317 ff.

[235] The trade between the United States, on the one hand, and the Far East and Africa, on the other, was also subject to scrutiny, but involved no jurisdictional issues.

[236] The Court spoke of "criminal offenses". (186 F.Supp. 298, at 301.)

[237] To further support subject matter jurisdiction, much was made of the fact that some conferences and committees located to the U.S. had relations to some of the shipping corporations.

[238] 186 F.Supp. 298, at 312 f.

[239] See *supra* p. 39 f. and 86 f.

[240] 186 F.Supp. 298, at 314. And here the *Alcoa* case may be of some guidance, the Court noted. (*Id.* at 313.)

[241] 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed. 2d 777 (1962).

[242] 370 U.S. 690, at 706. As to the *Sisal* case see *supra* p. 77.

[243] *Id.* at 704. (Citing the bulk of the cases heretofore reviewed). (The Court, it seems, preferred to slightly rephrase the language of *Sisal*, in order to make it fit into the pattern of the later case law, stating that the activities of the defendants in that case had an impact within the United States and upon its foreign trade and therefore, consequently, the Sherman Act was held to control). *Id.* at 705. *Cf. supra* at p. 77).

[244] The original complaint was filed in October, 1954. Issues regarding personal jurisdiction

were argued in United States v. The Watchmakers of Switzerland Information Center, Inc., 133 F.Supp. 40 (S.D.N.Y., 1955), *reargument denied*, 134 F.Supp. 710 (S.D.N.Y., 1955). (See *supra* p. 18 f.) The case was subsequently dismissed as regards some defendants and others signed consent decrees. (See 1960 Trade Cases π 69,655.) As to the remaining defendants the case went to trial in November, 1960 (see *infra* n. 253) in U.S. v. The Watchmakers of Switzerland Information Center, Inc., 1963 Trade Cases π 70,600, and initial Final Judgment was entered in January 1964 (apparently not reported). This Judgment was later modified (the so-called Modified Final Judgment, 1965 Trade Cases π 71, 352). (On this see *infra* p. 108 ff.) Hereby the litigation was terminated without appeal.

For a comprehensive review of that case, its background and its intricacies, see G.W. Haight in Rahl, at 311—363. Also see Antitrust Developments 1955—1968, at 47—50 and Antitrust Law Developments 1968—1975, at 357—358; Ellis, J.J.A., Extraterritorial Application of Anti-Trust Legislation, 17 N.T.I.R. 51, at 57 (1970); ILA 1964, at 321—322, 410—413 and 575—577; ILA 1966, at 67—74. (The case will be discussed further with respect to its international law implications, *infra* chapter XVI).

[245] For further particulars, see 1963 Trade Cases π 70, 600, at 77, 417 f. and 77, 422.

[246] The figures are from 1953. *Id.*, at 77, 423 ff.

[247] See *id.*, at 77, 426 ff.

[248] See *id.*, at 77, 436 ff.

[249] *Id.*, at 77, 435 f.

[250] *Id.*, at 77, 433 f.

[251] *Id.*, at 77, 447 f.

[252] See *supra* n. 244.

[253] The American Watch Association, the eleven American corporations mentioned and other corporations not mentioned signed consent decrees in 1959 and 1960 (1960 Trade Cases π 69,655) and are therefore not further referred to.

As regards Montres Rolex S.A., the case was voluntarily dismissed by the Government. As regards the defendant The Watchmakers of Switzerland Information Center Inc., ("Wosic"), the case was dismissed for failure on the part of the Government to sustain its burden of proof as to Wosic's part in the combination. (*Id.*, at 77, 452 f.)

For further details with respect to personal jurisdiction, see *supra* p. 18 f.

[254] See *supra* n. 29. Also see e.g. Zwarensteyn, at 47 f. and 54 ff.

[255] 1963 Trade Cases π 70,600, at 77,455 and 77,456.

[256] See *supra* n. 30 and p.

[257] It is notable that a provision in the Collective Convention fixing sales prices on watch products (see *id.*, at 77,427) was discussed only insofar as it had any direct effect on American resale prices. The provision could not, according to the Court, be contested unless it constituted an attempt to fix resale prices in the United States. The Court found that the minimum sales prices for Swiss watch products sold in Switzerland for domestic use or for export, clearly had nothing whatever to do with the prices in the United States and added: "The plaintiff does not contend that the sale of Swiss watches in Switzerland at fixed prices is illegal." Did the Court mean to say that price-fixing in Switzerland on Swiss watches is outside the reach of the Sherman Act, and that thus only Swiss law can be applied here? Or did the Court simply state that the Government had failed to include the pertinent price-fixing in its complaint?

[258] *Id.* at 77,455 and 77,456 (citing most of the cases heretofore reviewed, e.g. *Alcoa, General Electric, Timken, National Lead* and *Oldham* but also cases from the early case law such as *Sisal, Pacific & Arctic, American Tobacco* and *Thomsen v. Cayser*).

[259] *Id.* at 77,453.

[260] As so this problem, see *supra* p. 79 f.

[261] It may be argued that the Court applied the rule of *Alcoa* (see *supra* p. 81), implying that the burden of proof as to effects on U.S. commerce shall shift to the defendants once the plaintiff has proved an intent on the part of the defendants to affect such commerce, that the defendants failed to sustain their burden (the non-existence of effects) and that consequently nothing was disclosed as to actual effects on U.S. commerce. However, not a word in the Court's opinion indicates a reasoning in this direction.

[262] See *supra* p. 59 f.

[263] See Rahl, at 357 ff., in particular 359. Also see the Court's opinion and the domestic cases cited there, *id.* at 77,455 f.

[264] At this hearing, the Swiss Government appeared as *amicus curiæ*. A burning issue through the entire litigation was to what extent the Swiss Government was involved in the arrangements of the Swiss watch industry, particularly to what extent these arrangements were required, directed or at least desired, by the Swiss Government, and, hence, whether these arrangements could be shielded on the ground of sovereign immunity or on the basis of the act of state doctrine. As to this issue, see the discussion *infra* chapter XVI.

[265] 1965 Trade Cases π 71,352. (Filed January 7, 1965).

[266] *Id.*, at 80,491—80,492. (Section XI (E), subsections 1—6, whereof 3 and 4 were new as compared to the initial Final Judgment.)

[267] *Id.*, at 80,491.

[268] See Rahl, at 332 and 337.

[269] *Id.* at 80, 491, Sections IV (C) and VIII (B).

[270] *Id.*, latter part of Section IV (C).

[271] *Id.*, Section II (A). Also see Rahl, at 331 and 336. Section XII (A) (3) which provided for procurement of documents in the hands of defendants, was subjected to the condition that such documents would not have to be produced when the production is illegal under Swiss law.

[272] *Id.* at 80,492. Another factor was the prospect of immediate relief (considering appeals were not expected).

[273] See further on this, *infra* chapter XVI.

[274] *Id.* at 80,493. As to the case cited, see *supra* p. 96 and 99.

[275] *Supra* p. 81, particularly p. 82 ff.

[276] *Supra* p. 81 f.

[277] *Supra* p. 90 and 104.

[278] *Supra* p. 90 f. and 104 f.

[279] *Supra* p. 77.

[280] See *Alcoa, supra* p. 81; *National Lead, supra* p. 90; the *ICI* case, *supra* p. 96; *Sanib, supra* p. 100; the *Swiss Watch* case, *supra* p. 105.

[281] See *General Electric, supra* p. 91.

[282] The *Swiss Watch* case, *supra* p. 105.

[283] See *Timken, supra* n. 173.

[284] See *Oldham, supra* p. 101.

[285] As the former group of cases, see *supra* p. 91, 103 and 108 (in this order), and the latter, see *supra* p. 82 ff., 93 ff. and 101.

[286] *Supra* p. 85 f.

[287] *Supra* p. 108.

[288] *Supra* p. 94 f.

[289] *Supra* p. 101.

[290] See *supra* p. 91, 104, n. 173, and p. 104 (in this order). Whether the requisite intent was applied in the *ICI* case (*supra* p. 97 f.) is uncertain.

[291] See e.g. Rahl, at 86 ff.

[292] *Supra* p. 101 and 108.

[293] *Supra* p. 95 f, 98 ff. and 108 ff. (in this order).

[294] See *supra* n. 293.

[295] *Supra* p. 81.

[296] 404 F.2d 804 (D.C. Cir., 1968), *certiorari denied*, 393 U.S. 1093, 89 S.Ct. 872 (1969).

[297] Foreign commerce cases are referred to and relied on without regard to whether they are criminal, administrative or civil.

As to actions for treble damages, see the *American Banana* case *supra* p. 67.

[298] The place of performance may be seen as merely another point of contact in the nexus-scheme.

[299] Much of the defense rested on an analogy from cases involving restraints in interstate commerce. In principle, the Court, however, repudiated that analogy, stating that the problem in interstate commerce case law is primarily to what extent the federal government, acting within the framework of a federal system has power to deal with domestic restraints. The issue there, the Court continued, is whether the interstate commerce is affected. The choice is between federal or state law, all *American* law. In foreign commerce case law, on the other hand, principles of international law are involved. Such factors as citizenship — which are unimportant in domestic cases — become meaningful in an international setting. The choice lies between applying the Sherman Act or not. (404 F.2d 804, at 811—812, n. 20. Also see *supra* p. 55 ff.).

[300] *Id.* at 813. Connecting factors mentioned were: There were American seamen employed and there was more business for American-based industries dependent on shipping — e.g. repair and insurance. (A federal statute — 46 U.S.C. § 672 a(b) — requires — or did at the time— that American-flag vessels must carry American crews and provides, further, that they are liable to penalty taxes if they are repaired abroad, and that they be available to the U.S.

Government in times of national emergency. The transportation also afforded a direct economic benefit to the United States (at least potentially).

[301] *Id.* at 814 (particularly n. 31.)

[302] *Id.* at 815.

[303] By this the Court did not exclude the possibility that foreigners may be held under the U.S. antitrust laws for restraints in the particular market, when U.S. foreign commerce is affected. *Id.* at 817.

[304] See *id.* at 808.

[305] *Id.* at 817, especially n. 47.

On the other hand, where the market involved consists of shipping services between two foreign ports, without American characteristics, and where the only American aspect is that a few of the persons competing in the market are offering American flag ships, the Sherman Act, the Court conceded, has no application. *Id.* at 816.

[306] See n. 46, *id.* at 817.

[307] *Id.* at 815. *But see* n. 41 (*id.* at 816) where the Court, somewhat surprisingly, interposed that as far as commodities are concerned, "then, of course, the absence of an effect on United States exports or imports renders the Sherman Act inapplicable", implying that there is a distinction to be made jurisdictionally between shipping trade as such and the sale of commodities.

[308] The case had a purely jurisdictional posture, but see n. 39, *id.* at 815,as to the standard of reasoableness.

[309] 331 F.Supp. 92 (C.D. Cal., 1971), *affirmed*, 461 F.2d 1261 (9th Cir. 1972), *certiorari denied*, 409 U.S. 950 (1972).

[310] See Zwarensteyn, at 49 ff. Also see the *American Banana* case, *supra* p. 67.

The plaintiff requested for damages of totally 300 million dollars as well as extensive equitable relief. (See 331 F.Supp. 92, at 101.)

[311] Acts, such as the inducement of the foreign governments and the eventual agreements preceding these.

[312] *Id.* at 103. See von Kalinowski, at § 5.502(2), at 5-120 and 5-121-22. The views of the scholars, including the one named, will be discussed further *infra* p. 163 ff.

[313] Matters appearing to bear upon proof of plaintiffs' claims of antitrust violations could not serve to defeat jurisdiction. *Id.* at 103.

[314] *Id.* at 103.

[315] Here the Court quoted Beausang, The Extraterritorial Jurisdiction of the Sherman Act, 70 Dick.L.Rev. 187, at 191 (1966). See *supra* p. 35.

As to the relevance of the interstate commerce test as an indicator for foreign commerce cases, the Court seemed to be of the opinion that "the standard of 'substantial effect' laid down in the interstate case law defines antitrust jurisdiction over restraints of intrastate, as contrasted with interstate, business", and has little to with foreign commerce cases. *Id.* at 102. Nevertheless, the Court applied a foreign commerce formula almost identical with the interstate commerce test: "direct or substantially affect". (See Rahl, at 63 ff. and *supra* p. 38 ff. "Direct" is to be compared to "in" commerce. "Affect" denotes relation and not result. See *id.* at 103, n. 15).

Also see Simson, G. J., The Return of *American Banana*: A Contemporary Perspective on American Antitrust Abroad, 9 J. Int. Law & Econ. 233, especially at 240, (1974).

[316] As to this doctrine, see *infra* chapter XVI.

[317] 383 F.Supp. 586 (E.D. Penn. 1974). (Solely the jurisdictional issue.) As to findings of facts, remedies, etc, see 375 F.Supp 610 (E.D. Penn. 1974).

[318] See *supra* n. 310.

[319] See e.g. *supra* p. 69 and 92 f.

[320] 383 F.Supp 586, at 588.

[321] See *supra* n. 312.

[322] See *supra* n. 315.

[323] 383 F.Supp. 586, at 587. As to *Alcoa*, see *supra* p. 81. "Direct affect" may of course be regarded either as an objective or a subjective criteria, or both. That way it may be compared to "intent" in Alcoa. The Court in the instant case failed to give further guidance. See Simson G.J., *supra* n. 315, at 240.

[324] See *supra* n. 20. Mark here that place of performance still seems to play an independent roll.

[325] 375 F.Supp. 610, at 621 ff.

[326] *Id.* at 627. (Damages, approximately 180.000 dollars.)

[327] 395 F.Supp. 221 (S.D.N.Y. 1975).

[328] *Id.* at 227. Here the Court directly quoted the plaintiffs' complaint.

[329] See *supra* p. 85 f. *General Electric, supra* p. 92 f., was also cited.

[330] Fugate (2d ed.), at 48, was referred to.

[331] *Id.* at 227 ff.

[332] *Supra* p. 68.

[333] See e.g. *Pacific & Arctic* and *Thomsen v. Cayser, supra* p. 73 and 74.

[334] *Supra* p. 81 ff.

[335] See e.g. Von Kalinowski, at § 5.502(2), at 5-120 and especially 5-120-22; Rahl, at 59 ff.; Fugate (hereinafter 2d ed.), at 52 ff. and Brewster, at 74 f.

[336] *Supra* p. 113 f., see also *infra* p. 118 f..

[337] Rahl so suggested at p. 65 f.

[338] *Supra* p. 115, 116 and 117 (in this order).

[339] *Supra* p. 82 ff.

[340] *Supra* p. 113 f.

[341] See *supra* n. 307.

[342] Timberlane Lumber Co. v. Bank of America, N.T. & S.A. 549 F.2d 597 (9th Cir. 1976).

[343] U.S. v. Aluminum Co. of America, 148 F.2d 416, see *supra* p. 81.

[344] 549 F.2d 597, at 613.

[345] The Court was well aware of the import of the relationship between the actor and the country in which he is sued. "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." (549 F.2d 597 at 612.) One may assume that whether the American law applied is of a criminal or civil nature, also may make a difference, even if the Court did not to say so.

[346] See at 601 and 615.

[347] The only importance that this localization had, was that it constituted one of the elements to be evaluated in the third part of the tripartite analysis, see *infra* p. 122.

[348] Mark this definition of extraterritoriality. See further *infra* p. 124 f.

[349] See at 609 ff.

[350] Here the Court cited *Alcoa* (148 F.2d 416) on several occasions and most of the earlier case-law was noted. Among the commentators observed we find W. Fugate, K. Brewster, J. Rahl, J. von Kalinowski, A. Neale, Zwarensteyn and Katzenbach. The views of these commentators shall be discussed further *infra* p. 163 ff.

[351] "To some degree", the Court acknowledged", the requirement for a substantial effect may implictly incorporate these additional consideration, with 'substantial' as a flexible standard that varies with other factors." (549 F.2d 597, at 612.) See also *infra* p. 123 ff.

[352] See 549 F.2d 597, at 613 ff.

[353] 549 F.2d 597, at 613 (§ 14).

[354] The principal sources of inspiration in framing this method, wherein various elements are weighed, were K. Brewster, Antitrust and American Business Abroad, at 446 (1958) and the Restatement (2d) of Foreign Relations Law of the United States, Section 40. While Brewster's list of variables and that advanced by the Court seem to correspond, the latter and the Restatement show one noteworthy distinguishing feature. In section 40 (b) of the Restatement it is suggested that a court should act in the light of "the extent and the nature of the hardship that inconsistent enforcement actions would impose upon persons,". The Court in Timberlane discussed no such consideration. On the other hand, the Court's list of variables was not intended to be exhaustive. The list provided only for some examples.

[355] 549 F.2d 597, at 615 (§§ 18—20).

[356] *Id.*

[357] 148 F.2d 416, see *supra* p. 81.

[358] 82 F. Supp. 753 (D.N.J. 1949), see *supra* p. 91, especially at 95 f.

[359] 549 F.2d 597, at 612.

[360] See *supra* n. 357.

[361] See e.g. *supra* p. 94 and 111 f.

[362] See e.g. *supra* p. 95 f. and 108 ff.

[363] See *supra* p. 65 f.

[364] As to the legal writers, see further *infra* p. 163 ff.

[365] *Cf. supra* p. 55 ff. The Court's opinion on the relevance of the interstate commerce test in the foreign commerce area is stated at (549 F.2d 597) 612: "Indeed, that 'substantial effects' element of interstate antitrust analysis may well be responsible for the use of an effects test for foreign commerce." The interstate commerce test, the Court continued, 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." (Here the Court cited cases from the interstate commerce field, see *supra* p. 38 ff.). "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." (Citing cases.) "Only respect for the role of the executive and for international notions of comity and fairness limit that constitutional grant."

[366] Moreover, the requisite for stating a claim necessitates, according to the Court, a greater showing of burden or restraint, a demonstration that the effect is sufficiently large to present a cognizable injury to the plaintiffs and, thereby, a civil violation of the antitrust laws. Here, however, the Court added a clarifying note: "Our separation in the foreign commerce context between the degree of restraint necessary for establishing subject matter jurisdiction as opposed to that required to state a claim is, of course, not duplicated in the interstate setting, for there a 'substantial' restraint is in any event necessary for the establishment of jurisdiction itself. Nevertheless, since the interstate cases provide a standard for both jurisdiction and the statement of claim [citing cases] they thus offer some guidance for determining the degree of restraint necessary to support a claim for relief in the foreign commerce context as well [citing cases]. Although the decision whether the restraint alleged in the instant case qualifies to state a claim is for the district court in the first instance, we note that the quantitative test of substantiality is a 'practical, case-by-case economic judgment,' not one based on 'abstract or mechanistic formulæ' ", (citing cases). 549 F.2d 597, at 615, note 35.

[367] 404 F.2d 804 (D.C. Cir. 1968), see *supra* p. 113.

[368] 549 F.2d 597, at 612.

[369] *Id.* at 615.

[370] See *supra*.

[371] 549 F.2d 597, at 613.

[372] *Id.* at 615.

[373] See however, *supra* n. 366.

[374] See e.g. 549 F.2d 597, at 609:, where the Court spoke of "extraterritorial conduct", "acts outside the U.S. territory", concluding: "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."

[375] See *infra* in chapter XV.

[376] 549 F.2d, at 615 §§ [17] and [18–20].

[377] 595 F. 2d 1287 (3d Cir. 1979).

[378] *Id.*, at 1291.

[379] *Id.*, at 1292.

[380] *Id.*, at 1297 f.

[381] *Id.*, at 1296.

[382] *Id.*, at 1299.

[383] *Id.*

[384] 473 F.Supp. 680 (S.D.N.Y. 1979).

[385] *Id.*, at 688.

[386] *Id.*, at 687.

[387] See *supra* n. 382.

[388] 473 F. Supp. 680, at 688 (S.D.N.Y. 1979).
Also see *Industrial Investment Development Corporation v. Mitsui & Co., Ltd.*, 594 F.2d 48 (5th Cir. 1979).

[389] 494 F. Supp. 1161 (E.D. Pa. 1980).

[390] *Id.*, at 1179.

[391] *Id.*, at 1184 and 1188 f. As to the *American Banana*, the *Alcoa* and the *Timberlane* cases and *Mannington Mills*, see *supra*

[392] *Id.*, at 1189.

[393] *Id.*

[394] 617 F. 2d 1248 (7th Cir. 1980).

[395] For further details, see e.g. Wood/Carrera, The International Uranium Cartel: Litigation and Legal Implications, 14 Tex. Int. L.J. 59 (1979); Merhige, The Westinghouse Uranium Case; Problems Encountered in Seeking Foreign Discovery and Evidence, 13 Int. Law 19 (1979); Canenbley, at 108 f.

[396] See further *infra* p. .

[397] See further *infra* p. .

[398] See further *infra* p. .

[399] 617 F. 2d 1248, at 1353 (7th Cir. 1980). As to the *Alcoa* and the *Timberlane* cases, and *Mannington Mills*, see *supra*

[400] *Id.*, at 1255 f.

[401] *Id.*, at 1255.

[402] *Id.*, at 1256.

[403] *Supra* n. 389, at 1189.

[404] *Supra* n. 389. at 1189, n. 66.

[405] American Banana Co. v. United Fruit Co., 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909). See *supra* p. 67.

[406] Timberlane Lumber Co. v. Bank of America, N.T. & S.A. 549 F.2d. 597 (1976). See *supra* p. 120.

[407] U.S. v. Aluminum Co. of America, 148 F.2d 416 (2 Cir. 1945). See *supra* 81.

[408] 243 U.S. 66. (1917) See further *supra* p. 74.

[409] U.S. v. Pacific & Arctic Railway & Navigation Co., et al., 228 U.S. 87. See further *supra* p. 73; U.S. v. Sisal Sales Corp., 274 U.S. 268 (1927). See further *supra* p. 77.; U.S. v. Nord Deutscher Lloyd, 223 U.S. 512 (1912). See further *supra* p. 72.

[410] U.S. v. American Tobacco Co., 221 U.S. 106 (1911). See further *supra* p. 69.

[411] U.S. v. Hamburg — Amer. P.F.A. Gesellschaft, 200 Fed. 806 (S.D.N.Y. 1911), 216 Fed. 971 (S.D.N.Y. 1914). See further *supra* p. 76.

[412] See *supra* p. 74.

[413] See *supra* p. 79 f.

[414] See *supra* n. 409.

[415] See *supra* p.

[416] U.S. v. National Lead Co., 63 F.Supp. 513 (S.D.N.Y., 1945), *affirmed*, 332 U.S. 67 (1947). See further *supra* p. 90.

[417] Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962). See further *supra* p. 104.

[418] See *supra* p. 77.

[419] U.S. v. General Electric Co., 82 F.Supp. 753 (D.N.J. 1949). See further *supra* p. 91.

[420] Sanib Corp. v. United Fruit Co., 135 F. Supp 764 (S.D.N.Y. 1955). See further *supra* p. 100.

[421] U.S. v. Watchmakers of Switzerland Information Center, Inc., 133 F. Supp. 40, *reargument denied*, 134 F. Supp. 710 (S.D.N.Y. 1955). Also see 1963 Trade Cases, paragraph 70,600. See further *supra* p. 105.

[422] See *supra* p. 90.

[423] In re Grand Jury Investigation of the Shipping Industry, 186 F. Supp. 298 (D.D.C., 1960). See further *supra* p. 103.

[424] See *supra* n. 421.

[425] See *supra* n. 407.

[426] See *supra* n. 419.

[427] See *supra* n. 420.

[428] See *supra* p. 82 ff.

[429] Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969). See further *supra* p. 113.

[430] See *supra* n. 405.

[431] See *supra* p. 113 f.

[432] See the discussion *supra* p. 38 ff., 43 ff., 54 ff. and 57 ff.

[433] The decision in Occidental Petroleum Corp. v. Buttes Gas and Oil Co. 331 F. Supp. 92 (C.D. Cal. 1971), *affirmed*, 461 F.2d 1261 (9th Cir. 1972), was denied certioari, 409 U.S. 950 (1972). Whether the lower court's reasoning concerning subject matter jurisdiction was convincing to the Supreme Court cannot be ascertained. The act of state doctrine, such as it was invoked in the lower courts, may have been at least as persuasive. See *supra* p. 115 f.

[434] See *supra* n. 429.

[435] Timberlane Lumber Co. v. Bank of America, N.T. & S.A. 549 F.2d 597 (1976). See further *supra* p. 120 ff.

[436] The question, at what point jurisdiction is established, cannot be readily answered when reading the court's opinion in *Timberlane*. The general impression is, though, that according to the court, jurisdiction is established when the third part of the analysis — the weighing of interests test — as a result has admitted such. The endeavour to break down the mechanical tests applied in earlier case law into a tripartite analysis, strengthen this impression. So does the reasons stated — see 549 F.2d, at 615 — for vacating the lower court's dismissal of the case: The dismissal could not be sustained on jurisdictional grounds, since there was, *inter alia*, no comprehensive analysis of the relative connections and interests of Honduras and the United States. However, the word *should*, implies, again, that jurisdiction was established on the basis of some effect upon American commerce, *i.e.*, when the first part of the tripartite analysis was completed.

[437] See the Restatement (2d) of Foreign Relations Law, Section 40 and Brewster, at 446.

[438] U.S. v. Aluminum Co. of America, 148 F.2d 416 (2 cir. 1945). See *supra* p. 81 f.

[439] See *supra* p. 91. (The *General Electric* case) and 105 (the *Swiss Watch* case).

[440] See *infra* p. 503 ff.

6. The foreign commerce case law in the doctrine — as compared

6.1 Introduction

To establish the jurisdictional criteria in the foreign commerce field on the basis of the relevant cases, and to do it with some measure of exactitude, is, as we have seen, not easy. The decisions lack continuity and consistency, the jurisdictional formulae advanced are poorly defined, there is no modern leading decision from the Supreme Court of the United States, etc.[1] To search for guidelines in the doctrine makes the task even more difficult, for, just as much as the court decisions vary, just as much do the opinions of the commentators as to the correct meaning and the implications of these decisions.

6.2 The pre-Alcoa decisions

Each commentator's opinion has, of course, its distinct individual traits, but if seen very roughly, one can divide the commentators into several categories. In one category we find those whose analyses of the foreign commerce case law basically coincide with that presented above. In another we find commentators who read unambiguity and consistency into the foreign commerce case law, who fix the jurisdictional criteria, *de lege lata,* without much difficulty, and who, above all, claim that these criteria have been unchanged since the *American Banana* case,[2] *i.e.,* throughout the foreign commerce case law. In a third category, again, we find commentators that have intermediate views.

Among those legal writers whose interpretations of the early foreign commerce case law, in principle, correspond to the findings given in the summary above, we find *Whitney, Jennings, Smit, Hale & Hale, Rosenfield, Reynolds, Simson, Areeda, Hunting, Barnard, Wolf, Hermanns, Meessen, Krumbein, Bohlig, Haymann, Rehbinder, Baker* and *Brewster.*[3]

They correspond in particular with respect to the conclusion that prior to *Alcoa,* the place of conduct (sometimes coupled with a complementary requisite of nexus) controlled jurisdiction. *Rosenfield,* for instance, writes: "Prior to Alcoa, courts within this country had struggled to find some activity within the United States on which to rest jurisdiction."[4] *Reynolds* puts it more elaborately: American courts "... were slow to abandon the underlying principle of (the territorial) doctrine, *i.e.*, that legislative juris-

diction is to be limited to the country in which the conduct occurred. They continued to require allegations of some 'act' within the jurisdiction of the United States ...".[5] *Brewster* summarizes: "All foreign commerce cases since *Banana* have included allegations of some acts within the territorial jurisdiction of the United States (if not on the part of the foreign party, then pursuant to an agreement by him with the domestic party).[6] ... That effects within the United States or upon United States commerce with foreign nations would bring wholly foreign conduct within the Sherman Act's reach was propounded until [the decision in] Alcoa".[7] And *Jennings* concludes that in all the cases before *Alcoa,* jurisdiction was "... limited to what was performed and intended to be performed within the territory of the United States."[8] *Krumbein,* to name a German commentator, finds, speaking of the pre-*Alcoa* era, that "[d]iese entscheidungen stehen dafür, dass wenigstens ein Teil des wettbewerbsbeschränkenden Vorgehens durch körperliche Anwesenheit der Beteiligten in den Vereinigten Staaten lokalisiert sein muss, wenn es nach den amerikanischen Marktgesetzen beurteilt werden soll."[9] "Die Alcoa-Entscheidung ist über die Präzedenzien hinweggeschritten und hat neue Kriterien für die Jurisdiktionsanknüpfung geschaffen ... [V]orher [Alcoa] immer ein tatsächlicher Ausführungsakt auf amerikanischem Territorium verlangt worden war ...".[10] And *Meessen* shows little hesitation in claiming that Judge Hand made an error in interpretation in maintaining that the decision in *Alcoa* implied no deviation from earlier case law.[11]

In contrast to the views presented by these authors, stand the commentaries of *Fugate, Claudy, Riwk, Frank, Backer, Heidemann, Ellis, Bloch, Rollings, Raymond, Edwards, Oliver, Timberg, von Kalinowski,* the *1955 Attorney General's Report* and *Antitrust Developments 1955—1968.*[12] Symptomatic for some of these writers is the belief that jurisdiction has rested on the principle of effects ever since *American Banana.* In *American Banana,* they hold, this principle was not brought to the fore, simply because no effects were present, and in *Alcoa,* they maintain, *American Banana* was merely distinguished (on that ground). *Rollings* writes: "In the absence of such effect on American commerce it is clearly established that the antitrust law may have no extraterritorial application",[13] citing *American Banana.* And *Edwards,* having studied the pre-*Alcoa* cases, concludes: "It appears that unless the conspiracy affects American commerce, no action lies under the Sherman Act; but if American commerce is affected, then it does not matter whether the conspiracy was formed in the United States or abroad."[14] *Fugate* states that: "U.S. laws do not have any application in foreign territory, absent an effect upon U.S. foreign commerce.

The *Banana* case clearly stands for this proposition."[15] (Many of the modern legal writers have in their work relied on the extensive analysis of *Fugate*. His work will therefore be dealt with separately below).[16]

Other commentators, again, take the standpoint that *American Banana,* in practise if not theoretically, is overruled or at least departed from. *American Banana,* according to their view, was basically the only case in which the principle of effects did not govern jurisdiction. So, for instance, *Claudy* regards the reasoning of *American Banana* as having been "rejected" by the cases that followed (*Pacific & Arctic, Thomsen v. Cayser,* the *Sisal* case, etc.), "which have unhesitatingly applied Sherman Act sanctions to acts done abroad and legal there but which nonetheless had proscribed consequences for United States foreign commerce".[17] And *Timberg* is of the opinion that the "... mechanical reliance [in *American Banana*] on the lawfulness under foreign law of *acts* taking place therein has yielded, in subsequent Sherman Act cases, to a more functional economic emphasis on the domestic illegal *effects* of those foreign acts ..."[18] specifically referring to, *inter alia, Thomsen v. Cayser* and the *Sisal* case.[19] *Ellis* claims that the doctrine of effects "has become part of American antitrust law"[20] ever since *American Tobacco*[21] (the case immediately following *American Banana*) and *Raymond,* that this case "started the departure" from American Banana.[22] *Bloch* appears to have found that the effect-principle was born in *American Tobacco* and that later cases (*Thomsen v. Cayser, Sisal,* etc.) required substantial effects for jurisdiction to lie.[23] The following excerpt from the *1955 Attorney General's Report* is also representative: "From these early cases [prior to Alcoa], it seems clear that the Sherman Act may apply, not only to conduct in this country, but also to acts abroad ... with ... substantial effects upon American foreign commerce".[24] *Oliver,* finally, concludes that: "[t]he Alcoa Case is consistent with Supreme Court decisions to date".[25]

Mann and *Zwarensteyn* have a unique understanding of the pre-*Alcoa* case law, and especially the *American Banana* case.[26] They both claim, seemingly independent of each other (if not wholly uninfluenced), as *Mann* phrases it, that *American Banana* has been "more frequently and more seriously understood than most other decisions."[27] Their point of departure is the fact that *American Banana* involved a claim for triple damages raised by a private party and they conclude that, since the plaintiff was a private party seeking damages, the action was civil, *i.e.,* sounding in tort. "Having classified the action as sounding in tort", *Zwarensteyn* continues, "the only logical conclusion any court could arrive at was to decide the case in accordance with the principles of tort in the Conflict of Laws ...

which was exactly what the Court did."[28] Recovery for the plaintiff was denied by the Supreme Court because "no tort had been committed", in Costa Rica, *Zwarensteyn* suggests,[29] or because, according to *Mann,* in Costa Rica "the Sherman Act did not apply, so that the plaintiff could not prove a tort in Costa Rica and was bound to fail."[30]

The gist of this reasoning seems to be that in civil actions American courts do not have jurisdiction over — *i.e.,* the Sherman Act does not cover — acts committed abroad regardless of any effects upon American commerce. The interest of the United States, as a state, to protect its trade against detrimental effects of anticompetitive activities apparently should not, in *Mann's* and *Zwarensteyn's* view, be confused with the interest of the same state to protect its citizens from tortious acts. In the latter case, effects upon U.S. trade were immaterial, they seem to be suggesting. An entirely different matter, *Mann* explains, is "the case in which the United States, in the exercise of its sovereign power, proceeds in respect of a wrong alleged to have been done to it as a result of the infringement of its criminal legislation."[31] The unavoidable conclusion is that had that been the case in *American Banana,* then the effects doctrine would also have been applied.

Due to this singular interpretation of the *American Banana* case, *Mann* and *Zwarensteyn* see no incongruity or inconsistency in the foreign commerce case law. "The *American Banana Co.* case", *Mann* observes, "would, so it may be confidently asserted, be decided in exactly the same way after more than fifty years."[32] *Zwarensteyn* is unsure, however, having read the *Pacific Seafarers* case, and therefore inserts that the modern view seems to be that a "civil remedy would be available, as long as there is a *nexus* between what is being done and the United States."[33]

Does this classification of the cases in civil, criminal and — according to *Zwarensteyn* — regulatory actions, really explain the lack of continuity and consistency in the foreign commerce case law with respect to jurisdictional criteria? It does so only if the reasoning of *Mann* and *Zwarensteyn* holds good. But it does not, for several reasons. First, all indications in the *American Banana* case itself point to the fact that when Justice Holmes spoke of all legislation as being "prima facie territorial", he meant to include not only the law of torts but also criminal law, not only the Sherman Act in its civil posture but also in its criminal (as well as regulatory) form. By simply reading the opinion — especially 213 U.S. 356—357 — one cannot escape the impression that Justice Holmes had common jurisdictional criteria in mind for both civil and criminal actions. In the dicta he did not speak of the law of torts in particular, but the law in general. Moreover, he termed the acts complained of as torts and criminal, interchangeably. To

argue that the Court would have decided the case differently, had the plaintiff been the United States Government in a criminal action, is to overlook such statements as: "In the case of the present statute [the Sherman Act] the improbability of the United States attempting to make acts done in Panama or Costa Rica *criminal* is obvious";[34] it is to forget that in the opinion, criminal cases are abundantly cited;[35] it is to ignore the whole essence of Justice Holmes' jurisdictional rule.[36]

Secondly, in the cases immediately following American Banana, no sign of a distinction — for jurisdictional purposes — between civil and criminal cases can be discovered.[37] By comparison, to name an example, *Pacific & Arctic*[38] — a criminal case — and *Thomsen v. Cayser*[39] — a civil case — hold identical jurisdictional criteria: the place-of-conduct rule, as in *American Banana*. In *Thomsen v. Cayser,* the more recent case, *Pacific & Arctic* was cited as the foremost precedent.[40] In *Sisal,*[41] which was not a civil case, Justice Holmes' jurisdictional rule in *American Banana*[42] was once again invoked, although this time to support jurisdiction.[43] Thirdly, there is, as far as can be ascertained, not one case in the whole history of antitrust law, neither in the foreign commerce case law, nor in the interstate commerce case law, which confirms the civil-criminal distinction. As has been found in the foregoing analysis of the foreign commerce case law, no court has ever, at least not explicitly, regarded the character of the action as relevant for the sake of jurisdiction.[44] In modern civil cases, further, courts have applied the jurisdictional formulae previously invoked in criminal or regulatory cases, and *vice versa*. It may confidently be asserted that the *American Banana* case would *not* be decided in the same way today.[45]

6.3 The development after Alcoa

While many of the commentators regard the development of the law of jurisdiction in antitrust as straightforward, some believing this development to have started with the *American Banana* case,[46] some with the decision in *Alcoa*,[47] others, again, are more reluctant to read such a degree of consistency into the foreign commerce case law.[48] Thus, while *Fugate,* for instance, is of the opinion that the Supreme Court of the United States has "uniformly upheld so-called extraterritorial jurisdiction in antitrust cases where a direct and substantial effect on United States commerce can be shown",[49] *Meessen* argues that the courts of the United States (including the Supreme Court) were slow to follow the path of *Alcoa*.[50] Not until the end of the 1960s, claims *Meessen,* had the courts fully accepted the prin-

ciples laid down in *Alcoa*. The change from the "place of wrong" rule employed in *American Banana*[51] to the principle of effects invoked in *Alcoa*[52] was, in *Meessen's* view, gradual. In accord are *Rehbinder* and *Krumbein*. The former is able to perceive a trend in the U.S. courts towards the application of a principle of effects.[53] The latter reports cases, more recent than *Alcoa* (*e.g., National Lead*),[54] in which the principle of effects was not applied, suggesting that the break-through of *Alcoa* was slow.[55] And *Smit* is convinced that "[u]p to this day [1958] there is no holding by the Supreme Court declaring the Sherman Act applicable only on the basis of acts performed by foreigners abroad",[56] as is *Barnard,* who states that "[n]o other case has [up to 1963] directly met the issue raised by Alcoa and it is not possible to say that another court would follow Judge Hand's reasoning to the farthest logical conclusion."[57]

Apart from *Smit,* no author emphasizes the fact that the Supreme Court of the United States has not yet had the opportunity to confirm the validity of the *Alcoa* doctrine. When *Areeda*[58] brings *Continental Ore*[59] to the fore as representative of the Supreme Court's view, and when he maintains that this case implied an approval of the doctrine of *Alcoa*[60] (*Alcoa* was cited), he forgets that in *Continental Ore,* as in the *Sisal* case, jurisdiction rested on *conduct within* the United States *as well as* impact upon U.S. foreign trade.[61]

Whatever the views of the various legal writers may be of the development after Alcoa, all of them agree to the fact that the principle of effects has superseded the "place of wrong" rule. The issue of today is not which principle is controlling, but rather how we are to understand the principle of effects, *i.e.,* what the elements of this principle are.

6.4 Fugate

1) *Fugate's* entire discussion of jurisdiction over foreign commerce is based on the assumption that the antitrust laws are mainly of a criminal nature.[62] This characterization of the antitrust laws apparently has, according to his view, an obvious relevance for questions of international law because, having made the assumption, Fugate proceeds to analyze the foreign commerce case law from an international law angle,[63] invoking cases and comments from this area which concern multistate crimes. But, then again, he denies that characterization of an act violating the antitrust laws as being criminal or tortious has any great significance.[64]
2) "Aside from certain observations [in *American Banana*],[65] the United States *Supreme Court* has *uniformly* upheld so-called extraterritorial

jurisdiction in antitrust cases where a *direct and substantial effect* on United States commerce can be shown."[66] This is the conclusion arrived at by Fugate, having analyzed the foreign commerce case law in its entirety. The cases stemming from the Supreme Court are thus uniform. The *American Banana* case is not really overruled by later cases, it is distinguished, Fugate claims.[67] The reason for denying jurisdiction in *American Banana,* he explains, was simply that no effects were considered to have been present, or at least that such were not *proved* to be present. The words of Justice Holmes that the "general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done", and if the acts "were not torts by the law of the place", they "were not torts at all",[68] must thus, according to this view, be read in the light of the fact that no effects were present in the case.[69] Had such effects been present, or proved to exist, the court and Justice Holmes would have granted jurisdiction. Thus Fugate reasons, and thus he believes the courts in the cases following *American Banana* to have reasoned, for in these cases the test stated was, according to Fugate: "Do the acts or contracts have a substantial effect upon foreign commerce or operate within U.S. territory?"[70]

When examining the earliest of the cases referred to by Fugate, specifically from *American Tobacco*[71] to the *Sisal*[72] cases, as was done in chapter 1.5 above, one finds his interpretations questionable. True, *American Banana* has been distinguished, but not on the ground suggested by Fugate. The distinguishing factor has rather been that while in *American Banana* the acts complained of were found to have their *situs* outside the United States, the courts in the cases that followed founded jurisdiction on activity within the United States. A direct and substantial effect on American commerce was never alone sufficient as a basis for jurisdiction.[73]

Even less acceptable is the proposition that the Supreme Court has uniformly upheld the "direct and substantial effects" test. This is certainly not true of the cases decided by the Supreme Court before *Alcoa.*[74] As we have seen, the requirement "affect" has here been complementary to the requirement that acts be implemented within the United States.[75] Nor is it true of the case law pursuant to *Alcoa.* (*Alcoa* itself was not reviewed by the Supreme Court). The few cases decided in the Supreme Court of the United States since 1945 have shown only limited adherence to the principles laid down in *Alcoa.* It seems that in no case, has the "direct and substantial effects" test been expressly applied. Moreover, in none of the cases

referred to by Fugate (p. 30) has the Supreme Court delivered an authoritative view on the subject which would support the conclusions drawn by the author. In *Timken*,[76] a U.S. District Court, it is true, based jurisdiction upon "direct and influencing" effects,[77] and on appeal to the Supreme Court of the United States the case was affirmed. An examination of the Supreme Court's opinion, however, reveals that the Court apparently did not pass on the jurisdictional issue. To read a "direct and substantial effects" test into *American Tobacco*,[78] *Thomsen v. Cayser*,[79] the *Sisal* case,[80] *Pacific & Arctic*,[81] *National Lead*[82] and *Continental Ore*[83] is more than a misinterpretation, it is wishful thinking, a confusion of a *de lege lata* and a *de lege ferenda* analysis.[84]

As firm as Fugate may be in his opening statement regarding the "direct and substantial effects" test and its penetration in the Supreme Court,[85] as unsettled he becomes when subsequently studying the foreign commerce case law. A U.S. court has power to assume jurisdiction, Fugate conclusively suggests, when U.S. foreign commerce is "involved or affected",[86] when the restraining acts or contracts have a "substantial effect" upon such commerce "or operate within U.S. territory",[87] or when such acts are "effective" within the United States,[88] or when there is "some direct and substantial effect" on U.S. foreign trade,[89] or when acts or contracts carried out abroad "operate within the United States or ... affect U.S. trade",[90] or when there is an "effect" upon American commerce.[91] A similar state of vagueness characterizes Fugate's analysis of the *American Banana*[92] case. In commenting upon the jurisdictional criteria applied in *American Banana* Fugate assumes: "[A]pparently Justice Holmes was not thinking of the *question* of *effects* upon U.S. trade. He was looking at the validity under foreign law of acts in a foreign country by U.S. citizens, and concluded that, as a matter of comity, the law of a foreign nation should govern as to acts of U.S. citizens in that country. The principle enunciated is indeed one which is generally accepted."[93] Having thus established that the *question* of effects was not considered in *American Banana,* Fugate continues a few paragraphs later "... U.S. laws do not have any application in foreign territory, absent an effect upon U.S. foreign commerce. The *Banana* case clearly stands for this proposition."[94] And further below: "[T]he Supreme Court [in the *Banana* case] ... considered that the complaint did not allege sufficient effects upon U.S. foreign commerce."[95] Did the Supreme Court consider the question of effects, or did it not? One cannot avoid the impression that there must be *two* American Banana cases; but, of course there are not.

The line of misconstructions and errors in Fugate's work could be pro-

longed with further examples — the interpretation of the *Cutting* case,[96] the comparison between *American Banana* and *Strassheim v. Daily,*[97] etc. — but those pointed at should suffice in this context.

Fugate's cardinal mistake, when analyzing the foreign commerce case law, is that he seeks continuity an consistency where such cannot be found. The individual cases do not, as we have seen, form an entity with respect to jurisdictional criteria. The fact cannot be ignored: the jurisdictional criteria have undergone changes since *American Banana.*[98] The principles laid down by Justice Holmes in that case are, if not explicitly overruled then at least, not followed today. It is inconceivable that, as Fugate *seems* to argue, Justice Holmes at the time of *American Banana* had accepted the applicability of the principle of effects within the area of antitrust. There is no trace at all of this principle in *American Banana,* despite its evident relevancy.

After all, United Fruit Co. had effectively prevented American Banana Co. from exporting banana products into the United States, and after all, the plaintiff did advance the argument that the Sherman Act, in one way or the other, governed acts done abroad.[99]

6.5 The principle of effects in the doctrine

In describing the law of jurisdiction as developed in the case law after *Alcoa,*[100] the majority of the commentators furnish scanty statements, which contend nothing more and nothing less than the meagre formulae laid down by the American courts. Thus, "effects" alone,[101] "direct and substantial effects",[102] "actual and intended effects",[103] "proven and specifically intended effects",[104] "adverse effects",[105] "direct, substantial and reasonably foreseeable effects",[106] "actual, substantial and intended anticompetitive effects",[107] "direct effects",[108] to name some statements, are all held to constitute the essence of the principle of effects.[109] The common denominator is obviously the requirement of "effects". But we are not told what "direct" effects signifies and what distinguishes them from, for example, substantial, adverse and actual effects. At times, we are not even told whether the case law provides an answer in this respect.

There are, however, a number of commentators who recognize that the basis for a definition of the effects-principle is poor, but who still elaborate more extensively as to the import and significance of the principle.[110] That part of their analysis is guess-work or founded on mere speculation, is only a natural consequence of the present circumstances. There is a risk, though, that by building theories of the effect principle on loose foun-

dation, one intermingles the analysis of what the law is with the analysis of what the law ought to be. The commentators now to be mentioned have not, it seems, always avoided this pitfall.

The effects principle has, as regarded in this part of the doctrine, several aspects. One is the question: Effect on what? Another; Is effect measured by quantity or quality? What is the type of effect? A third: If measured by quantity, how much? A fourth: What about the requirement of intent or foreseeability? All of these aspects will be touched upon in the following. But first: What are the exact meanings of the words "affect" and "effects"?

The terms "affect" and "effects" have been and are used — the first as a verb, the second as a noun — interchangeably in the case law as well as in the doctrine (in the German doctrine "auswirken" and "Auswirkungen" and in French "influencer" and "effets"). To be precise, "affect" implies the direct operation (influence or action) of one thing upon another. When A "affects" B, it produces an effect upon B, it changes B in some way (whether good or bad). "Affect" presupposes a stimulus powerful enough to evoke a response or elicit a reaction. "Affect" may even imply a definite alteration or modification. This term must first of all be distinguished from the *verb* "effect", which implies achievement of an end *in view* and normally requires as its subject an intelligent agent or the means he uses to attain his end. "Effect" therefore, in contrast to "affect", means to bring about (close to "achieve" or "accomplish"). But "affect" must also be distinguished from "concern" (the verb). The latter implies a nexus or a relation. A "concerns" B when it has to do with B, it has reference to B without necessarily changing or influencing it. And finally, the *noun* "effect" may be applied to any result, whether brought about unconsciously or consciously — it serves equally well whether it names a result of the influence ("affect") of one thing upon another or of directed effort ("effect"). The noun "effect" thus implies *actual* result.

6.5.1 Effect on what?

There is a general consensus in the doctrine as to the principle that jurisdiction presupposes effects on American *commerce,* not on competition.[111] A line must be drawn between the substantive issue — whether the restraint is unlawful under the substantive antitrust laws — on the one hand, and whether the restraint alleged to be unlawful falls under the jurisdiction of the American courts, on the other. (See *supra* p. 35. As to the term "commerce", see *supra* p. 37 f.). In other words, the courts do not here seek to

establish whether the restraint is a *per se* violation of the antitrust laws or whether the restraint falls under the rule of reason. The issue is rather if the restraint as such, irrespective of its *per se* or reasonable nature, has effects upon American commerce.

6.5.2 What type of effects?

The issue here is whether effects on American commerce are to be measured in quantity or quality, or both. The requirement that effects must be "substantial" can be found everywhere, and legal writers seem to agree on the quantitive nature of this requirement. (See further, below under 6.5.3.). In addition to this (or as an alternative requirement) the great majority of these writers invoke the requisite "direct" effects. The formula reads either "direct *and* substantial effects" or "direct *or* substantial effects". "Direct" is by some writers intended to be a subjective requisite (as to this, see under 6.5.4.), while others again, have something entirely different in mind. Among these writers we find *Rahl, von Kalinowski* and *Sullivan,* all of whom maintain the view that the foreign commerce test has to correspond with the interstate commerce test.[112] The test for both areas is therefore either "direct or substantial effects" or "in or substantial effect" on commerce, where the requisites "direct" and "in" are interchangeable.[113] According to *von Kalinowski,* "[a] direct effect arises when a restraint is placed upon and limited to goods and services that flow in ... commerce. The effect is *assumed* from the fact that restraint was directly applied to those goods or services and does not have to meet any quantitive standards."[114] "Direct effects" is thus a qualitative test. An actual effect does not have to be proved. It is sufficient that U.S. commerce *can* be affected. *Rahl* and *Sullivan* agree,[115] and they all are of the opinion that the foreign commerce case law has given birth to this model of the foreign commerce test.

Terminology aside, these authors' views thus do not hold much variances. The only difference, it seems, is one of thoroughness. While *von Kalinowski* and *Sullivan* do not hesitate to place the interstate commerce test on a par with the test applied in foreign commerce, at least as far the "direct" requisite is concerned, apparently believing, that further comments are superfluous and only briefly referring to the foreign commerce case law, *Rahl* takes great pains to substantiate his theory, by presenting a detailed analysis. It is, in this context, of considerable value to carefully examine this author's reasoning.

To be observed at the outset is that *Rahl's* purpose with his whole analy-

sis is "to try to locate as clearly as possible the lines of demarcation drawn by American case law in the application of the commerce tests."[116] His object is thus to establish the foreign commerce test *de lege lata.* The test that most closely corresponds to what has been applied in the foreign commerce case law, is, in *Rahl's* view, the "in-or-substantial effect in commerce" formula, where "in" is just another word for, but preferable to, "direct". The interstate and foreign commerce tests, he claims, are co-extensive for jurisdictional purposes.[117] A restraint, *Rahl* explains, is "in" foreign commerce *either* when it interferes with the movement of exports or by limiting, redirecting or otherwise changing the circumstances in the flow of goods or services between United States and other countries, *or* when it tends to regulate prices, terms, customers, sales territories or other business aspects in any line of U.S. foreign commerce.[118] But that is not all. A restraint may also be "in" foreign commerce when attached to goods sold by one foreign corporation to another, namely when these goods are, prior to the purchase, imported from the United States, or are to be exported to the United States after the purchase (with some qualifications, however).[119] Here, *Rahl* transfers the "prior order" doctrine and the doctrine of "practical continuity of movement of the goods" from the interstate commerce case law to the foreign commerce area. (See *supra* at p. 39 ff.). If a restraint is found to be "in" foreign commerce, most courts, according to *Rahl,* do not look for "substantial" effects.[120]

There is no doubt that *Rahl's* theory has many practical and pedagogical advantages; and were it so that the foreign commerce case law had developed along these lines, much would probably, at least regarding clarity, have been gained; but it has not developed along these lines. One looks in vain to find foreign commerce cases that would support his theory. Occassionaly even *Rahl* admits this fact,[121] especially as to the restraints in foreign markets (between foreign corporations). True, with respect to the restraints interfering with foreign commerce *Rahl* cites two cases, *Continental Ore* and *Minnesota Mining,* and it may be that the fact-pattern of these fit into his theory. However, the courts' reasonings in these cases do not. The cases studied by *Rahl* either bear the language of "effects" (whether substantial, actual, adverse, material or influencing) or of acts occurring in the United States, or no language at all in this respect.[122] But, *Rahl* argues, "no case has been found holding that proof of substantiality is *required* where the restraint operates directly to interfere with a line of export commerce by cutting it off, or by rechanneling it to different markets or customers or into different products."[123] Even if that were to be true, which it is not, *Rahl* would hardly be able to single out a case explicity

holding that proof of substantiality is *not* required.[124] Furthermore, by minimizing the significance of the requirement put forth in cases involving transportation,[125] *e.g., Pacific & Arctic*[126] and *Thomsen v. Cayser*[127] — namely that acts must have occured within the United States, *Rahl* manages to adapt this category of cases to his foreign commerce theory. It is not convincing when *Rahl* in support of this states: "There was no indication that any proof of reduction or alteration in the volume or kind of such foreign commerce was at all necessary."[128] (Referring to *Pacific & Arctic*).[129] That the court in question did not rest jurisdiction on substantial effects, does not necessarily mean that it was, for jurisdictional purposes, content with the fact that the transportation was "in" the line of U.S. foreign commerce. And it clearly was not. Jurisdiction was primarily founded on acts within the United States.[130]

It thus seems as if *Rahl,* in an effort to clarify and categorize the foreign commerce case law, abandons his intentions to describe the law as it is and ends up stating the law as it, in his mind, ought to be. The foreign commerce cases do not fit into the "in or substantial effect" formula. Nor has the interstate commerce test, with the same wording, been transferred to the foreign commerce area; not yet, at least. It is striking how strictly the courts in the foreign commerce case law limit their selection of precedents to — precisely — foreign commerce cases. The interstate commerce case law is, it seems, irrelevant in this respect. The question of whether it should be is quite another matter.

6.5.3 How much effect?

The quantity element of the effects-principle is by most authors conveyed in the standard of "substantiality". Few authors, however, take the trouble of defining "substantiality", and when they do, they usually have the words of Judge Hand in mind when he noted in the *Alcoa* case: "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 ... [I]t is safe to assume that Congress certainly did not intend the [Sherman] Act to cover them."[131] From this one may conclude, which is often done, that *insignificant* effects — in Judge Hand's view — did not suffice for jurisdictional purposes. Yet, we have not become much wiser. All that is said so far is that "substantial" effects are those that are not insignificant, which in effect means that "substantial" equals *not insubstantial,* which is to say that "substantial" effects are those that are "substantial".

For *Rahl* and *von Kalinowski*, the requirement of substantiality becomes relevant when a restraint is "indirect" or not "in" ("in the stream") of foreign commerce (for *Sullivan* mere "effects" are sufficient).[132] An illustration: If a French firm, which is in the business of exporting finished goods to the United States, were to be prevented from — or face obstacles in — purchasing raw materials from two African firms, due to anticompetitive agreements between them — agreements to boycott, exclusive dealings, tying agreements, etc. — such agreements are within the ambit of the U.S. antitrust laws, provided they "substantially" affect (or, according to *Sullivan,* "affect") U.S. foreign (or interstate) commerce. While *von Kalinowski* makes no attempt to define "substantiality", *Rahl* explains that all that is meant by "substantial" is that "the effect of the restraint must not be too slight or *de minimis;* the courts do not really try to measure the volume of effect."[133] Anything that can be called "substantial" will suffice.[134] In accord are *Homburger* and *Jenny,* concluding that "gänzlich nebensächliche Auswirkungen ... wohl nicht ausreichen würden".[135] In accord is also *Heidemann*[136] and, seemingly, *Fugate.*[137]

This is probably the best description that can be given of the substantiality standard. It is an illusion to believe that further knowledge can be acquired by examining the facts of each foreign commerce case in detail, since even if one could establish, in figures, the exact effects of a restraint upon U.S. exports or imports, one would never know, due to the silence of the courts, the amount of effects required for jurisdiction. *Schwartz* touches the core: "How, then, can such effects be ascertained by courts and cartel authorities? The American decisions show that the courts carried out no economic analysis but confined themselves to ascertain the restraint of competition on the import or export market. What mattered was the direct effect of the restrictive act on competition within the domestic or foreign commerce of the United States. The indirect economic consequences of the restraint of competition caused thereby, for instance as regards the level of prices or of the imports or exports, were not ascertained. It suffices that the restraint of competition is bound to have consequences for the foreign commerce. No proof is required as to the nature or seriousness of such consequences ... Indeed, it would hardly ever be possible to furnish such proof."[138]

The end-result seems to be that the "substantiality" standard has been driven into the back-water of the "directness" test. Thus, when the foreign commerce test reads "direct *and* substantial" effects, proof of "directness" paves the way for proof of "substantiality", to the extent that proof of the latter becomes virtually unnecessary. Somewhat con-

fusing, however, is the situation where *either* "directness" or "substantiality" can form the basis for jurisdiction, *i.e.*, where the test reads "direct *or* substantial" effects.[139] Is it possible fo a court to hold that there is "substantiality" when (a) nothing can be inferred from the "directness" of the effects, since such effects are not and cannot be present, (b) the court does not try to measure the effects (as proposed by *Rahl*),[140] *and* (c) no proof is required as to the seriousness of the effects? (See *Schwarts* above). *Rahl's* answer is that "substantiality" can be based on a "plausible theory".[141] Does that mean that even *"probable"* effects would satisfy the "substantiality" standard (or must there be "substantial probable" effects?) Has the law really moved so far away from the "*actual* effects" rule once introduced in *Alcoa?*[142] Or is it just that some commentators allow themselves to be governed too keenly by the interstate commerce case law? *Rahl* is well aware of the risks connected to this method of *lex lata* analysis and therefore interposes the following viewpoint *de lege ferenda:* "In foreign market cases, however, the courts could very well call for convincing proof of the fact of effect and also for a demonstration that the effect is, or will be, really quantitatively significant."[143]

6.5.4 The subjective requisite; intent or foreseeability

Ever since the requisite "intent to affect" was introduced in *Alcoa,*[144] discussions have been carried on concerning the exact implications of this subjective requisite. In *Alcoa,* as has been suggested above,[145] the court did not require evidence of the defendants state of mind at the moment of acting (whether evil or not). Instead it inferred from the defendant's conduct that an intent was present. It argued that the defendant's position was such that he must have believed that effects on American imports were substantially certain to follow from the restraint executed by him.

Rahl indicates that the court in *Alcoa* required a *specific* intent ("a strict intent requirement"), not mere foreseeability.[146] A specific intent implies "a specific, conscious purpose to bring about the effect", as distinguished from "a mere purpose to do the act which caused the effect", *Rahl* explains. A specific intent, as *Rahl* sees it, is stricter than foreseeability, which in turn is stricter than a mere purpose to do the act which caused effects.[147] The difference between these three types of subjective requisites is, of course, one of degree. In agreement is apparently *Brewster.*[148] Another view is entertained in *Antitrust Developments 1955—1968,*[149] which states that *Alcoa*[150] (as well as the *General Electric*[151] case) clearly indicates, that intent "does not mean the specific intent to accomplish the result of mon-

opoly or restraint of trade. The element of intent is established if the actor should have known that its conduct would have the forbidden effects and the conduct itself was deliberate."[152a] And further: "[I]ntent means deliberately engaging in conduct the natural and probable consequences of which is restraint of trade or monopoly."[152b] (This referred to a domestic case, which in fact does not speak of "natural and probable" consequences, but of "necessary and direct" consequences).[153] *Fugate* also is of the opinion that intent in *Alcoa* meant nothing more than the "usual rule that persons are presumed to intend the normal consequences of their acts" (a general intent).[154] In accord are *Bohlig*[155] and *Heidemann.*[156] The *Antitrust Developments 1955—1968, Fugate*[157] and the commentators just mentioned, base their standpoint on the *General Electric*[158] case, decided only a few years after *Alcoa.*[159]

In *General Electric,* they claim, the intent requisite of *Alcoa* was interpreted and enlightened. Interpreted, yes: *Alcoa* was both cited and quoted in considerable length. Enlightened, no: It does not seem as if the learned scholars, mentioned above, have thought of the possibility that *Alcoa* was incorrectly interpreted — whether consciously or not — in *General Electric.* The suggestion is, that it was. "Intent" in Alcoa implies an intent to affect the volume of United States exports or imports.[160] The requisite "intent" in *General Electric* was viewed in another sense, namely as an intent to restrain trade or to build a monopoly, an intent to thwart competition, or more particularly, an intent to contribute to the maintenance of a monopoly within the United States. (Philips, the Dutch firm, contributed to General Electric's monopoly).[161]

Hence, while in *Alcoa* the requisite intent was introduced in order to vest jurisdiction in the case, intent in *General Electric* was, it seems, discussed with a view to establish a *substantive violation* of the antitrust laws. What the defendant (Philips) in *General Electric* intended — knew or should have known — was that competition in the United States was prevented or destroyed. In *Alcoa,* again, this issue was not dealt with in the jurisdictional analysis. Judge Hand did not ask if the defendant ("Limited") intended to restrain competition.[162]

The conclusion is that although the jurisdictional reasoning including the "intent to affect and actual effects" formula in *Alcoa* was quoted *in extenso* in the *General Electric* case,[163] and although the purpose of the court in that case was to follow *Alcoa,*[164] the end-result reveals that *Alcoa* was, in point of fact, not adhered to. To state it simply: *General Electric* and *Alcoa* are not comparable; the cases do not discuss the same issues. The *Alcoa* test is therefore neither enlightened nor limited or expanded by the court in

General Electric.

The construction of the *Alcoa* case given by *Rahl* thus stands unaffected,[165] which does not, however, close the intent issue. Not explored by *Rahl* is the distinction noted by him between an intent to affect commerce and mere foreseeability of the effects. (The former apparently qualified as a "specific" intent, the latter as a "general" intent).[166] In the *Antitrust Guide For International Operations;* published by the Antitrust Division of the United States Departement of Justice (1977), it is proposed that American courts have jurisdiction when foreign restraints have a "substantial and foreseeable effect" on U.S. commerce.[167] Here foreseeability is equal to a "clear purpose" or an "intent" to affect.[168]

However, as in most instances, foreseeability is not defined. *Hunter,* who is one of those who does make an attempt, differentiates *foreseeable* effects and *primarily intended* effects, the latter requisite being regarded as stricter than the former.[169] Through a number of illustrations followed by commentaries, *Hunter* sheds some light upon the proposed distinction, well aware of the fact that the difference is just a matter of degree.[170] It is clear to him that, when a restrictive agreement between foreign corporations is expressed to be specifically directed towards (or related to) the U.S. market, any effects that are produced by the agreement are such that are primarily intended.[171] But where, for instance, two foreign producers have agreed on prices or other terms on goods sold to South America thereby causing the elimination of a U.S. export corporation from that market, ultimately leading to affects on U.S. exports, such effects would not, according to *Hunter* fall into the category "primarily intended".[172] Would they fall into the category "foreseeable"? *Hunter* would probably answer in the affirmative. At least it is conceivable that the foreign firms knew or should have known that their agreement would produce the stated effects.[173]

In the *Restatement (2d) of Foreign Relations Law,*[174] the following example is provided to illustrate "foreseeability": X, a consumer of a commodity in state A, agrees to buy this commodity exclusively from Y, a dealer in A buying only from producers in A. As a result, X ceases to buy from Z, a dealer who purchases the commodity on the world market, including a substantial amount from state B. Consequently the exports of the commodity from B are substantially reduced. The view advanced in the *Restatement* is that these are *not* effects that are *foreseeable.*

The little that can be learned from these illustrations is that the closer the nexus between the restraint and U.S. commerce, the greater the probability that the effects of the restraint are foreseeable, intended, or primarily in-

tended. And as to the distinction between foreseeability and primarily intended, we learn that the former requisite necessitates less causal connection than does the latter.

In other words: The more "directly" the restraint is connected to American commerce, the higher the probability that its effects will be found to be "intended". "Directness" becomes a substitute for "intent" (see *supra* under 6.5.2.). *Simson* (at 240) would agree. Restrictive agreements that are specifically directed towards U.S. foreign trade, *i.e.*, that are "direct" or that are "in the stream of" or "in"[175] U.S. foreign trade, are also such that are intended, or, in *Hunter's* terminology, "primarily intended" to produce effects upon U.S. foreign trade. If this suggestion holds true, the opposite situation must also be, that is, where an agreement is *not* specifically directed to U.S. foreign trade, where the agreement thus is "indirect" (not "in" that trade), or where effects are "indirect", the effects produced by that agreement are not "intended". But it does not hold true; not entirely. By examining a specific restrictive agreement, its construction, its scope, etc., we may establish that it encompasses, or does not encompass, U.S. foreign trade, and from this we may infer that the parties to the agreement intended to, or did not intend to, affect that trade. But does the fact that the agreement does not encompass U.S. foreign trade really exclude the possibility that effects upon that trade were intended? Might there not be other types of evidence, evidence not pertaining to the specific agreement, evidence of other circumstances, that tend to show that, after all, effects were intended? If this is so, "directness" and "intention" cannot be substitutes, even if they at times may coincide.

When *Meessen* differentiates *foreseeability* and *intention,* he too indicates that the latter requisite is seen as stricter than the former.[176] The distinguishing element lies implicit in *Meessen's* reasoning, but is not elaborated.

We reach some understanding of the distinction through *Brewster*.[177] Referring to the *Alcoa* case, he realizes that the "intent" requisite is not clear, "for the law", he says, "recognizes both specific and 'objective' intent". Yet, Brewster explains, objectively intended effects are such that a party to a restrictive agreement should have foreseen whether subjectively intended or not.[178] Foreseeability, *Trautman* fills in, is the "objective ability to anticipate the impact".[179]

The discernable distinction thus seems to be the following: When "foreseeability" is the prevailing requisite, the plaintiff has to show that in the mind of *any reasonable man* with knowledge of the alleged restraint, effects upon U.S. foreign commerce could be foreseen. Where "subjective"

ot "specific" intention prevails, the plaintiff must prove that the defendants in the specific case intended to produce such effects. What causes confusion is that the means of providing proof of "foreseeability" and "intent" may often coincide — to prove the existence of an agreement or other objective circumstances from which "foreseeability" or "intent" can be inferred, may be the object in either instance. The difference, however, does not lie so much in the type of evidence advanced, but in what the court in the specific case can and should infer from that evidence. And "intent" warrants further inferences than "foreseeability". Hence the difference is in "degree" and not in kind.

Where does *Alcoa* fit in?[180] Undoubtedly, and as was said in the beginning of this section, in *Alcoa*[181] a "specific" intent was required. Judge Hand did not merely inquire what a reasonable man could foresee in light of the restraint complained of (the "Alliance") but rather what the defendant in question ("Limited") had in mind when erecting the restraint.

To what extent is the *Alcoa* intent rule adhered to by the American courts today? *Rahl* is inclined to think that the intent rule has become the generally accepted doctrine, although limited, in its application to *foreign firms* only.[182] This is the true significance of the Alcoa rule, claims *Rahl,* since "Judge Hand did not say that this double requirement of intent and effect would apply to American firms for conduct abroad".[183] American firms, including their subsidiaries abroad, can be held liable purely on an intent *or* effect basis. Also *Fugate* limits the Alcoa intent rule to non-nationals.[184] *Rahl's* way of arguing (*Fugate* forwards neither arguments nor other references) is not only unconvincing, it is misleading. Judge Hand was only dealing with a foreign firm ("Limited") to which he applied the "intent" rule. He had no reason at all to utter anything with respect to American firms. To draw conclusions from what Judge Hand did not say, and had no reason to say, is to draw conclusions from nothing at all, which ought to reflect on the validity of the conclusion. In support of his findings *Rahl* goes on to cite the *General Electric* case and the *Swiss Watch* case.

In the *Swiss Watch* case,[185] to the extent that the *Alcoa* rule was applied, it was applied equally to foreign and American corporations. There is no sign of unequal treatment in the case in this respect.[186] As to *General Electric,*[187] the *Alcoa* "intent" rule was applied, but it was, as suggested above, applied incorrectly and in a misinterpreted form. (The "intent" requisite was attached to substantive violation and not, as in *Alcoa,* to jurisdiction).[188] The inevitable result of this misinterpretation was that the court in General Electric *not only* inquired whether the foreign defendant ("Philips"), *but also* whether the American defendants, "intended" to violate the antitrust

laws of the United States. (Hence no differentiation).

But is there any grain of truth in the proposal that the *Alcoa* "intent" rule was designed for foreign firms only. The answer lies in the *Alcoa* case itself.[189]

When marking the boundaries of jurisdiction in light of the "limitations customarily observed by nations upon the exercise of their powers", Judge Hand was not so much troubled by the fact that the defendant was a foreigner, but by the fact that the restraint occured outside the United States. The jurisdictional standard invoked was to substitute performance within the United States. Conduct within the United States was "clearly unlawful" and not subject to the jurisdictional standard, whereas conduct outside the United States was unlawful only where the standard was met. Judge Hand's entire reasoning revolved around the fact that the conduct took place abroad, and the crucial issue was whether the Sherman Act covers such conduct. "There may be *agreements*", he said, "*made beyond our borders* not intended to affect imports, which do affect them, or which affect exports ... 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.*"[190] The critical question was thus that the conduct occured in the territory of another sovereign and not that the agreements were made by foreigners.[191]

Furthermore, to substantiate his "intent and effect" formula, Judge Hand brought forth precedents involving both foreign and American defendants, such as *Pacific & Arctic, Thomsen v. Cayser* and the *Sisal* case, which hardly would have been relevant, had Judge Hand limited his analysis to foreign firms.[192] Finally, how would the rule introduced by Judge Hand, that after the intent to affect commerce has been proved, the burden of proof as to actual effects shifts to the defendant,[193] correspond to the theory suggested by *Rahl,* that American firms acting abroad are jurisdictionally covered on an "intent *or* effect" basis? If "effect" suffices, who would be left with the burden of proof?

In view of this line of argument, would not a conclusion *ex analogia,* be more in the course of sound logic, than the conclusion *e contrario,* which *Rahl* has apparently made?[194]

In *Sanib Corp. v. United Fruit Co.,*[195] a case decided a decade after *Alcoa,* there were only U.S. corporations before the court. Nonetheless the court based jurisdiction on the *Alcoa* rule, holding that the restraint "was intended to, and in fact did affect" United States commerce.[196] Commenting upon the case, *Rahl,* once again, concludes out of thin air: "It

does not appear that the court's reference to intent meant that this was essential to the action."[197] One could just as well conclude that it does not appear that anything that the court said, was meant to be essential to the action.

Among those commentators who maintain that jurisdiction over the foreign activities of both American and foreign corporations rests without distinction, *inter alia,* on an intent requisite, we find *Areeda, Bohlig, Heidemann, Homburger, Reynolds* and *Brewster.*[198] It must be stressed, however, that the comments of these authors are based on the cases decided before 1960—1965, especially the *Alcoa* case[199] and its immediate aftermath. The more recent case law is, consequently, not taken into account. Among the few more modern writers who hold that the *Alcoa* "intent" rule still controls, irrespective of the nationality of the defendants, we find *Simson* and *Rill/Frank.*[200] Their view is basically also shared, it seems, by the *Antitrust Guide For International Operations,* where "foreseeability" or "clear purpose" is advocated.[201]

In the view of *von Kalinowski, Rosenfield, Davidow, Baker, Ongman* and *Backer,* however, the "intent" requisite plays either a secondary role or no role at all.[202] *Von Kalinowski,* for instance, turns away from the "intent" requisite for the "directness" test. The correct jurisdictional formula is, in his view, "direct or substantial effects", which is equivalent to, as we have seen above, *Rahl's* "in or substantially affect" formula.[203]

Von Kalinowski does not make clear whether the test of "directness" is assumed to encompass the "intent" requisite or whether it is entirely freed from subjective elements. When commenting on the *Fleischmann* case,[204] decided in 1975, where the court imposed the *Alcoa* "intent" rule,[205] *von Kalinowski* remarks: "In addition to the requisite occurence in or direct effect upon interstate or foreign commerce, the court gave weight to the theory that there must be an intent to affect commerce."[206] Here, von Kalinowski indicates that "directness" and "intent" are separate tests. The analysis, *lex lata,* of *von Kalinowski* has been attached great authority, judging from foreign commerce cases that have taken notice of his work. In at least two cases, *Todhunter-Mitchell* and *Occidental Petroleum,* the courts have fully relied on, or at least have been greatly influenced by, the findings of *von Kalinowski,* which is only *one* sign of the continuous interplay between the doctrine and the courts.[207]

6.6 Antitrust Law Developments

The swift survey of the extraterritorial reach of United States Antitrust laws given in the *Antitrust Law Developments*,[208] holds conclusions which are wholly in accord with those arrived at in the present work.[209] One of these is that "[p]rior to 1945, in all reported United States antitrust cases the defendants included American corporations and acts that were essential to effectuate the restraint took place in the United States."[210] Another is that in *Alcoa* "an American court for the first time declared that the Sherman Act proscribed restrictive agreements wherever entered into or consummated ...".[211] And a third: "Notwithstanding Judge Hand's view of the 'settled law', *Alcoa* represented a major development in American law. It extended, as a matter of judicial policy, antitrust jurisdiction to encompass wholly foreign conduct on the basis of the economic effects of that conduct within the United States."[212] Then somewhat reluctantly, an attempt is made to stipulate the jurisdictional criteria as applied in the U.S. courts.[213] Noticing that the courts lack a straight course, that some courts found jurisdiction upon "effects" and others upon conduct within the United States,[214] the authors, half guessingly, suggest that "... the degree of the impact, the substantiality of the anticompetitive effects and, perhaps, also the 'intent' ", are controlling citeria in the foreign commerce field."[215] These findings must however be regarded more as fair estimations of what can be awaited in the future advanced as pieces of advice for practising lawyers, rather than a thorough *de lege lata* analysis.

6.7 Are more lenient *substantive* rules applied in foreign commerce cases as compared to interstate commerce cases?

In the summary of the foreign commerce case law given above, the conclusion was arrived at that U.S. courts did *not* apply more lenient substantive antitrust rules in the foreign commerce area than those applied in the interstate commerce cases.[216] As far as can be ascertained, this view is generally agreed upon in the doctrine. The opinion stated by *Fugate* is significant: "[A]s a general rule, practises which are unreasonable per se in interstate commerce are also unreasonable per se in foreign commerce, once the court concludes that it has jurisdiction over the acts and contracts involved. The older cases as well as the more recent ones follow this reasoning."[217] To the same effect is the comment by *Rahl* to a memorandum of the United States Department of Justice from 1974,[218] stating, *inter alia,* that "most restraints of trade involving foreign commerce will be governed

by the rule of reason".[219] Rahl continues: "If this means that domestic per se rules will not be followed, and a restraint in foreign commerce, whether domestically per se or not, will be weighed against evidence that the restraint benefits exports trade or the balance of payments, this is not the rule of reason that I am familiar with, but is a wholesale departure from it, and without any support in the case law".[220] *Von Kalinowski* is in full agreement with this view: "The decisions have not indicated that the courts draw any distinction between the type of restraint which may affect foreign commerce as opposed to interstate commerce. This is particularly so since the statute itself does not create any such distinction. Restraints that would control the handling, sales, or prices of goods or services contemplated by Section I generally would, therefore, seem to be the kind also contemplated with respect to foreign commerce."[221] *Brewster,* too, recognizes that the same rules are applied internationally and domestically, even if he seems to regard a general rule of reason more appropriate *de lege ferenda* in the foreign commerce area, which, however, is quite another matter.[222] *Kronstein, Miller* and *Schwartz,* while having a contrary view to *Brewster, de lege ferenda,* share the general interpretation of the existing law.[223] *Bohlig* and *Sullivan* agree ("courts, quite rightly, have rejected the broad contention that the *per se* rules ought not to apply with full vigor to foreign activities").[224] *Claudy* and *Rollings* hesitate, but seem to agree in principle.[225]

The prevailing view thus is that the U.S. antitrust laws are applied coextensively in the foreign and interstate commerce areas. If the observation, made by *Rahl,*[226] that the "great majority of situations in American antitrust cases which have involved foreign activities have also involved restraint of competition in American domestic, interstate commerce, so that the law probably could have reached them without a 'foreign commerce' clause" is correct, then how would it be possible to dissent? That is, were the foreign and interstate commerce tests to be applied simultaneously or alternatively in cases involving foreign activities, *i.e.,* were the foreign commerce case in fact to be an interstate commerce case, then there could not, per definition, exist any dissimilarities concerning the substantive rules. Theoretically Rahl may be right. Reality, however, has proved different. In reality, most cases with foreign elements have fallen within the scope of the foreign commerce[227] test, sometimes both foreign and interstate commerce has been found to be affected, but seldom or never has a foreign restraint been reached without the foreign commerce clause, and seldom or never has the interstate commerce test expressly been invoked.

6.8 Distinctions between U.S. and alien corporations in the applicability of substantive rules

Distinctions between U.S. and alien corporations in the application of *jurisdictional* rules have, as observed above, been assumed to exist by some commentators, in particular as regards the requisite of "intent".[228] With respect to *substantive* rules, no such distinctions, as far as can be detected, have been proposed. Most commentators do not even mention the possibility; others again dispose of the matter with very few words. So, for instance, *Fugate* states categorically: "There is no distinction in the terms of the Sherman Act as to U.S. citizens and non-nationals."[229] *Brewster* asking "Is the law different for foreigners?", indicates that there is no statutory basis and no judicial precedent (save some implications in the *Alcoa* case) which would warrant a double standard of liability.[230]

Notes, Chapter 1, Section 6

[1] See the summary of the foreign commerce case law, *supra* p. 132 ff.

[2] American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

[3] *W.D. Whitney,* Sources of Conflict Between International Law and the Antitrust Laws, 63 Yale L.J. 655 (1954), at 657 ff.; *R.Y. Jennings,* Extraterritorial Jurisdiction and the United States Antitrust Laws, 33 Brit. Y.B. Int'l L. 146 (1957), at 161 ff.; *H. Smit,* International Aspects of American and Netherlands Antitrust Legislation, 5 N.T.I.R. 274 (1958), at 284 and 286; *R.D. Hale* and *G.E. Hale,* Monopoly Abroad: The Antitrust Laws and Commerce in Foreign Areas, 31 Tex. L. Rev. 493 (1953), at 500 f.; *B.A. Rosenfield,* Extraterritorial Application of United States Laws: A Conflict of Laws Approach, 28 Stan. L. Rev. 1005 (1976), at 1017 ff.; *W. Bradford Reynolds,* Extraterritorial Application of Federal Antitrust Laws: Delimiting the Reach of Substantive Law Under the Sherman Act, 20 Vand. L. Rev. 1030 (1966—67), at 1034 ff.; *G.J. Simson,* The Return of *American Banana:* A Contemporary Perspective on American Antitrust Abroad, 9 J. Int. L. & Econ, 233 (1974), at 235 ff.; *P. Areeda,* Antitrust Analysis, at 63 f.; *W.B. Hunting,* Extra-territorial Effect of the Sherman Act: American Banana Company Versus United Fruit Company, 6 Ill. L. Rev. 34 (1911—12), at 36 ff. and 42 ff.; *R.C. Barnard,* Extra-Territoriality and Anti-Trust Law in the United States, 12 Int. & Comp. L. Q. 95 (Supplement 1963), at 98 ff.; *E. Wolf,* Die amerikanische Antitrust-Gesetzgebung und ihre internationalen Auswirkungen, 53 GRUR 241 and 289 (1951), at 293 ff.; *Hermanns,* at 27 ff.; *Meessen,* at 121 ff.; *Krumbein,* at 10 ff.; *Bohlig,* at 39 ff.; *Böhlig,* Die Auswirkung des amerikanischen Antitrustrechts auf Patente und Patentlizensen im Ausland, 61 GRUR 421 (1959), at 428 ff.; *Haymann,* at 197 ff.; *Rehbinder,* at 38, n. 40; *Baker D. I.,* Antitrust and World Trade: Tempest in an International Teapot?, 8 Corn. Int. L. J. 16 (1974), at 37. *Brewster,* at 65 ff.

[4] *Rosenfield, supra* n. 3, at 1017.

[5] *Reynolds, supra* n. 3, at 1036—37, also see p. 1037, n. 38.

[6] *Brewster,* at 70.

[7] *Brewster,* at 72.

[8] *Jennings, supra* n. 3, at 164.

[9] *Krumbein,* at 15—16.

[10] *Id.,* at 18.

[11] *Messen,* at 122—123.

[12] *Fugate,* at 29 ff. Also see *Fugate,* Antitrust Jurisdiction and Foreign Sovereignty, 49 Va. L. Rev. 925 (1963), at 926 ff., *Fugate,* Damper or Bellows? Antitrust Laws and Foreign Trade, 45 ABA J. 947 (1959), at 928 and *Fugate,* Antitrust Aspects of Transatlantic Investment, 34 L. & Cont. Probl. 135 (1969), at 142 ff.; *Claudy D.E.,* United States Foreign Commerce under the Antitrust Laws, 1952 WuW 903, at 906 ff. and *Claudy D.E.,* Sherman Anti-Trust Law: Applicability to Foreign Commerce, 37 Corn, L. Q. 821 (1952), at 822 ff.; *Ellis J.J.A.,* Extraterritorial Application of Anti-Trust Legislation, 17 N.T.I.R. 51 (1970), at 51 f.; *Bloch H.,* Extraterritorial Jurisdiction of U.S. Courts in Sherman Act Cases, 54 ABA J. 781 (1968), at 781 ff.; *Rollings C.,* The Extraterritorial Application of American Antitrust Law and the Export Expansion Act of 1971, 5 Int. L. & Pol. 531 (1972), at 531 f.; *Raymond J.M.,* The Exercise of Concurrent International Jurisdiction: "Move with Circumspection Appropriate", 8 B. C. Ind. & Com. L. Rev. 673 (1967), at 684 ff.; *Edwards J.E.,* Inadequacy of National Regulation of Cartels and Proposed Control by United Nations, 14 G. Wash. L. Rev. 626 (1945—46), at 631 f.; *Oliver C.T.,* The Range of Effect of the Anti-Trust Laws of the United States, 1964 ILA 511, at 520; *Timberg S.,* Antitrust and Foreign Trade, 48 Nw. U. L. Rev. 411 (1953), at 413 f.; *Von Kalinowski,* at 5—114 ff.; *Rink J.F.* and *Frank R.L.,* Antitrust Consequences of United States Corporate Payments to Foreign Officials: Applicability of Section 2(c) of the Robinson-Patman Act and Sections 1 and 2 of the Sherman Act, 30 Vand. L. Rev. 131 (1977), at 137.; *Backer J.R.,* Sherman Act Jurisdiction and the Acts of Foreign Sovereigns, 77 Colum L. Rev. 1247 (1977), at 1249, n. 12; *The Report of the Attorney General's National Committee to Study the Antitrust Laws,* 66 (1955), at 66 ff.; *Antitrust Developments 1955—1968,* at 46 ff.; also see *Notes and Comments,* Extraterritorial Application of the Antitrust Laws: A Conflict of Laws Approach, 70 Yale L. J. 259 (1960), at 261; *Heidemann, D.W.,* at 35 ff.

[13] *Rollings, supra* n. 12, at 531 f.

[14] *Edwards, supra* n. 12, at 631.

[15] *Fugate,* at 40.

[16] See *infra* p. 168

[17] *Claudy* in WuW, *supra* n. 12, at 906 f. Compare *Claudy* in Corn. L. Q., *supra* n. 12, at 822: "As to foreign activity and non-nationals, the required effect upon United States commerce constitutes not only the substantive violation but also supports the operation of United States legislation on foreign activity and foreigners." This conclusion is arrived at after a study of the following cases: United States v. Pacific & Arctic Ry., et al., 228 U.S. 87 (1913), Thomsen v. Cayser, 243 U.S. 66 (1917), and — later — United States v. Sisal Sales Corp., 247 U.S. 268 (1927).

[18] *Timberg, supra* n. 12, at 419.

[19] See *supra* n. 17.

[20] *Ellis, supra* n. 12, at 52.

[21] United States v. American Tobacco Co. 221 U.S. 106 (1911).

[22] *Raymond, supra* n. 12, at 686.

[23] *Bloch, supra* n. 12, at 782. As to the cases, see *supra* n. 17.

[24] The *1955 Attorney General's Report, supra* n. 12, at 70. The *Antitrust Developments 1955—1968* is heavily influenced by this report, see the Developments at 46.

[25] *Oliver, supra* n. 12, at 520, presumably including both pre-*Alcoa* cases as well as more recent cases. *Heidemann,* at 35 f., seems to indicate that the jurisdictional criteria laid down in *American Banana* differs from those employed in later cases in that *place of contract* is regarded as a relevant connecting factor therein, whereas later cases deem that factor irrelevant. A careful reading of the *American Banana* case reveals, however, that in that case too the place of contract is without jurisdictional significance. See *supra* p. 67 and 80.

[26] *Mann F.A.,* Studies, at 82 ff.; *Zwarensteyn;* at 121 ff.

[27] *Mann,* Studies, at 84. *Cf. Zwarensteyn,* at 124.

[28] *Zwarensteyn,* at 124.

[29] *Zwarensteyn,* at 124.

[30] *Mann,* Studies, at 84.

[31] *Id.*

[32] *Mann,* Studies, at 84, n. 2.

[33] *Zwarensteyn,* at 126. Pacific Seafarers Inc. v. Pacific Far East Line, Inc., 404 F. 2d 804 (D.C. Cir., 1968), *cert. denied,* 393 U.S. 1093 (1969).

[34] 213 U.S. 347, at 357 (emphasis added).

[35] See the cases cited *id.,* at 356—357.

[36] *Cf. Hunting, supra* n. 3, at 36 ff. *But see Kronstein, Miller, Schwartz,* at 44 f.

[37] As to these cases, see *supra* p. 69 ff.

[38] United States v. Pacific & Arctic Co. et al., 228 U.S. 87 (1913).

[39] 243 U.S. 66 (1917).

[40] *Id.,* at 88.

[41] United States v. Sisal Sales Corp., 274 U.S. 268 (1927).

[42] American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

[43] 274 U.S. 268, at 276. Also see the *Restatement (2d) of Foreign Relations Law,* Section 18, where crimes and torts are covered by the same jurisdictional rule.

[44] *Cf. Schwartz,* at 239 and *Haymann,* at 57.

[45] See for instance: Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal., 1971), *affirmed,* 461 F. 2d 1261 (9th Cir., 1972), *cert. denied,* 409 U.S. 950 (1972); Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F. 2d 804, (D.C. Cir., 1968), *cert. denied,* 393 U.S. 1093 (1969); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), wherein reference is made back to the *Sisal* case and the *American Banana*

case (at 704, 706) — see *supra* n. 41 and 42; Sanib Corp. v. United Fruit Co., 135 F. Supp. 764 (S.D.N.Y., 1955); Fleischmann Distilling Corp. v. Distillers Co. Ltd., 395 F. Supp. 221 (S.D.N.Y., 1975); Todhunter-Mitchell & Co., Ltd. v. Anheuser-Busch, Inc., 375 F. Supp. 610, (E.D. Penn., 1974), *amended,* 383 F. Supp. 586 (E.D. Penn. 1974); Timberlane Lumber Co. v. Bank of America, N.T. & S.A. 549 F. 2d 597 (1976), These cases would all, to use *Zwarensteyn's* terminology, be classified as civil. In none of these, with the possible exception of *Continental Ore,* has the jurisdictional rule laid down in *American Banana* been applied. (*Zwarensteyn* makes an error — at p. 126 — when he believes that *Continental Ore* is a criminal action — he even advances the case as one of the most significant examples of criminal cases. He is wrong. *Continental Ore* was a private treble damage action).

[46] See e.g. *Fugate,* at 40 ff.; *Rill J.F.* and *Frank R.L.,* Antitrust Consequences of United States Corporate Payments to Foreign Officials: Applicability of Section 2(c) of the Robinson-Patman Act and Sections 1 and 2 of the Sherman Act, 30 Vand. L. Rev. 131 (1977), at 138 f.; *Claudy D.E.,* Sherman Anti-Trust Law: Applicability to Foreign Commerce, 37 Corn. L. Q. 821 (1952), at 822 f. Also see *supra* p. 67 (American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909)).

[47] See e.g. *Bohlig,* at 42 ff.; *Heidemann,* at 35 ff.; *Sullivan,* at 714 f.; *1955 Attorney General's Report,* at 70 ff.; *Rahl,* at 67 ff.; *Areeda,* at 63 f.

[48] See e.g. *Kronstein, Miller, Schwartz,* at 240 ff.; *Antitrust Law Developments 1968—1975,* at 356 ff. and the commentators mentioned here below. (United States v. Aluminum Co. of American, 148 F. 2d 416 (2d Cir., 1945).)

[49] *Fugate,* at 30.

[50] *Meessen,* at 123 f.

[51] See *supra* n. 46.

[52] See *supra* n. 47.

[53] *Rehbinder,* at 38, n. 40.

[54] United States v. National Lead Co. 332 U.S. 319 (1947).

[55] *Krumbein,* at 19. The *Alcoa* case, see *supra* n. 48.

[56] *Smit,* at 286. *Cf. Bohlig,* writing at the same time, at 44.

[57] *Barnard,* at 101.

[58] *Areeda,* at 63 f.

[59] Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

[60] See *supra* n. 47.

[61] 370 U.S. 690, at 706. United States v. Sisal Sales Corp., 274 U.S. 268 (1927).

[62] *Fugate,* at 31, 35 and 37.

[63] *Fugate,* at 31 ff.

[64] *Fugate,* at 42.

[65] American Banana Co. v. United Fruit Co., 213 U.S. 347, 29 Sup. Ct. 511, 53 L. Ed. 826 (1909).

[66] *Fugate,* at 30 (emphasis added).

[67] See *Fugate,* at 40 ff.

[68] 213 U.S. 347, at 356 and 357.

[69] See *Fugate,* at 37, 40 ff. and 44.

[70] *Fugate,* at 42.

[71] United States v. American Tobacco Co. 221 U.S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663 (1911).

[72] United States v. Sisal Sales Corp. 274 U.S. 268, 47 Sup. 592, 71 L. Ed. 1042 (1926).

[73] See the summary *supra* p. . . .

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

[75] See the summary *supra* p. 79 f.

[76] Timken Roller Bearing Co. v. United States, 341 U.S. 593, 71 Sup. Ct. 971, 95 L. Ed. 1199 (1951).

[77] 83 F. Supp. 284, at 309 (N.D. Ohio, 1949).

[78] See *supra* n. 10.

[79] 243 U.S. 66, 37 Sup. Ct. 353, 61 L. Ed. 597 (1917).

[80] See *supra* n. 11.

[81] United States v. Pacific & Arctic Railway & Nav. Co. 228 U.S. 87, 33 Sup. Ct. 443, 57 L. Ed. 742 (1913).

[82] United States v. National Lead Co. 332 U.S. 319, 67 Sup. Ct. 1634, 91 L. Ed. 2077 (1947).

[83] Continental Ore Co. v. Union Carbide and Carbon Co. 370 U.S. 690, 82 Sup. Ct. 1404, 8 L. Ed. 2d 777 (1962).

[84] In Occidental Petroleum Corp. v. Buttes Gas & Oil Co. 331 F. Supp. 92 (C.D. Cal., 1971), *affirmed,* 461 F. 2d 1261 (9th Cir. 1972) certiorari was denied in the Supreme Court — 409 U.S. 950 (1972) — a fact that could imply that the Supreme Court indirectly accepted the grounds on which jurisdiction was established in the lower courts, namely when a "direct or substantial effect" was present (*id.,* at 103). It could just as well imply that the Supreme Courtregarded the ground for dismissing the case in the lower courts (act of state) as controling, sparing the court the trouble to review the jurisdictional issue. The better view would still be that *nothing* can be infered from a denial of certiorari.

[85] See *supra* p. 168 f.

[86] *Fugate,* at 42.

[87] *Id.*

[88] *Fugate,* at 39.

[89] *Fugate,* at 32.

[90] *Fugate,* at 73.

[91] *Fugate,* at 40.

[92] American Banana Co. v. United Fruit Co., 213 U.S. 347, 29 Sup. Ct. 511, 53 L. Ed. 826 (1909).

[93] *Fugate,* at 31 (first emphasis added).

[94] *Fugate,* at 40.

[95] *Fugate,* at 44.

[96] See *Fugate,* at 35 f. As to the *Cutting* case, see *infra* p. ...

[97] See *Fugate,* at 37, where the author, again, maintains that no effects where considered to have been *present* in the American Banana case. About *Strassheim v. Daily* (221 U.S. 280, 31 Sup. Ct. 558, 55 L. Ed. 735 (1910)) see *supra* 5.5. n. 20.

[98] See *supra* p. 132 ff.

[99] See the brief for plaintiff in that case.

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

[101] See e.g. *Timberg, supra* n. 12, at 419; *Rosenfield, B.A., supra* n. 3, at 1010 and *Rollings, C., supra* n. 12, at 531 f. *Rollings* does mark, though in a note — at 531, n. 3 — "that delimitation of requisite effect is necessary", and further down in the same note: "A change in the volume of American imports or exports is one indicator of 'effect'." Some commentators prefer the term "affect" instead of "effect", without indicating, however, whether any distinction is intended, see, for instance, *Goldstein, E.E.,* International Patent and Knowhow Interchanges and the American Antitrust Laws, 4 Tex. Int. L. For. 42 (1968), at 42 f.; *Claudy, D.E.,* at 822; *Barnard, R.C.,* at 97; *Ellis, J.J.A.,* at 51.

[102] See e.g. *Davidow, J.,* Extraterritorial Application of U.S. Antitrust Law In a Changing World, 8 L. & Pol. Int. Bus. 895 (1976_1), at 896.

[103] See e.g. *Rill, J.F.* and *Frank, R.L.,* at 139.

[104] See *Reynolds, W.B.,* at 1041.

[105] See *Claudy, D.E.,* at 823. *Cf. supra* n. 2.

[106] See *Jones, R.T.,* Extraterritoriality in U.S. Antitrust: An International "Hot Potato", 11 Int. Law. 415 (1977), at 424.

[107] See the *1955 Attorney General's Report,* at 76.

[108] See *Hale* and *Hale,* at 502.

[109] Also see *Notes and Comments,* Extraterritorial Application of the Antitrust laws: A Conflict of Laws Approach, 70 Yale L. J. 259 (1960), at 261 ("prohibited effects"); *Gleiss, A.,* Die Gefahren des US-Antitrustrechts für europäische Unternehmen, AWD (Aussenwirtschafstdienst des Betriebs-Beraters) 1969, p. 499, at 501, who percieves four, individual, jurisdictional grounds: when the restraint takes place in the United States, when it takes place in the United States, although the act was first implemented elsewhere, when the restraint takes place outside the United States but acts in furtherance of this are intended to be implemented or are in the verge of being implemented within the United States, or when the restraint takes place outside the United States and has effects on the U.S. territory or upon U.S. exports or imports.

[110] See e.g. *von Kalinowski,* at 5-120: "[T]he meaning of the term 'effect' is not capable of a ready definition ..."; *Homburger/Jenny,* at 57: "Der Begriff der Auswirkung ('effect', 'impact') ist nirgends definiert." Also see *Rahl,* at 56; *Simson,* at 240.

[111] See e.g. *Rahl,* at 63; and the same: American Antitrust and Foreign Operations: What is

Covered? 8 Corn. Int. L. J. 1 (1974); *Fugate,* at 145 and 174; *Bohlig,* at 47 f.; *Schwartz,* Applicability, at 716.

[112] See *Rahl,* at 59 ff.; *von Kalinowski,* at 5-114 ff.; *Sullivan,* at 714 ff. *But cf. Fugate,* at 72 and 74.

[113] Also see *Bohlig,* at 49 f., who combines the "directness" test with the requisite "intent", without attempting to define "directness".

[114] *Von Kalinowski,* at 5-121.

[115] See *Rahl,* at 64 ff. and *Sullivan,* at 714 f. As to how much proof is required, see *Rahl,* at 63.

[116] *Rahl,* at 56.

[117] *Rahl,* at 64 ff.

[118] *Rahl,* at 69 ff. and 75 ff.

[119] *Rahl,* at 80 ff.

[120] *Rahl,* at 63 f.

[121] *Rahl,* at 80.

[122] See the cases referred to by *Rahl,* at 72. *Cf.* p. 68.

[123] *Rahl,* at 72 f.

[124] Take *Alcoa* (United States v. Aluminum Co. of America, 148 F. 2d 416, 2d Cir. 1945), for instance, (at 443 f.). Does *Rahl's* formula "in or substantial effects" upon commerce coincide with Judge Hand's reasoning in that case, that is, does it suffice, for jurisdictional purposes, that a restraint is applied to U.S. foreign commerce, without having effects upon it? *Rahl* answers yes. Judge Hand's answer was obviously no: "Such agreements may on the other hand intend to include imports into the United States, [in *Rahl's* terms, be "in" the commerce] and yet it may appear that they have had no effect upon them. . . . [W]e shall assume that the [Sherman] 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." That the burden of proof as to these effects was placed upon the defendants in *Alcoa* (at 444), does not change this conclusion. As *Rahl* (at 67) himself puts it, here we are only discussing the *elements* of the foreign commerce test, not matters of proof or substantive antitrust rules.

[125] See *Rahl,* at 74 f.

[126] United States v. Pacific & Arctic Co., 228 U.S. 87 (1913).

[127] 243 U.S. 66 (1917).

[128] *Rahl,* at 74.

[129] See *supra* n. 126.

[130] See the analysis *supra* p. 73 f. and 78 ff.

[131] United States v. Aluminum Co. of America, 148 F. 2d 416 (2d Cir. 1945), at 443.

[132] See *Rahl,* at 83 ff., *von Kalinowski,* at 5—119 ff. and *Sullivan,* at 714 f.

[133] *Rahl,* at 62. (Note omitted).

[134] *Rahl*, at 86.

[135] *Homburger/Jenny*, at 58. (Note omitted).

[136] *Heidemann*, at 43.

[137] *Fugate*, at 74 f. In his first edition of the same work, *Fugate* finds that "any *substantial* effect" may suffice. (Ist ed., 1958, at 55. Also see n. 20 on the same page).

[138] *Schwartz*, Applicability, at 715 f.

[139] That is the test advocated by *Rahl*, *von Kalinowski* and *Sullivan*, see *supra* n. 132.

[140] See *supra* n. 133.

[141] *Rahl*, at 86.

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

[143] *Rahl*, at 86. (Note omitted).

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

[145] See *supra* p. 84 ff.

[146] *Rahl*, at 87.

[147] *Id.*

[148] See *Brewster*, at 63 ff. and 81 ff.

[149] See the *Antitrust Developments 1955—1968*, at 49.

[150] See *supra* n. 144.

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

[152a] See *supra* n. 149. (Note omitted).

[152b] *Id.*

[153] United States v. Masonite Corp., 316 U.S. 265 (1942), at 275.

[154] *Fugate*, at 48. (Note omitted). Also see *Fugate*, at 194 f., where "specific intent" is discussed and denied.

[155] See *Bohlig*, at 50 f.

[156] See *Heidemann*, at 43 f.

[157] See *Fugate*, at 48.

[158] See *supra* n. 151.

[159] See *supra* n. 144. *Cf. Frisinger*, Extraterritoriale Anwendung des US-Antitrustrechtes und "Personal Jurisdiction" über ausländische Gesellschaft, 1972 AWD 12, at 14.

[160] See *supra* p. 84 ff.

[161] See *supra* p. 91 ff. Also see the case, United States v. General Electric Co., 82 F. Supp. 753 (D.N.J. 1949), at 890 f.

[162] The distinction is, simply stated; a) Did A intend to restrain competition?; b) Did A intend to restrain competition and thereby intend to affect U.S. commerce?

[163] See *supra* n. 151 at 890.

[164] *Id.*, at 891.

[165] See *supra* p. 41 ff., 167 and 177. *Rahl*, at 87. But see *Rahl*, at 67, n. 37. Facing obvious difficulties in attuning the *Alcoa* case (see *supra* n. 144) to his "in-or-substantial effect on commerce" formula, *Rahl* surprisingly denies the jurisdictional nature of the "intent" requisite, claiming that it is "an element of substantive violation". This remark he seems to have overlooked only a couple of pages later, where he, as we have seen, recognizes the jurisdictional nature of the requirement (at 86 ff.).

[166] See *supra* p. 167 and *Rahl*, at 87.

[167] Antitrust and Trade Regulation Report No. 799, p. E-1 ff.

[168] *Id.*, at E-3.

[169] *Hunter*, Specific Application to Anti-Trust Matters of General Principles of International Law Governing the Assumption and Exercise of Jurisdiction, ILA 1970, 221 ff., at 236. The international law aspects of this article will not be touched upon here. Mark, however, that the requisite "primarily intended" is a proposal *de lege ferenda*, imposed in light of international law. Here the views of *Hunter* serve the sole purpose sheding some light on the "intent-foreseeability" distinction.

[170] See *Hunter*, ILA 1972, 156 ff., where he continues the discussion in an article under the same title as in *supra* n. 169.

[171] *Id.*, at 157. *Cf. The Restatement (2d) of Foreign Relations Law*, Section 18, Illustration 9, at 51, where like effects are characterized as foreseeable.

[172] *Id.*, at 160 f.

[173] Objections may, of course, be raised, again *de lege ferenda*, against the requirement "primarily intended". One may argue that it is too strict, too specific; that "primary" intention may be impossible to prove; or that effects upon American are probably seldom "primarily intended", but rather that the "primary" intention may more often be to drive a competitor out of business, to gain some extra profits, or to achieve an increase of prices. This discussion will however be dealt with in the text *infra*.

[174] The *Restatement (2d) of Foreign Relations Law*, Section 18, Illustration 8 (at 50 f.).

[175] See *supra* p. 42 f. 169 and 177 f.

[176] See *Meessen*, at 163.

[177] See *Brewster*, at 65.

[178] *Id.* Also see *Brewster*, at 81 ff.

[179] See *Trautman*, in Brewster, at 320 f.

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

[181] See *supra* p. 177 f.

[182] See *Rahl*, at 86 ff.

[183] *Rahl*, at 88.

[184] *Fugate*, at 72 and 74. Also see *Sullivan*, at 715 f.

[185] United States v. The Watchmakers of Switzerland Information Center, Inc., 1963 Trade Cases π 70,600 (starting at p. 77,414).

[186] As to the nationality of the deffendants, see *id.*, at 77,417 ff. Named as defendants, in addition to the Swiss corporations and organisations, were several U.S. corporations. As to the jurisdictional conclusions drawn by the court in the case, see *id.*, at 77,453—77,456.

[187] 82 F. Supp. 753 (D.N.J. 1949).

[188] See *supra* p. 178.

[189] United States v. Aluminum Co. of America, 148 F. 2d 416 (2d Cir. 1945), at 443 f.

[190] United States v. Aluminum Co. of America, 148 F. 2d 416 (2d Cir. 1945), at 443 (emphasis added).

[191] *Meessen,* at 123, reproaches Judge Hand for having laid to strong an emphasis on the "place of contract" rule, especially in the passage: "Both agreements would clearly have been unlawful, had they been made within the United States". (*Id.,* at 444.) (The place of the signing of the contract has, as we have seen — *supra* at p. 79 f. and 132 ff. — never been a decisive factor when determining jurisdictional issues). Read in its whole context, however, the expression "making agreements" seems to have pertained to the anticompetitive conduct in general, and not literally the signing of a contract. The basic terms of Judge Hand were "conduct" and "consequences".

[192] See *id.*, at 444.

[193] See *id.*, at 444 f.

[194] The issue has been discussed by *Brewster,* at 63 ff., who is more causcious when interpretating the *Alcoa* case: "Thus, if it is supposed that an American party to a naked restraint affecting United States foreign commerce would be held liable per se without explicit proof of actual purpose or effects, then Hand's opinion implies different standards for Americans and foreigners. However, Judge Hand's broad language might be construed as requiring proof of both intent and effect of agreements made abroad whether or not Americans are involved." Also see *Brewster,* at 73 and 75. *Cf. Haymann,* at 196 f. and 210 f.; *Zwarensteyn,* at 118 f. *But see* the *1955 Attorney General's Report,* at 76, where *Rahl's* double standard of jurisdiction is advocated, but only as a matter of what the law *should* be, not what it is. The *Antitrust Developments 1955—1968,* accepts the guideline proposed by *1955 Report.* In the *Antitrust Law Developments,* at 357, the opinion is advanced that it is unnecessary to invoke an "intent" requisite over conduct abroad by United States citizens or corporations; unnecessary in view of international law standards, it is held. Whether this is *lex lata,* we are not told. *Cf. Jones, R.T.,* 'Extraterritoriality in U.S. Antitrust: An International 'Hot Potato' ', 11 Int. Law. 415, (1977), at 424 f.; *Raymond, J.M.,* 'The Exercise of Concurrent International Jurisdiction: 'Move With Circumspection Appropriate' ', 8 Bost. Coll. Ind. & Com. L. Rev. 673 (1967), at 685 f.; *Gleiss, A.,* "Die gefahren des US-Antitrustrechts für europäische Unternehmen", 1969 AB 499, at 501.

[195] Sanib Corp. v. United Fruit Co., 135 F. Supp. 764 (S.D.N.Y. 1955).

[196] *Id.*, at 766.

[197] *Rahl,* at 84.

[198] See *Areeda,* at 64; *Brewster,* at 74 f.; *Bohlig,* at 50 f.; *Heidemann,* at 43 f.; *Homburger, E.,* 'Zur extraterritorialen Anwendung der amerikanischen Antitrustgesetze', 54 SJZ 97 (1958), at 99 ff.; *Reynolds, W.B.,* 'Extraterritorial Application of Federal Antitrust Laws:

Delimiting the Reach of Substantive Law Under the Sherman Act', 20 Vand. L. Rev. 1030 (1966—67), at 1039 ff., especially at 1040 n. 59.

[199] United States v. Aluminum Co. America, 148 F. 2d 416 (2d Cir. 1945).

[200] See *Simson,* at 237 f. and 240 f.; *Rill, J.F. & Frank, R.L.,* 'Antitrust Consequences of United States Corporate Payments to Foreign Officials: Applicability of Section 2(c) of the Robinson-Patman Act and Sections 1 and 2 of the Sherman Act', 30 Vand. L. Rev. 131 (1977), at 138 f.

[201] See the Antitrust and Trade Regulation Reporter No. 799, at E-1, especially at E-2 f.

[202] See *von Kalinowski,* at 5-114 ff.; *Rosenfield, B.A.,* 'Extraterritorial Application of United States Laws: A Conflict of Laws approach', 28 Stan. L. Rev. 1005 (1976), at 1010; *Davidow, J.,* 'Extraterritorial Application of U.S. Antitrust Law in a Changing World', 8 L. & Pol. Int. Bus. 895 (1976_1), at 896; *Baker, D.I.,* 'Antitrust and World Trade: Tempest in an International Teapot?' 8 Corn. Int. L. J. 16 (1974); *Ongman, J.W.,* ' 'Be No Longer a Chaos': Constructing a Normative Theory of the Sherman Act's Extraterritorial Jurisdictional Scope', 71 Nw. U. L. Rev. 733 (1977); *Backer, J.R.,* 'Sherman Act Jurisdiction and the Acts of Foreign Sovereigns', 77 Colum. L. Rev. 1247 (1977).

[203] See *von Kalinowski,* at 5-121 f.

[204] Fleischmann Distilling Corp. v. Distillers Co. Ltd., 395 F. Supp. 221 (S.D.N.Y. 1975). See *supra* p. 117.

[205] *Id.,* at 227.

[206] *Von Kalinowski,* Current Service, at 32.

[207] See Todhunter-Mitchell & Co., Ltd. v. Anheuser-Busch, Inc., 383 F. Supp. 586 (E.D. Penn. 1974), at 587. The first part of the case 375 F. Supp. 610 (E.D. Penn. 1974). Also see Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), at 102 f.

[208] *Antitrust Law Developments,* is a successor to *Antitrust Developments 1955—68,* which in turn was designed to update developments in the antitrust field since the *1955 Report of the Attorney General's National Committee to Study the Antitrust Laws.* Both volumes are products of the Section of Antitrust Law of the American Bar Association. The latter volume, in contrast to the former, is intended to be a source independent of the aforementioned Attorney General's Report. (As to this report, see further *supra* p. 164). Antitrust *Law* Developments is consequently not endorsed by any government agency or organization.

[209] *Antitrust Law Developments,* at 354—360.

[210] *Id.,* at 356.

[211] *Id.*

[212] *Id.,* at 357.

[213] *Id.,* at 360.

[214] *Id.,* at 358.

[215] *Id.,* at 360.

[216] See *supra* p. 135 f.

[217] *Fugate,* at 71 and 146, 185 f. Also see the discussion following these pages.

[218] *Reprinted* in 5 CCH Trade Reg. Rep. ¶ 50,129, at 55,208 (1974).

[219] *Id.*, at 55, 208.

[220] *Rahl*, 'American Antitrust and Foreign Operations: What is covered?', 8 Corn. Int. L. J. 1 (1974), at 8. More generally see *Rahl*, at 73 f.

[221] *Von Kaliowski*, at 5-120 (notes omitted).

[222] See *Brewster*, at 79 ff. and 354 ff. In particular, see the last lines at p. 355 and the first at 356.

[223] See *Kronstein/Miller/Schwartz*, at 251. The *per se* rule seems, in their view, "particularly applicable to international restraints."

[224] See *Bohlig*, at 58 ff., who, although critical, recognizes *lex lata*. *Sullivan*, at 715 (note omitted).

[225] See *Claudy, D.E.*, 'Sherman Anti-Trust Law: Applicability to Foreign Commerce', 37 Corn. L. Q. 821 (1952), at 831 f. and *Rollings, C.*, 'The Extraterritorial Application of American Antitrust Law and the Export Expansion Act of 1971', 5 Int. L. & Pol. 531 (1972), at 538—40. Also see *Timberg, S.*, 'Antitrust and Foreign Trade', 48 Nw. U. L. Rev. 411 (1953), at 418 and *Notes* and *Comments:* 'Extraterritorial Application of The Antitrust Laws: A Conflict of Laws Approach', 70 Yale L. J. 259 (1960), at 281 f. Against is *Areeda*, at 68: "[D]omestic per se rules cannot be automatically transposed to international conduct affecting American exports." The two most cited cases in support of the view that the same rules apply are United States v. Timken Roller Bearing Co., 83 F. Supp. 284 (N.D. Ohio, 1949), *mod. and affirmed*, 341 U.S. 593 (1951) and United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950).

[226] *Rahl*, at 67.

[227] See for instance Sanib Corp. v. United Fruit Co., 135 F. Supp. 764 (S.D.N.Y. 1955), at 766 and United States v. The Watchmakers of Switzerland Information Center, Inc., 1963 Trade Cases ¶ 70,600, at 77,414, especially at 77,456. *Sullivan*, at 714 ("in or affecting American foreign trade or commerce"), *cf. Rahl*, at p. 65 ff.

[228] See *supra* p. 181 ff.

[229] *Fugate*, at 44 f.

[230] See *Brewster*, at 63 ff., especially at 64. *Cf. Zwarensteyn*, at 131.

7. The reactions of foreign states

The exercise of jurisdiction by American authorities in antitrust cases, involving foreign enterprises or other foreign elements, has provoked vigorous reactions from abroad. Protests have been raised, and they have been directed against the allegedly broad American enforcement policies in the pre-trial discovery procedure, and in the subsequent court proceedings. Foreign courts have responded negatively when requested to assist in the enforcement, foreign governments have expressed their discontent and deep concern through diplomatic channels, foreign government organs have intervened and appeared as *amicus curiae,* and foreign legislators have enacted counter-legislation for the purpose of neutralizing the effects of American law. In the following, a few examples will be provided.

In the *General Electric* case, the Government of the Netherlands submitted a protest against a decree proposed by the Attorney General with respect to the disposition of certain patent rights held by Philips.[1] The decree as proposed, the Netherlands Government pointed out, would "result in extraterritorial jurisdiction to be assumed by the Court over the property and the activities of... a Netherlands corporation". A such exercise of jurisdiction would not be in conformance with "the settled rules of International Law governing the sovereign rights of nations to regulate and deal with corporations organized under their law".[2] And the Netherlands Government concluded:

"If the U.S. Government, acting as Plaintiff in this case, will let itself be guided by the settled rules of international law prescribing that decrees, penal or quasi-penal in character, shall not have extra-territorial effect, and thus will give new instructions to its attorney, the Court no doubt will limit the terms of the proposed decree so as to bring them in accordance with these rules, and will take full cognizance of the sovereign rights of the Netherlands over its own nationals, its own trade and commerce, and its own patent system."[3]

Whether as a result of this protest note or of other considerations, the court in the case subsequently did moderate the proposed decree adding, furthermore, a "saving clause".[4]

When the court in *U.S. v. Imperial Chemical Industries, Ltd.*[5] ordered ICI, a British corporation, *inter alia*, to refrain from exercising certain rights under its British patents, British Nylon Spinners, another British corporation (not a party before the American court), brought an action in Great Britain against ICI to protect its rights as an exclusive licensee.[6] The British court, enjoining ICI to comply with the American court order,

found that the order was "an intrusion on the authority of a foreign sovereign", in particular since it made "directions addressed to that foreign sovereign or to its courts or to nationals of that foreign Power".[7] To make orders, the court continued, which would "destroy or qualify" the rights of an English national, was "an assertion of an extraterritorial jurisdiction which we do not recognize".[8] In another context the court observed:

"Applied conversely, I conceive that the American court would likewise be slow (to say the least) to recognize an assertion on the part of the British courts of jurisdiction extending (in effect) to the business affairs of persons and corporations in the United States."[9]

And in the laconic words of Lord Dennings: "[T]he writ of the United States does not run in this country".[10]

When various European oil companies were requested to produce documents located in Europe in connection to *In re Investigation of World-Arrangements with Relation to the Production, Transportation, Refining and Distribution of Petroleum* (Oil Cartel),[11] the immediate reaction of the government of the United Kingdom, the Netherlands, France and Italy was to prohibit the production of the documents. The British Government considered the American order a breach of "international comity" and the Government of the Netherlands considered it an "infringement of its Sovereignty".[12]

When in 1960, numerous subpoenas were served on foreign corporations ordering them to produce documents located outside the United States in connection to the *Grand Jury Investigation of the Shipping Industry,*[13] a number of foreign governments submitted protests with reference to international law, emphasizing particularly that the American exercise of jurisdiction was contrary to principles of international law.[14]

A year later the Federal Maritime Board ordered some 190 foreign carriers to file certain records located abroad to the Board. The foreign carriers petitioned for review of the orders in *Montship Lines, Ltd. v. Federal Maritime Board,*[15] and, simultaneously, numerous foreign governments filed diplomatic protests with the Secretary of State. The Danish Government considered the American order to be "incompatible with the sovereign rights of Denmark". The British Government regarded it as "beyond the legitimate limits of United States jurisdiction" under international law, as did the Indian, the Italian, the Japanese, the Norwegian, the Netherlands, the Swedish and the Yugoslavian governments.[16]

These two shipping cases also gave rise to a number of "blocking-statutes" in the states affected. The object of these statutes was to obstruct

American discovery orders by prohibiting the supplial of documents at the request of foreign authorities.[17]

In 1961, a bill (the Bonner Bill) introduced in the United States Congress suggesting amendments of the Shipping Act of 1916, again provoked responses from a number of foreign governments. Some of the proposed amendments would, if enacted, extend the jurisdictional powers of the American authorities beyond what was possible under international law, the claim was. They would infringe upon the sovereignty of other states and encroach upon their jurisdictional rights.[18] Subsequently, the controversial provisions were stricken by the United States Senate. Senator Engle gave the following reason:

"We struck them out because American regulatory law cannot impose an extra-territorial effect. There is no question about it. Twelve countries came before the State Department and submitted their protests and their objections to our committee, in which they objected to submitting themselves to the regulatory power of the United States. We agree with that statement."[19]

In the *Swiss Watch* case the Swiss Government intervened and appeared as *amicus curiae* before the American court,[20] where it stated, *inter alia,* that the application of American antitrust law "would infringe Swiss sovereignty, would violate international law and would be harmful to the international relations of the United States", and further:

"Not only does the present action constitute a direct attack upon the legislation and policy of the Swiss Confederation; it further seeks to regulate conditions in Switzerland and to limit the control which the Swiss Confederation may exercise over its own watch industry."[21]

Recently, the *Westinghouse* uranium litigation has touched upon the nerves of international relations.[22] Westinghouse Electric Corporation sought to obtain documents located abroad by taking advantage of the letters rogatory procedure.[23] However, the requested Canadian, Australian and British courts refused to give effect to the letter rogatory.[24] In Great Britain, Lord Wilberforce in the House of Lords found that "the attempt to extend the grand jury investigation extra-territorially into the activities of the RTZ [Rio Tinto Zinc] companies was an infringement of United Kingdom sovereignty".[25] And further:

"The intervention of Her Majesty's Attorney-General establishes that quite apart from the present case, over a number of years and in a number of cases, the policy of Her Majesty's Government has been against recognition of United States investigatory jurisdiction extra-territorially against

United Kingdom companies. The courts should in such matters speak with the same voice as the executive...".[26]

The *Westinghouse* uranium litigation also constituted the main impetus for the enactment of further counter-laws in the affected states, of which the British Protection of Trading Interests Act of 1980 is, thus far, the most extensive.[27]

Notes, Chapter 1, Section 7

[1] *U.S. v. General Electric Co.*, 82 F. Supp. 753 (D.N.J. 1949) and 115 F. Supp. 835 (D.N.J. 1953). See *supra* p. 91.

[2] Note and Memorandum from the Netherlands Ambassador to the Secretary of State of May 3, 1951. See further Brewster, at 46 ff.

[3] *Id.*

[4] *U.S. v. General Electric Co.*, 115 F. Supp. 835, at 851 ff. and 877 ff. (D.N.J. 1953). See the "saving clause", *id.*, at 878. See further *supra* p. 95 f.

[5] 105 F. Supp. 215 (S.D.N.Y. 1952).

[6] *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.*, [1953] 1 Ch. 19 (C.A. 1952) (interloctury appeal); *British Nylon Spinners, Ltd. v. Industrial Chemical Industries, Ltd.*, [1954] 3 Weekly L.R. 505 (Ch.) (final appeal), [1954] 3 All. E.R. 88 (Ch.).

[7] [1953] 1 Ch. 19, at 25 (C.A. 1952).

[8] *Id.*, at 26.

[9] *Id.*, at 24.

[10] *Id.*, at 28.

[11] 13 F.R.D. 280 (D.D.C. 1952). See further *infra* p. 613.

[12] See ILA 1964, at 569 and 572. Also see the Canadian reaction on like American orders in *In re Grand Jury Subpoena Duces Tecum, Addressed to Canadian International Paper Company*, 72 F. Supp. 1013 (S.D.N.Y. 1947). See further ILA 1964, at 565 ff.

[13] *In re Grand Jury Investigation of the Shipping Industry*, 186 F. Supp. 298 (D.D.C. 1960).

[14] See further ILA 1964, at 577 ff.

[15] 295 F. 2d 147 (D.C. Cir. 1961).

[16] See further ILA 1964, at 578 ff.

[17] See further *infra* p. 601 ff. as regards "blocking statutes".

[18] See ILA 1964, at 582 ff.

[19] See *id.*, at 585.

[20] *U.S. v. The Watchmakers of Switzerland Information Center, Inc.*, 133 F. Supp. 40

(S.D.N.Y. 1955), 134 F. Supp. 710 (S.D.N.Y. 1955), 168 F. Supp. 904 (S.D.N.Y. 1958), 1963 Trade Cases π 70,600 (S.D.N.Y. 1962), *order modified,* 1965 Trade Cases π 70,352 (S.D.N.Y. 1965). See further *supra* p. 105.

[21] See further ILA 1964, at 575. Also see Rahl, at 334 ff.

[22] See further *infra* p. 601 ff. and *supra* p. 129.

[23] In Black's Dictionary (5th ed.) a "letters rogatory" is defined as follows: "A request by one court of another court in an independent jurisdiction, that a witness be examined upon interrogatories sent with the request. The medium whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of court procedure peculiar thereto and entirely within the latter's control, to assist the administration of justice in the former country." (*The Signe Tiedmann v. The Signe*), 37 F. Supp. 819, at 820 (E.D. La. 1941).

[24] The High Court of England first honored the letters of request with reference to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters *(In re Westinghouse Elec. Corp. Uranium Contracts Litigation,* [1977] 3 W.L.R. 430, [1977] 3 All. E.R. 703 (C.A. 1977), *revised,* [1978] 2 W.L.R. 81 /H.L. 1977), [1978] I All. E.R. 434. See further Wood/Carrera, The International Uranium Cartel: Litigation and Legal Implications, 14 Tex. Int. L.J. 59, at 97 ff. (1979).

As to the Convention see 658 U.N.T.S.

[25] *Rio Tinto Zinc Corporation and others v. Westinghouse Electric Corporation et e contra, RTZ Services Ltd and others v. Westinghouse Electric Corporation et e contra,* [1978] I All. E.R. 434, at 447 (i) (H.L. 1977). The Court here cited (with approval) *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.,* [1953] 1 Ch. 19 (C.A. 1952).

[26] *Id.,* at 448 (h). *Cf.* the opinion of Viscount Dilhorne, *id.,* at 460(e); Lord Diplock, *id.,* at 467(b); Lord Fraser of Tullybelton. *id.,* at 475 (c-f).

[27] 1980, c. 11. The Act was introduced to the British House of Commons in 1979 in order to "provide better protection to companies and individuals in the United Kingdom against attempts by overseas countries to impose their domestic legislation and regulations outside their own territory." See [1980] 5 Trade Regulation Reporter (CCH) II 50,415; Department of Trade of the United Kingdom, Press Notice Ref. 445, Protection of Trading Interest Bill published Oct. 31, 1979. See further *infra* p. 601 ff.

Also see the introduction to the Protection of Trading Interests Bill, Explanatory Memorandum, Ist paragraph:

"This Bill provides protection for persons in the United Kingdom from certain measures taken under the laws of overseas countries when those measures apply to things done outside such countries and their effect would be to damage the trading interests of the United Kingdom, or would be otherwise prejudicial to the sovereignty or security of the United Kingdom."

Chapter II
United States — Securities regulation

1. Introduction

The history of United States securities regulation at the federal level goes back to 1933, when the first piece of legislation — the Securities Act — was generated. During the seven years that followed, six additional statutes were enacted, and moreover, the Securities Exchange Commission (S.E.C.) was established, the supervisor, administrator and the principal enforcer of securities regulation. This intense legislative process, the end-result of which was — and still is — no doubt, the most comprehensive regulatory scheme in the world, had its roots, of course, in the fateful 1929 stock market crash. The clear intention was to bring the securities market back in order and to reconstruct the public's confidence in securities.[1]

As the jurisdictional discussion in the doctrine and in the courts has primarily evolved around the Securities Act of 1933 and the Securities Exchange Act of 1934, these will also constitute the nucleus here — the remaining statutes are of minor interest and will be disregarded.[2] But before presenting the jurisdictional debate, some light will be shed upon the substantive contents of the Acts of 1933—34.

The cardinal object of the Securities Act — the "truth-in-securities" Act — is to secure a true flow of correct and complete information between the seller and buyer of securities. The act has its spear-head directed towards the *primary* distribution of securities by the issuer to the public, wherein full disclosure of all relevant details is required. In order to effect full disclosure, the Act imposes extensive registration requirements and no security may be offered or sold through the mails or instrumentalities of interstate or foreign commerce without compliance with these requirements, unless an exemption stated in the Act, or in any of the rules promulgated under the Act by S.E.C., is applicable.[3]

The registration statement, which is to be filed with the S.E.C., implies the furnishing of a vast amount of particulars regarding the character, size,

capital structure, history and earnings of the business enterprise involved, certified financial statements, the purpose of the distribution, etc.[4] The key words are: maximum disclosure of all material facts. In addition, all potential purchasers must be served with a prospectus carrying the bulk of the information furnished through registration[5]. Non-compliance with these rules and false or incomplete statements are subject to a number of sanctions, civil as well as criminal.[6] Likewise, a sale or offer of a security which is fraudulent or misrepresentative, whether or not exempted from the registration requirements, renders the issuers involved liable.[7]

The Securities Exchange Act of 1934 is primarily geared to trading in securites *subsequent to* the initial distribution ("secondary" distribution). The Act, *inter alia,* provides for registration with the S.E.C. of securities exchanges which entails the supervision over the rules and practices of these, the regulation of broker-dealers trading in securities, (periodic) continuing registration and disclosure requirements, proxy solicitation and the regulation of "insider" trading[8]. The omnipresent object, again, is to secure a system of communication and trading based on true and complete information and to forestall fraudulent and manipulative devices. In connection hereto, several distinct remedies are available.[9]

Of particular significance in the jurisdictional context are the rules concerning "insider" trading. This is so simply because most of the cases for which have focused on the issue of subject matter jurisdiction in this area have, as we will se *infra,* involved such trading. Therefore, this phenomenon will be illuminated a little further.

The heart of the "insider" trading regulation is Section 10 (b) of the Act and rule 10b-5 promulgated thereunder by the S.E.C. in 1942.[10] These broad "anti-fraud" stipulations provide, at the outset, that it shall be unlawful for *any person,* directly or indirectly in connection with the *purchase or sale of any security* by the use of *any means* or instrumentality of interstate commerce or of the mails or of any facility of any national securities exchange, to commit certain acts. Specifying what exactly is unlawful, Section 10(b) proceeds as follows:

b) To use or employ.... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

In rule 10b-5 the Commission (S.E.C.) has implemented this delegated power to carve out further details, prescribing that it is unlawful

a) To employ any device, scheme, or artifice to defraud, b) to make any

untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person....

Still, rule 10b-5 is nothing more than an outline. The fine distinctions, the clear-cut features and defined limits are for the courts to elaborate upon. "Any person", to name one "empty vessel", has been defined to include any person having access to material information not disclosed to the public.[11] Such a person is characterized as "insider". Material information", again, is held to be such to which a reasonable man would attach significance to when deciding whether or not to make a particular transaction;[12] "purchase or sale" has been held to cover merger-situations and new issues of shares;[13] "security" has been broadly defined,[14] etc. The work of construction has proved to be an on-going, never-ending process, proceeding case by case.

The anti-fraud provisions are enforceable through a battery of criminal sanctions and civil remedies. Both equitable and legal remedies are available in the latter case.

With a view to simplify the legistation concerning securities regulation to eliminate duplications in it and to increase its efficiancy, a Federal Securities Code has been proposed. The idea is to bring together under one cover all statutes dealing with securities and administered by the S.E.C., including the Securities Act of 1933 and the Securities Exchange Act of 1934. One proposal in this regard was launched in 1978.[15]

2. Personal jurisdiction

Jurisdiction *in personam* over alien corporations in the area of securities regulation has a paradigm of its own. While the pertinent statutory language in Section 22(a) of the Securities Act and Section 27 of Securities Exchange Act closely parallels that of Section 12 of the Clayton Act (to which it bears a marked resemblance) and therefore should not, one would think, warrant too broad a deviation when construed, the courts have not followed the paths set out in the antitrust case law. According to Sections 27 and 22(a), venue is properly laid with respect to criminal proceedings, in the district wherein any act or transaction constituting the violation oc-

curred and with respect to civil (or administrative) proceedings, in the district wherein 1) any act or transaction constituting the violation occured, or 2) the defendant is found, or 3) the defendant is an inhabitant, or 4) the defendant transacts business. Service of process, on the other hand, is valid in the district in which the defendant is an inhabitant or wherever the defendant may be found.[16] The venue provisions must presumably, as is done in antitrust law, be read in light of the general venue provision, Section 1391 (d) of the Judicial Code, which enables the plaintiff to sue an alien defendant in "any district".[17] Thus far the rules regarding personal jurisdiction in securities regulation, as contrasted to those of antitrust law, seem to move along parallel lines. The deviation begins when it comes to the service of process rules.

The leading case regarding personal jurisdiction and especially the construction of the service of process provision is undoubtedly *Leasco Data Processing Equipment Corp. v. Maxwell.*[18] The case involved alien (British) defendants and the issue was, as regards personal jurisdiction, were they properly served with process? The answer lay in the words of Section 27: "Process may be served wherever the defendant may be found". The import of these words, the court ruled, is that process is validly served wherever the defendants may be found *in the whole world, i.e.,* the term "found" implies no geographical limitations.[19] The only limits upon personal jurisdiction over aliens are those set by the constitutional due process clause of the Fifth Amendment. The court's theory was thus that, when Congress enacted Section 27 of the Securities Exchange Act in 1934, it intended to extend personal jurisdiction to the full reach permitted by the due process clause.[20] Moving further, the court observed that the outer perimeters of the due process clause were well amplified by the Restatement (2d) of Conflicts of Law, specifically § 27 and the sections following.[21] "All this reflects the modern notions that where a defendant has acted within a state or sufficiently caused consequences there, he may fairly be subjected to its judicial jurisdiction even though he cannot be served with process in the state", the court explained.[22] Since the principal function of service of process is to give notice and an opportunity to be heard, there is no reason to prevent service from running across borders.[23]

Personal jurisdiction for the *Leasco* court was, accordingly, a combination of *"minimum contacts"* as understood in the Restatement, *opportunity to be heard* and *notice.* In cases involving "unusually extreme circumstances", and where "material injustice" is manifest, the court found, the doctrine of *forum non conveniens* may be invoked.[24] In comparison, the result arrived at in *Leasco* does not depart from that generally reached

in antitrust case law, if regarded from a purely *practical point of view.* From this narrow viewpoint, personal jurisdiction in securities regulation and antitrust law may even be seen as coextensive. The divergence lies rather in the foundations of the result. Thus, while courts in antitrust cases construe the "found"requirement in Section 12 of the Clayton Act strictly and enlarge the jurisdictional span by the application of Rules 4(e) and (i) of the Federal Rules of Civil Procedure, authorizing the employment of the state "long-arm" statutes,[25] the *Leasco* court gave the "found" requirement a scope so broad as to make the detour over the "long-arm" statutes wholly unnecessary.

The ruling in *Leasco* was whole-heartedly adhered to in *Travis v. Anthes Imperial Limited,*[26] decided a year later, and in *Bersch v. Drexel Firestone, Inc.,* decided in 1975, where Judge Friendly, writing for the court (as in *Leasco)* definitely confirmed the construction given the "found"requirement in Section 27.[27]

In *Bersch,* personal jurisdiction was questioned, *inter alia,* with respect to a Canadian brokerage house (Crang) with no office, bank accounts, telephone listings, subsidiaries, affiliates or salesmen in the United States, and with respect to a Canadian corporation (I.O.S), with a principal place of business in Switzerland and without offices in the United States. Neither of these corporations were found to be "present" in the United States or to be "doing business", *i.e.,* engaged in systematic and continuous activity,[28] therein, in the traditional sense.[29] But did they have "minimum contacts?" It should be noted, that the presupposition is that each defendant must be proved to have individual "minimum contacts", independent of each other. The record showed that representatives of both defendant corporations participated in or joined meetings within the United States on several occassions. "Minimum contacts" as defined under Section 36 of the Restatement are acts done in the state related to the cause of action (here violation of, *inter alia,* Section 10(b) and Rule 10b-5 thereunder of the Securities Exchange Act).[30] Defendant Crang's meetings were held not sufficiently related to the cause of action and therefore not constituting "minimum contacts", while the meetings of I.O.S., on the other hand, which were more numerous and systematic, were held to be directly related to the cause of action so as to form the basis for "minimum contacts" and consequently, personal jurisdiction.[31] Crang's contacts with the United States were further scrutinized under Section 37 of the Restatement, which provides that *effects* caused by acts done outside the United States may constitute "minimum contacts" if they are sufficiently related to the cause of action.[32] In an international context, the court, relying on *Leasco* once

once again, reasoned that Section 37 must be applied with caution, however. Only such effects, which occur "as a direct and foreseeable result" of the conduct outside the territory would suffice. Here, Crang did not know, and did not have good reason to know, that the acts done in Canada may produce effects within the United States, and therefore, personal jurisdiction could not be obtained.[33]

3. Subject matter jurisdiction

3.1 Introduction

The question of the jurisdictional reach of the securities acts have begun to trouble the minds of jurists only rather recently. In response to the increasing internationalization of the securities transactions during the last fifteen years, the United States courts have been focusing an increasing attention upon the jurisdictional provisions of these acts.

Whether the securities acts cover a transaction in securities (or any other act or imission related to such) with international ingredients, is — here as in antitrust law — initially a matter of legislative (Congressional) intent. The intent, again, may be extracted from the statutory language examined in light of the legislative history.[34] Unable to detect guiding elements of any significance in either the language or the history, however, courts have taken it upon themselves to mark the boundaries of the law. This situation was accurately described by Judge Friendly in *Bersch v. Drexel Firestone, Inc.:*

"We freely acknowledge that if we were asked to point to language in the statutes, or even in the legislative history, that compelled these conclusions, [with respect to subject matter jurisdiction] we would be unable to respond. The Congress that passed these extraordinary pieces of legislation in the midst of the depression could hardly have been expected to foresee the development of offshore funds thirty years later. We recognize that reasonable men might conclude that the coverage was greater, or less, than has been outlined in this opinion... Our conclusions rest on case law and commentary concerning the application of the securities laws and other statutes to situations with foreign elements and on our best judgment as to what Congress would have wished if these problems had occured to it".[35]

Still, the courts are not entirely groping in darkness. Not only can they, as observed in the quoted opinion, find lodestars in the antitrust case law and

other areas with similar perspectives, but they can also find guidance in general principles of international law, since, in the absence of clear legislative directives to the contrary, courts will not assume that Congress intended to violate international law standards. This canon of construction, developed in the case law, sets the utmost limit as regards subject matter jurisdiction.[36] As we shall in the following, courts have been engaged in extensive discussions as to the international principles covering the area, thereby affording a framework to the jurisdictional provisions. Although the courts may not, accordingly, go beyond the boundaries of international law without a Congressional mandate, nothing can under the circumstances prevent the courts from halting short of these boundaries.

3.2 The controlling statutory provisions

A parallel to the interstate and foreign commerce passages prescribed in the antitrust laws would be Section 2(7) of the Securities Act and Section 3(a)(17) of Securities Exchange Act.[37] These sections define the terms "interstate commerce" as they shall be understood in the remaining sections of the acts (see, *e.g.*, Section 10(b) of the Exchange Act which expressly prohibits the use, by any person, of the instruments of interstate commerce in furtherance of a scheme to defraud). "Interstate commerce", thus, shall include "trade, commerce, transportation, or communication.... between any foreign country and any state....".[38]

Disregarding minor terminological dissimilarities — "interstate commerce" including both interstate and foreign commerce — a first glance may lead to the conclusion that the sections mentioned above, as in antitrust law, supply the basis for determining the jurisdictional reach: Here we have two areas of economic law, antitrust law and securities regulation, with almost identical statutory language as far as subject matter jurisdiction is concerned, with no interpretatory quidance in the legislative history as to whether they should be concomitant, should not these two areas of law go hand in hand?[39]

Parallel lines do exist with respect to federal versus state jurisdiction: federal jurisdiction is construed to reach as far as the Commerce Clause in the Constitution allows.[40] When it comes to jurisdiction on the international level, however, courts have been reluctant to develop a foreign commerce test in line with that in antitrust law. The statutory provisions, noted above, have generally been held inconclusive or not dispositive.[41]

Nor is Section 27 of the Exchange Act (compare Section 22 in the Securities Act) dispositive. This section merely vests the federal courts with ex-

clusive jurisdiction of violations under the Act and provides little or no insight into the issues presented here.[42]

Yet there is one section in the Securities Exchange Act, that on its face seem to hold decisive jurisdictional traits. That is Section 30(b), which states:

"The provisions of this title or of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the [Securities Exchange] Commission may prescribe as necessary or appropriate to prevent the evasion of this title."[43]

The implications of this provision, in particular the locutions "any person" and "without the jurisdiction", have long been the source of great controversy amongst scholars. While it is clear that the provision exempts securities transactions by a group of persons from the courts' power to adjudicate, the disagreement pertains to the exact prerequisites for exemption, or more precisely: When is a person "without the jurisdiction" of the United States? The dividing line runs between those who claim that the term "jurisdiction", as applied in this context, means nothing more than the territory (and possesions) of the United States,[44] and those who believe that "jurisdiction" is equivalent to jurisdiction as defined by international law.[45] In the former case, the United States does not have jurisdiction where a person (with certain qualifications) transacts securities without the territory of the United States, in the latter, jurisdiction lies when principles of international law so provide. Furthermore, there is disagreement as to whether subject matter jurisdiction in the latter instance refers to jurisdiction within the limits of international law, or within the limits of constitutional law, or even, within the limits of securities law. For theoretically, as noted above, subject matter jurisdiction, as regards the securities law, may be more restrictive than international law principles would require and, on the other hand, Congress could extend subject matter jurisdiction beyond these principles as long as it stayed within the limits of the Constitution.[46]

The position taken by the Securities Exchange Commission was initially outlined in a brief, *amicus curiae,* in *Schoenbaum v. Firstbrook,* decided in 1968. The Commission there maintained in effect that Section 30(b) exempts only such activities that are beyond the jurisdictional reach of the United States.[47] A year later, two former Chief Interpretive Attorneys of the Commission, in the Virginia Law Review, expounded: Jurisdiction within the Section 30(b) "refers to jurisdiction over the subject matter in

the sense of 'limitations customarily observed by nations upon the exercise of their powers.''[48] Accordingly, international law marks the limit. An accurate application of the disputed Section, it is suggested, presupposes an analysis of the standpoint of international law in this particular field. Were that standpoint to be that all legislation is (prima facie) restricted to territory, "jurisdiction" would amount to territory, and there would be no controversy as to the substantive contents of Section 30(b).[49] But, of course, the Commission and its supporters do not suggests this. In their view, international law implies a serious consideration and weighing of multiple factors, such as competing governmental interests, laws and policies, the nationality of the parties, the locus of the act, etc.[50] One commentator, however, *J.G. Bruen, Jr,* while adhering to the Commission's interpretation of the "without jurisdiction" passage, regards the so-called protective principle to be the pertinent principle of international law.[51] Another writer, again, also adhering to the Commissions view in general, deems other international law principles as controlling.[52] Adopting the Commission's reading of the "without jurisdiction" passage, *i.e.,* that the limits of international law are determinative, thus inevitably leads to divergent opinions as to the contents of that law. But furthermore, it gives rise to the question: Did Congress, when enacting Section 30(b), refer to international law as developed in the early 1930s, or did they intend to encompass international law as it would develop, from time to time, in the years to come.[53] What Congress really intended is of course, in light of the poor legislative history, for no one to know.[54] Hence, there is ample room for speculation. The qualified guess of the Commission is, as we have seen, that Section 30(b) runs parallel with the developing international law.[55]

Nevertheless, the Commission's construction of the "without jurisdiction" clause has been criticized for being illogical on several grounds, the foremost of which is that it renders Section 30(b), seen *in toto,* entirely without substance.[56] "Jurisdiction" read in the international law sense, it is said, cannot accompany the rule-making power granted the Commission in the second half of the section, for then Congress would be "granting authority beyond its own limits of power".[57] The suggestion is, in other words, that if Section 30(b) exempts certain transactions outside the international jurisdiction of the United States, Congress would be unable to give the Commission authority to circumscribe this exemption by issuing regulations "necessary or appropriate to prevent evasion" of the law.[58]

Assuming that the legislative power of Congress is limited by the principles of international law, the suggestion would no doubt warrant consideration. But surely this is not the case, which, *inter alia,* is evident from

the canon referred to above that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains....".[59] The Constitution and especially the due process clause limit the power, not international law. This was duly recognized by the court in the Leasco case: "[I]f Congress has expressly prescribed a rule with respect to conduct outside the United States, even one going beyond the scope recognized by foreign relations law, a United States court would be bound to follow the Congressional direction unless this would violate the due process clause of the Fifth Amendment."[60]

Thus, there is nothing contradictory or illogical in construing international law principles into Section 30(b). (That it may be unwise, seen from a foreign policy angle, is quite another matter). The question is rather, is it likely. Accepting, *arguendo,* the view that "jurisdiction" equals jurisdiction under international law as it applies at the time in being, how does it reflect upon Section 30(b), in light of the jurisdictional expansion that has taken place during the last decades, an expansion which not only the antitrust case law bears witness to, but also, as we shall see below, the securities case law?[61] Realizing this broad jurisdictional spectrum, the Commission would only very rarely find a transaction in securities "without the jurisdiction" of the United States about which to regulate in accordance with its extraordinary power. The practical import of the Commission's rulemaking power would be infinitesimal. Jurisdiction would simply have outgrown that power. Yet, there is nothing unthinkable in this. It is not even unthinkable that Congress authorized the Commission to transgress international law under certain conditions, if one assumes, for instance, that the Congress in the early 1930s interpreted international law differently from what it is today in terms of jurisdiction, in particular, if it regarded jurisdiction to be more territorially restricted. Whether it is probable, turns on how one conceives the legislative and political atmosphere in the 1930s, a subject far too peripheral to pause at here.[62] But the criticism of the Commission's view does not end there.

In support of the view that jurisdiction merely refers to territory, *Geza Toth* juxtaposes the clause "without the jurisdiction of the United States" with similarly worded clauses in other sections of the Exchange Act, such as Section 5, Section 21 and Section 27. The inevitable conclusion that follows from such an analysis, Toth submits, is that any other understanding of the term jurisdiction than in the territorial sense would have "ridiculous" consequences.[63] And Toth continues: "There seems to be no way around this territorial interpretation of the scope of Section 30(b), because any attempt to diminish its application by substituting legal fictions for geogra-

phy necessarily concurrently augments the scope of Section 5" (and other sections as well, he may have added).[64] (Section 5 requires registration of exchanges — subject to some qualifications — "within or subject to the jurisdiction of the United States. . . ").[65] Toth's reasoning seems convincing enough; a non-territorial interpretation of Section 5 would, it seems, subject all major stock-exchanges in the world to the registration requirements, which would certainly be futile.

Nonetheless, there is a serious fallacy here. It lies in the presumption that "jurisdiction" not referring to territory by necessity must be worldwide in the sense that it comprehends every act, every person, and every phenomenon, whereever situated. Whatever jurisdiction in the international law sense may be, it obviously is not absolute. At least, the Securities Exchange Commission has never proposed this. Jurisdiction in international law, as defined in the Restatement (2nd) of Foreign Relations Law is, as we will see, clearly not without boundaries.[66] Hence, Section 5 (and other sections) may very well be construed to require registration of exchanges "within or subject to the jurisdiction "of the United States" as defined by international law; at least as long as logic is the only criterion for construction.

What is said so far must, however, not be misunderstood. The fact that the Securities Exchange Commission's interpretation of Section 30(b) is neither illogical ("ridiculous") nor unthinkable says nothing of its validity. The territorial interpretation may be just as valid. In the end, all that matters is the intent of Congress — unfortunately wiped out by the winds of time. Illogical would be to claim that "jurisdiction" refers to the limits of constitutional law, for then Congress would certainly be granting authority beyond the powers vested in Congress by the Constitution. It would also be illogical, finally, to place "jurisdiction" on a par with subject matter jurisdiction under the Act. It would be a complete redundancy to provide that the courts shall not have jurisdiction where a transaction is without the subject matter jurisdiction of the courts. Furthermore, as will be noted immediately below, Section 30(b) excludes some, but not all, transactions. The courts do have subject matter jurisdiction over transactions not excluded. These transactions cannot of course simultaneously be within the subject matter jurisdiction of the courts *and* without that same jurisdiction. Section 30(l) would have a similar self-extinguishing character if subject matter jurisdiction under the Act was to be held *identical* with jurisdiction under international law (or with territorial limits). Consequently, were the Commission's position with respect to the "without jurisdiction" clause to prevail, subject matter jurisdiction must rest on other premises than does jurisdiction under international law.

The other controversial passage in Section 30(b) — "any person insofar as he transacts a business in securities" — leads the throught to the provisions concerning personal jurisdiction in Section 27, rather than those concerning subject matter jurisdiction. (Compare the "transact business" test in the Clayton Act, Section 12).[67] The opening words of the provision, however, remove *that* ambiguity. They speak of the applicability of the Act as such, *i.e.*, subject matter jurisdiction.[68] However, other ambiguities remain. Throughout the Act the legislature has drawn a distinction between persons in general ("any person"), on the one hand, and professional traders in securities, such as brokers, dealers, etc., on the other. The burdens imposed upon "professionals" are in some instances, *e.g.*, registration, heavier than those of "any person".[69] The fraud provisions, however, are addressed to "any person"[70] (including professionals).

Here, suddenly, in Section 30(b), the distinction is relinquished. Not "any person", but "any person insofar as he transacts a business in securities" without the jurisdiction of the United States is exempted from the Act. Brokers and dealers no doubt transact business in securities (dealer for his own account, broker as an agent for another), but who else transacts such business.

In the now following analysis of the case law concerning subject matter jurisdiction under the securities laws, these issues and the whole of Section 30(b), in view of its controversial content, will be given specific attention.

3.3 The case law

3.3.1 Introduction

Unlike the antitrust law, the securities laws have attracted interest on the international arena only very recently. Most cases involving international elements have arisen during the last decade. This process has been the result of a increasing internationalization of the securities trade.

The analysis of case law that follows will, to the extent possible, hold the same parameters as employed when analyzing the antitrust case law,[71] with the exception of number 4) which has no relevance (dealing with the comparison between the interstate and foreign commerce test). Some of these parameters will be present very rarely, others more frequently, all depending of course, upon the circumstances in the individual case.

3.3.2 The early case law

3.3.2.1 Kook v. Crang[72]

Plaintiff Kook brought a *civil action,* recovery for a money judgment, alleging, *inter alia,* that defendant Crang had violated Section 7(c) of the Securities Exchange Act by extending credit for the purchase of securities.[73]

Foreign contacts: The defendants were citizens and residents of Canada. The defendant corporation (Crang) was a member of the Toronto Stock Exchange. The stock was investigated and purchased, the credit was extended, orders were placed and confirmed, payment was received and the stock was held as collateral for the credit extended in Canada.

The stock was Canadian and traded only on the Canadian exchange.[74]

U.S. contacts: The plaintiff was a U.S. resident. The defendant corporation was registered as a dealer and broker in the U.S. under U.S. law, and had a branch office in New York, which however did not buy or sell securities for individual customers. The plaintiff visited or contacted the New York office on several occasions for general market discussions, all but once on his own initiative. Orders by the plaintiff to buy stock were made by telephone from the U.S. and some payments for the stock were sent by mail from the U.S.[75]

Mutual contacts: The plaintiff made preliminary investigations of the market by making telephone calls and several trips from the U.S. to Canada.[76]

Process of localization: All essential acts in furtherance of the direct or indirect extension of or maintenance of credit were, the Court held, done in Canada. The Court did not inquire as to how and where the agreement to purchase stock on credit came into existence. The fact that the agreement may have been initiated from the U.S. through the use of mails and telephone, was not considered to be decisive by the Court. Only what took place in Canada was held decisive. Furthermore, the Court found that the New York office, had no part in the credit arrangement.[77]

Jurisdictional criteria: Subject matter jurisdiction was held to depend upon the localization of the act. Since all of the essential acts occurred in Canada, the U.S. courts had no jurisdiction. The foundation for this conclusion lies, the Court explained, in Section 30(b) which "specifically restricts the [Exchange] Act to the transaction of business within the United States".[78] Section 30(b), the Court continued, contemplates some necessary and substantial act within the United States.[79]

3.3.2.2 SEC v. Gulf Intercontinental Finance Corp.[80]

In this case the Securities Exchange Commission (S.E.C.) sought, *inter alia,* injunctive relief, in an action against Florida corporations and residents, and a Canadian corporation (Gulf), alleging, *inter alia,* that the Americans had organized Gulf, publicly offered its stock and subsequently diverted the proceeds of the distribution into their own pockets, thereby subjecting themselves to liability for *fraud* under Section 17(a) of the Securities Act and Section 10(b) of the Securities Exchange Act including Rule 10b-5 promulgated thereunder.[81]

Foreign contacts: One of the defendant corporations (Gulf) was Canadian. Its stock was offered by means of extensive advertising in sixty-three of the leading newspapers in Canada. The actual sales took place in Canada and the money received was deposited in Canadian banks.[82]

U.S. Contacts: The remaining ten defendants (five of which were corporations) were American. Canadian newspapers containing advertisements of Gulf stock were assumed to have been circulated in the United States through newsstands and visiting Canadians. The fraudulent scheme, including the distribution of stock, was directed from the U.S. by the American defendants. The money received from the sales was used in the U.S..[83]

Mutual contacts: Discussions and meetings preceding the organization of Gulf were held in the U.S. as well as in Canada. The purposes of the plan were effected through several trips, telephone calls and the sending of letters and other documents between the U.S. and Canada. Money received from sales of stock was transmitted from Canada to the U.S.[84]

Process of localization: The scheme to defraud, the Court said, operated and was executed in the U.S. as well as in Canada. The essential act within the United States was the offer made through the assumed circulation of Canadian newspapers in the U.S. to which the American public also was exposed, a public particularly interested in Canadian securities. "It is *sufficient* for subject matter jurisdiction", the Court concluded,.... "that such offers be made within the United States".[85] A showing of actual sales caused by such offers, was held unnecessary.

Jurisdictional criteria: In order to extend the basis for subject matter jurisdiction the Court further pointed at the fact that interstate commerce (as defined in the acts, *i.e.,* including foreign commerce) was involved. More specifically, various interstate facilities were used (telephone, mail, wires, transportation, etc.). Moreover, the fraudulent scheme was regarded as an inseparable whole and the activities that took place in the U.S. were necessary (maybe even the dominant) ingredients of the fraud, especially as it was

conducted by Americans in the United States.[86]

In what seems to be dicta, the Court finally submitted that subject matter jurisdiction could have been justified even though the offer was limited to Canadian territory and residents, provided that the instrumentalities of interstate commerce were utilized: "[I]t is obvious that the use of interstate facilities either directly or indirectly is the jurisdictional base of a complaint or prosecution under these sections."[87] Section 30(b) was not discussed.

3.3.2.3 Ferraioli v. Cantor[88]

This was a *civil* action under Section 10(b) and Rule 10b-5[89] for recovery of money paid to one of the defendant corporations (Denison) upon its sale of its controlling interest in a New York company. The complaint alleged that there was no advance disclosure to the minority shareholders of the takeover offer, which lead to a transfer executed at a price in excess of the market price. The minority shareholders were thereby denied the equal opportunity to sell at the same price.

Foreign contacts: The defendant corporations were Canadian. All negotiations preceding the transfer as well as the actual transfer took place in Canada. Representatives of Denison were present in Canada when there was a failure to disclose the offer.[90]

U.S. contacts: The plaintiffs were predominantly Americans.[91] The transfer included controlling interest in a U.S. corporation and the subsequent transfer of actual control consequently occurred in the U.S.[92]

Mutual contacts: To effect the transfer of control (from the defendants position in Canada), the mails and other means or instrumentalities of interstate and foreign commerce were utilized.[93]

Process of localization: Subject matter jurisdiction was based on acts committed in the United States, such as the actual transfer of control, including the resignations of directors and officers, constituted an inseparable part of the alleged violation as a whole (which was localized to the U.S. as well as Canada; to Canada, partly on the ground that the negotiations and the sale took place there).[94]

Jurisdictional criteria: Determinative for subject matter jurisdiction was, thus, the place of the wrong. Section 30(b) was not explicitly discussed.[95]

3.3.3 The early case law — Conclusions

The common denominator to the cases analyzed is that subject matter jurisdiction was dependent upon the locus of the violative act (the extension of

credit, the fraud, the non-disclosure, etc.).[96] While the jurisdictional criteria, thus, was the same throughout these cases, the criteria for *localizing* an act varied. For instance, in *Kook v. Crang*[97] the fact that credit was offered to a U.S. resident, probably by means of a telephone call or the sending of letter, did not make the extension of credit a U.S. act — it was not even reflected upon.[98] In *SEC v. Gulf International Finance Corp.*,[99] on the other hand, the offer of securities to Americans, assumed to have been advanced through the circulation of Canadian newspapers within the United States, was the decisive act-localising factor.[100] And, again, that the actual transfer of stock, money and credit occured in Canada in the *Kook* case, was held by the court to be essential for the localizing of the act. These contacts were not held to be decisive, in *Gulf* or in *Ferraioli v. Cantor*.[101]

The selection of act-localizing factors may at first sight seem arbitrary, yet the divergencies may be explained. The constituent elements forming the credit-extension, regarded as an illegal act, may be different from those relating to fraud or non-disclosure. All this is a matter of substantive law — the definition of a certain violation — and will not be further elaborated upon in this context.[102] The divergencies may also be explained by regarding the extension of credit in *Kook* as a single, independent, act, while the transfer of securities in *Gulf* and *Ferraioli* can be considered an inseparable part of something more comprehensive: the whole fraud.[103]

Whatever the rationale may be for choosing different factors, it is noticeable how the courts are restrained by the place of wrong rule and notions of territoriality and how painstaking the process is by which finally an act within the United States is found. In support of the jurisdictional ruling the courts have invoked Section 30(b), which is construed to exempt transactions taking place outside U.S. territory.

3.3.4 The transitional phase

3.3.4.1 Schoenbaum v. Firstbrook[104]

Schoenbaum, a shareholder in Banff Oil Ltd. (Banff), brought this civil action for damages, alleging that insiders and controlling shareholders of Banff had withheld valuable information concerning Banff's oil properties and transferred vast amounts of Banff securities to themselves at an artificially low market price, thereby violating Section 10(b) and Rule 10b-5 promulgated thereunder.[105]

Foreign contacts: All of the defendants (including Banff, two other corporations and several individuals), except one, were Canadians. All elements of the transactions of securities — the negotiations, the agreements,

the deliveries, the payments, etc. — had their *situs* in Canada, with the exception of an offer mailed from New York to Canada (see below). Banff conducted all of its operations within Canada.[106]

U.S. contacts: The plaintiff was an American. Banff's common stock was registered with the Securities Exchange Commission and partly traded upon the American Stock Exchange. One defendant was a U.S. corporation.[107]

Mutual contacts: The mails and other facilities of interstate commerce were used at a preparatory stage of the transactions as well as for the making of an offer.[108]

Process of localization: The District Court as well as the Court of Appeals found that the situs of the transactions and the alleged fraud was in Canada.[109]

Jurisdictional criteria: In determining the jurisdictional issue, the lower (District) court followed the earlier case law. Acts committed outside United States territory were held not to be within the purview of the securities acts.[110] Section 30(b) was interpreted accordingly.[111] Yet, that court did not wholly reject the plaintiff's contention, that acts committed outside U.S. territory but having an impact within it, are also covered. It even seemed to accept the contention as a matter of principle.[112] In the instant case, however, the court found no allegation of harm occurring within the United States. Any harm was to a Canadian corporation. "Any fraud", the court concluded, "occurred in Canada *and is without effect upon the United States securities markets.*"[113]

The Court of Appeal (hereinafter "the Court") held otherwise. The cardinal purpose of the securities acts, the Court reasoned, is to protect domestic investors and the domestic securities market from the effects of improper transactions, whether domestic or foreign.[114] Therefore, the foreign nature of a securities transaction, as found in the present case, did not preclude subject matter jurisdiction, the Court stated, "at least when the transactions involve stock registered and listed on a national securities exchange, and are detrimental to the interests of American investors."[115]

Furthermore, Section 30(b) was held to be inconclusive. While the "without the jurisdiction" clause was given a territorial interpretation, the "any person" passage was read to be restricted to brokers, dealers and banks, *i.e.*, persons conducting business in securities. Isolated foreign transactions, such as in the instant case, did not fall under the Section 30(b) exemption.[116]

The requisite effect was composed of the impairment of the value of American investments that the Court believed followed the issuance of Banff stock for inadequate compensation.[117]

However, for Section 10(b) to apply, the Court in addition required that there is a use of the mails or interstate commerce (including foreign commerce). By relying seemingly on the doctrine — developed in the entirely domestic case law — that use of mails or interstate facilities may be wholly incidental or occur in any manner, that requisite was easily complied with.[118]

Some conclusions: The specifics of this holding must be observed. The effect principle is invoked when *American investors are injured* (the value of their stock is impaired) by a foreign transaction involving *stock registered and listed on the American Stock Exchange.* Section 30(b) still excepts foreign transaction insofar as they are carried through by brokers, dealers or banks. "Without the jurisdiction" in that section, according to the Schoenbaum court, is equivalent to "without the territory".

3.3.4.2 Roth v. Fund of Funds, Ltd.[119]

Roth, a shareholder in Dreyfus Corporation (Dreyfus), brought a civil suit to recover short-swing "insider" profits — in accordance with Section 16(b) of the Securities Exchange Act — made by the Fund of Funds, Ltd. (Fund), on purchases and sales of common stock of Dreyfus.[120]

Foreign contacts: Defendant Fund was a Canadian corporation with its principal place of business in Switzerland. Negotiations preceding the transactions were held in Switzerland.[121]

U.S. contacts: Roth, the plainfiff, was American. The orders for the purchase and sale of the stock were executed by New York brokers on or through the facilities of the New York Stock Exchange. The payments and proceeds of the transactions were made and deposited by or in New York banks. Dreyfus' stock was registered and listed in New York.[122]

Mutual contacts: The above mentioned orders were placed in New York by telephone calls made from Switzerland.[123]

Process of localization: The transactions were localized to the United States.

Jurisdictional criteria: The place-of-wrong-rule determined subject matter jurisdiction. Consequently, Section 30(b) — interpreted in its territorial guise — was held to be inapplicable. *Schoenbaum v. Firstbrook* was only referred to in dictum.[124]

3.3.4.3 Finch v. Marathon Securities Corp.[125]

This again was a civil action for damages. It was alleged that the defendants had made misleading financial representations when selling securities to the plaintiff, amounting to fraud under Section 10(b) and Rule 10b-5

promulgated threreunder.[126]

Foreign contacts: The plaintiff as well as one defendant were British. Another defendant corporation was Bermudian, whose assets were subsequently (after the alleged fraud) transferred to a U.S. corporation. Negotiations preceding the securities transactions and including the alleged misrepresentations were held in London. The securities transacted were foreign — never listed or registered in the United States — and they were delivered in London. The final agreement according to which English law was to govern, was signed in London.[127]

U.S. contacts: The defendant Bermudian corporation had American officers, most of its directors were American and it was controlled substantially from the United States. One agreement, identical to that signed in London, was signed in New York.[128]

Mutual contacts: The mails and interstate (foreign) commerce facilities were used.[129]

Process of localization: The Court searched for acts or transactions *constituting the violation* committed within the United States, but found none. The fraudulent conduct, it held, occurred abroad, as the misrepresentations were were made, the misleading documents were furnished and the final agreement was executed abroad.[130]

Jurisdictional criteria: Schoenbaum v. Firstbrook[131] was followed in all aspects.

The interstate commerce requirement of Section 10(b) was readily satisfied. A careful weighing of the U.S. contacts against the foreign contacts, lead the Court to the conclusion that the fraud was committed abroad. Section 30(b) was held not to exempt isolated foreign transactions. Subject matter jurisdiction was, accordingly, not sustained.[132] But did the foreign fraud have any harmful consequences within the United States? Applying the *Schoenbaum* doctrine, the Court answered in the negative: The parties were predominantly foreign; the subject shares were securities in a foreign corporation neither registered nor traded on a national securities exchange; and finally, there was no showing of any domestic injury or consequence.

3.3.5 The prelude to the modern case law

3.3.5.1 Leasco Data Processing Equipment Corp. v. Maxwell[133]

In this civil action, the plaintiff ("Leasco") sought damages, alleging that the defendants by means of comprehensive fraudulent statements had induced Leasco to purchase Pergamon Press Ltd. stock — controlled by one of the defendants — at prices in excess of its true value, threreby violating

Section 10(b) and Rule 10b-5 promulgated thereunder.[134]

Foreign contacts: Most of the defendants,including the main defendant (Maxwell) and one plaintiff were British. Several meetings between Leasco and Maxwell and other defendants were held in London during which fraudulent statements were made as to Pergamon's profits, activities, assets, etc. The actual purchase of stock took place on the London Stock Exchange and the stock was paid for with cash furnished by Leasco International N.V., a Netherlands Antilles corporation, and delivered in London. Pergamon was an English corporation whose stock was not traded in an organized American securities market.[135]

U.S. contacts: The main plaintiff was American. Three of the defendants had principal offices in New York. Several meetings were held in the United States during which misrepresentations were made. The offer to buy stock and directives to buy and pay for it, emanated from the United States. The Netherlands Antilles' corporation, which paid for the stock, was wholly owned by the American plaintiff and the latter's *alter ego.*[136]

Mutual contacts: The telephone lines and the postal service between the United States and Great Britain were abundantly utilized to supply false information, to induce Leasco to purchase, to conclude minor agreements and to exchange business notes. The plaintiff and some of the defendants travelled across the ocean in the course of the particular business in question. Negotiations were conducted both in the United States and abroad.[137]

Process of localization: The fraud, as a whole, was carried through in Great Britain as well as in the United States, although the transaction of securities occured in British territory. This was the Court's conclusion.[138]

Jurisdictional criteria: Before establishing the jurisdictional criteria, the Court discussed the limits of jurisdiction in general. Since neither the wording of the Act nor the legislative history directed otherwise, principles of international law mark the outer limit, the Court reasoned, and it therefore analysed, what it regarded as an authority in this field, the Restatement (2nd) of Foreign Relations Law, Section 17 and 18.[139] Was subject matter jurisdiction permissible under any of those principles? According to Section 17, a state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs within its territory. Such onduct, the Court inferred, occured in the form of the various meetings held, negotiations conducted and misrepresentations made within the United States or through the interstate or foreign commerce channels, which taken together constituted an *essential link* in the fraudulent scheme.[140]

Nonetheless, subject matter jurisdiction was not acquired on that ground. The jurisdictional limits of the securities law were not to coincide

with those defined by international law; rather, they were to be more restrictive.[141]

First, while the Court did not expressly reject, it deemed as very doubtful, the possibility of establishing jurisdiction solely on the ground that a foreign fraud had an impact (upon American investors) within the United States, a basis for jurisdiction probably provided in Section 18 of the Restatement.[142] Secondly, jurisdiction was not founded on conduct constituting an essential part of a whole scheme, as Section 17 of the Restatement would justify.

For subject matter jurisdiction under the securities law to lie, the Court seems to have required more. It combined the jurisdictional criteria and reached the following formula: "While... we doubt that impact on an American company and its shareholders would suffice to make the statute applicable if the misconduct had occured solely in England, we think it tips the scales in favour of applicability when substantial misrepresentations were made in the United States."[143]

Section 30(b) was held not to exempt isolated transactions (the *Schoenbaum* doctrine) such as here.[144]

The Court did not explicitly discuss whether the interstate commerce requisites of Section 10(b) were met. On the other hand, there was ample evidence of use of such instrumentalities, a fact which may have motivated the Court to leave that issue aside.[145]

Some conclusions: No doubt the *Leasco* court was influenced by the *Schoenbaum* case, but did it regard that case as binding? It would seem so. In *Schoenbaum* subject matter jurisdiction rested, as we have seen, not on impact upon American investors alone, but also upon the fact that the transacted stock was registered and listed on an American stock exchange. In *Leasco* there was impact, but no stock involved which was listed and registered. Without further U.S. contacts, the *Leasco* court would have been compelled to either abstain from jurisdiction or break new jurisdictional ground beyond *Schoenbaum*.[146] But there *were* additional contacts, in the form of significant conduct, within the United States. Thus it seems that in the eyes of the court the significant conduct filled the empty space that the absence of U.S.-registered and listed stock had caused. In this way, subject matter jurisdiction was justified, and the continuity in the case law since *Schoenbaum* remained unbroken.[147]

3.3.5.2 Travis v. Anthes Imperial Limited[148]

Glen Travis and his family, together with the St Louis Trust Co. (all referred to as "Travis") owned almost eight per cent of the outstanding

shares of Anthes Imperial Limited ("Anthes"), when one day a tender offer was made to Anthes by Molson Industries Limited ("Molson"), for the purpose of merging these corporations. Travis was allegedly induced to retain his stock until the expiration of the offer, at which time a separate offer was to be made to Travis, as beneficial as the tender offer itself. But no such separate offer was made and Travis was thereby denied the opportunity to participate equally with other shareholders in the benefits of the merger. Subsequently Travis was forced to sell his shares of a nonprofitable price. In this civil action Section 10(b) and Rule 10b-5 were invoked.[149]

Foreign contacts: The corporate defendants, Anthes and Molson, and twenty-one of the twenty-three individual defendants were Canadians. Anthes' and Molson's stock was neither registered nor listed in the United States. Over ninety percent of Anthes stock was owned by foreigners. The merger was primarily a Canadian affair.[150]

U.S. contacts: The plainfiffs and two of the (twenty-three) individual defendants were Americans. Together with other Americans the plaintiffs owned ten percent of Anthes. Travis' final sale of Anthes' stock took place in the United States.[151]

Mutual contacts: The plaintiffs were induced to retain their stock by means of misrepresentations made through letters and telephone calls to and from Canada and the United States.[152]

Process of localization: The Court noted that significant steps in the fraudulent scheme occured both in Canada and the United States.[153]

Jurisdictional criteria: What took place in the United States, through the use of the mails and the interstate and foreign commerce, including the closing of the final sell-off by Travis to Molson, was held sufficient to support subject matter jurisdiction.[154] These contacts were held to constitute significant conduct within the United States.[155] The interstate commerce requirement of Section 10(b) was woven into the jurisdictional test as a whole.[156] Section 30(b) was construed, as in the *Schoenbaum* case, as not exempting isolated foreign transactions, other than those of brokers, dealers, etc., insofar as they are foreign.[157]

That impact upon American investors may be an additional factor in support of jurisdiction was discussed only incidentally in a footnote.[158] Yet the Court relied heavily, if not exclusively, on *Leasco,* where, as we have seen, jurisdiction was founded upon a *combination* of significant conduct *and* impact within the United States.[159] Either Leasco was misconceived or else impact was tacitly implied. To judge from the words of the opinion, the former is more likely to be the case. "In our view", the Court stated, citing and quoting both Leasco and Section 17 of the Restatement of

Foreign Relations Law, "subject matter jurisdiction attaches *whenever* there has been significant conduct with respect to the alleged violations in the United States."[160]

3.3.5.3 SEC v. United Financial Group, Inc.[161]

Here, the SEC sought injunctive relief, alleging that the defendants had, by means of untrue statements and omissions of material facts, induced investors to purchase their securities. (Section 10(b) and Rule 10b-5).[162]

Foreign contacts: Most of the corporate defendants (including investment companies, investment funds, "offshore mutual funds") and one individual defendant were foreign. Most of the investors were foreigners. The stock was, at least formally, offered exclusively to non-Americans. All information to the investors, including the alleged misrepresentations, was supplied abroad. All transactions of securities took place outside the United States.[163]

U.S. contacts: The investment companies and funds were owned and controlled by United Financial Group, Inc. which was incorporated in the United States. The money was partially reinvested in U.S. property. Five individual defendants were American. Preparatory work, such as the training and meeting of selling agents and the producing of the information materials, occurred in the United States. Securities were offered through advertisements in American magazines published abroad and presumably read by Americans residing and travelling abroad. Three Americans residing in foreign countries purchased securities. One American residing in the United States was offered an exchange of securities.[164]

Mutual contacts: The mails and other facilities of interstate-foreign commerce were used to prepare and distribute prospectuses, to set up sales meetings and to consummate reinvestment transactions.[165]

Process of localization: The Court did not say, but it may be assumed, that the fraud was localized to countries abroad as well as to the United States.

Jurisdictional criteria: The activities within the United States were characterized as substantial and in combination with the impact of *those* activities upon American investors residing abroad, subject matter jurisdiction was upheld. It should be carefully noted that is was not the impact of foreign activities but of *U.S.* activities that formed one of the elements on which jurisdiction was based. The impact of the foreign activities was not mentioned in the jurisdictional reasoning.

In other words, the sole criterion for subject matter jurisdiction was the fact that there were substantial activities in the United States.[166]

That the number of American investors was small in relation to the total sales of securities to aliens, was a fact deemed immaterial.[167]

The interstate commerce requirements were held to be satisfied, and the Court even discussed, without however reaching a definite conclusion, the appropriateness of founding jurisdiction *solely* on the use of interstate-foreign commerce facilities or the mails.[168]

The "without the jurisdiction" clause in Section 30(b) was construed *not* to refer to territory, but to something else which, however, the Court did not discuss.[169]

3.3.5.4 Selas of America (Nederland) N.V. v. Selas Corporation of America[170]

The plaintiff Selas of America (Nederland) — "SAN" — brought a *civil* action, involving as one count the alleged violation by the defendants — Selas Corporation of America ("SCA") — of Section 10(b) and Rule 10b-5 by virtue of certain fraudulent statements and misrepresentations that occurred in connection with the transfer of a major part (60 %) of SAN's stock to General Kinetics ("GK"), a corporation organized by "key employees" of SAN.[171]

Foreign contacts: Both SAN and KG, (including the "key employees") were Dutch corporations. The transfer of stock took place in the Netherlands.[172]

U.S. contacts: The defendant SCA was a U.S. corporation, which, before the transfer, owned 100 % of SAN. One "key employee" was American. The agreement, whereby stock was transferred, was made in the United States and fraudulent acts took place there. One major shareholder of SAN was American.[173]

Process of localization: Both the United States and the Netherlands were regarded as bases of action.[174]

Jurisdictional criteria: What took place in the United States was sufficient conduct to allow application of the Act, *provided* the transaction had a significant impact on the American securities market. It did, the Court concluded: "The result of SCA's alleged fraud may cause a serious if not a complete loss of a once wholly-owned company and that company's earnings". The shareholders of SCA would thereby be damaged as would the American securities market.[175]

Section 30(b) was not discussed; nor was the theory of interstate commerce facilities use.

3.3.5.5 Selzer v. Bank of Bermuda, Ltd.[176]

The plaintiff, Selzer, engaged in a series of financial transactions with the defendant Bank of Bermuda, including the creation of a personal trust with the Bank as trustee and Selzer as beneficiary. The present *civil* suit arose from, what Selzer alleged were violations of the securities laws in connection with those transactions.

Foreign contacts: The Bank was a Bermuda corporation. The nominal founder of the trust was a Canadian. The trust itself was a Bermuda citizen. Most transactions apparently occurred in Bermuda.[177]

U.S. contacts: Selzer was an American citizen. The Bank solicited the trust and other arrangements in New York. The trust was set up to invest in, and did invest in, American securities listed and unlisted on American exchanges.[178]

Process of localization: The Court was not concerned with localization, it merely deemed sufficient, for purposes of subject matter jurisdiction, that there were substantial acts within the United States in the form of the above mentioned solicitation and the investment in securities listed on American exchanges.[179]

Jurisdictional criteria: As a general principle the Court stated that subject matter jurisdiction is at hand when 1) there is some significant connection between the violations and the United States, such as, as was the case in *Schoenbaum v. Firstbrook* and *Roth v. Fund of Funds,*[180] involvement of stock listed on American exchanges or, as in *Leasco,*[181] fraudulent misrepresentations constituting an essential link in the whole fraud occurring within the United States; *and* 2) the effects of the violation are detrimental to American investors. Applying these criteria to the instant case, the Court found that both were fulfilled. First, the transactions in dispute involved trading in securities listed on American exchanges. Second, the effect of the alleged misconduct of the Bank in connection with the trust and other dealings, was ultimately born by Selzer, as the beneficiary of the trust.

Section 30(b) was construed in line with *Schoenbaum,*[182] *i.e.,* as referring to territory. Here, the defendant had acted within the territory of the United States, and therefore the exemption was inapplicable (see above: "Process of localization").[183]

The question of use of interstate commerce facilities, was not a subject of discussion.

3.3.6 Conclusions and summary — from Schoenbaum to Selzer

The jurisdictional reach of the securities laws, in particular its fraud provisions, has undergone a gradual expansion beginning with the *Schoenbaum* case, at times according to the method two steps forward and then one step backward. The *Schoenbaum* court was confronted with, as they saw it, an entirely foreign transaction, which if *Kook v. Crang* would have controlled, would have been outside the scope of the securities law. Subject matter jurisdiction was, however, upheld on the ground that American investors, residing in the United States, were injured (the value of their stock was impaired as a direct consequence of the violation of the law), *and* that the securities involved were both registered and listed on an American Stock Exchange. The court in *Roth v. Fund of Funds* was faced with a wholly U.S. transaction and therefore had no cause to apply the *Schoenbaum* formula. That formula was, however, consistently invoked in *Finch v. Marathon Securities Corp.* and lead the court to conclude that is was without jurisdiction since it could find no impact and since that pertinent securities were neither registered nor listed on an American exchange. In *Leasco,* again, the court found impact similar to that in *Schoenbaum* but the securities were not listed and registered on an American exchange. In order to sustain jurisdiction, therefore, the *Leasco* court had to remedy that insufficiency and thus it substituted the latter criterion for significant conduct within the United States, constituting an essential link in the fraudulent scheme. (It should be noted that the *Leasco* court did not localize the entire fraud to the United State, but only a significant part of it).

Impact and significant conduct within the United States were thus the jurisdictional criteria applied in *Leasco.* The court in *Travis v. Anthes Imperial Limited,* ostensibly relying on *Leasco,* retained jurisdiction without inquiring into effects of the fraud and without finding the stock in dispute to be listed and registered in the U.S. A little more than use of interstate-foreign commerce facilities was held sufficient. A similar situation was at hand in *SEC v. United Financial Group, Inc.,* where subject matter jurisdiction was based not on impact, not on American securities, but on conduct — characterized as preparatory — within the United States, the fact that three Americans, residing abroad purchased the fraud-infected securities and possibly on the fact that the corporations, whose securities were sold, were owned and controlled by a U.S. corporation. *Selas of America* paralleled *Leasco,* insofar as both significant conduct within the United States and impact of the whole fraud upon the American securities market was required. The impact here was, however, of a more *indirect* nature

than in *Schoenbaum* and *Leasco*.

With the *Selzer* case, the circular movement was completed. In *Selzer, Schoenbaum* and *Leasco* were brought in accord with the following jurisdictional formula:

When there is some *significant connection in the violations* with the United States either in the form of stock listed and registered on the American exchange or substantial conduct within the United States, *and,* in addition, *detrimental effects* upon American investors, there is jurisdiction.

The *Selzer* formula is no doubt an accurate interpretation of the case law from *Schoenbaum* and onward, and will therefore also serve as a summary of the jurisdictional criteria applied during this period.

The theory emerging in *Schoenbaum,* that application of the fraud provisions of the securities laws requires use of interstate-foreign commerce facilities or of the mails, has been emphasized only very sporadically in the cases that followed. In most cases, this test has not even been discussed. Is it rejected, neglected or simply regarded as so self-evident as to require no separate analysis? Judging from *Leasco* and *Travis,* the latter explanation is the most probable one, for there the test was, it seems, tacitly woven into the jurisdictional reasoning as a whole.

The interpretation given Section 30(b) in *Schoenbaum, i.e.,* that the "without jurisdiction" clause refers to territory and that the section does not exempt isolated foreign transactions (only those executed in the course of a business in securities) has set the tone for the whole case law to follow, with one exception: *SEC v. United Financial Group, Inc.,* where the court construed the Section otherwise without however, indicating how it came to this conclusion.

The breakthrough of the principle of effect in *Schoenbaum* and subsequent cases has not induced the courts to refrain from thorough examinations of the situs of the fraud at issue. On the contrary, inquiries into the U.S. contacts of the fraud, as compared to the foreign contacts, have been a matter of routine. This is hardly surprising. First, the doctrine of effects has no function in cases where the whole fraud was carried through in the United States. Second, as is illustrated by *Leasco,* that doctrine forms only one part of the jurisdictional test applied; the other part — significant conduct — presupposes a process of localization. And finally, the doctrine is invoked — as in *Schoenbaum* — when the fraud is entirely foreign, a conclusion that is possible only after a localization.

3.3.7 The leading cases

3.3.7.1 Bersch v. Drexel Firestone, Inc.[184]

This class action, civil in character, sprang from the distribution of stock of I.O.S, Ltd. ("IOS") and the charge was that the prospectuses, pursuant to which stock offerings were made, in addition to being false and misleading, failed to reveal material facts, all in violation of, *inter alia,* the fraud provisions of the securities laws.[185]

Foreign contacts: The plaintiffs in this class action were preponderantly citizens and residents of foreign countries. Most defendants were foreign. IOS (also a defendant) was organized under the laws of Canada and had its main business office in Switzerland. The fraudulent prospectuses emanated from wholly foreign sources and were, with few exeptions, distributed abroad. The overwhelming majority of the final sales were concluded abroad between foreigners, and the concerned securities were neither listed nor registered on an American exchange.[186]

U.S. contacts: Some plaintiffs and a few defendants were American. Preliminary discussions, negotiations, meetings and investigations were conducted by some defendants in the United States. Parts of the prospectuses were drafted and demonstrated therein and accounts were opened in U.S. banks for the proceeds from the sales. Americans in the United States and abroad relied on the prospectuses and purchased securities.[187]

Mutual contacts: The instrumentalies of interstate-foreign commerce were utilized.[188]

Process of localization: The Court viewed the fraudulent actions and transactions involved in the case as predominantly foreign. The United States activities were, on the other hand, characterized as merely preparatory. To use the Court's allegory: A bullet was shot from one foreign country into another and the acts in the United States, at the most, furthered the producing of the gun.[189]

Jurisdictional criteria: As in *Leasco,* Judge Friendly (writing for the Court) observed that the activities within the United States, as a matter of *international law,* were sufficient to confer jurisdiction upon United States. But here the issue was, did the Court have subject matter jurisdiction under the *securities laws?* For the purpose of deciding that issue, the Court classified the various plaintiffs according to their nationality and place of residence and found the following categories: Foreign citizens, residing abroad; American citizens, residing in the United States; American citizens, residing abroad. The jurisdictional criteria varies, the Court held, depending on the category of plaintiffs involved.[190]

1. *Foreign plaintiffs, residing abroad:* With respect to these the fraud was committed by the placing of the prospectuses with foreign origin in the hands of the purchaser, either directly or through the mails, at a time when the purchaser resided in a foreign country. All elements of the transactions took place abroad. Actions taken in the United States were merely preparatory. These, U.S. based activities were too insignificant in comparison to those abroad, the Court concluded, and could therefore not justify jurisdiction. Subject matter jurisdiction, the Court added, requires that there be activities in the United States (or culpable failures to act) that directly cause injury to foreigners abroad, which probably would have been the case, had the prospectuses been distributed *from* the United States.

Thus, when United States activities are merely preparatory in character, it is immaterial how much injury foreigners suffer. It is also unimportant that the United States economy in general, and American corporations in particular, may suffer due to decreased trust, on the part of foreign investors, in the American securities market, American underwriters, American firms and the whole American investment industry.[191]

2. *American citizens, residing in the United States:* Some twenty American citizens bought securities relying, the Court assumed, on prospectuses dispatched from abroad to the United States. Here, using the allegory above, the bullet was fired from abroad and hit Americans in the United States. Acts commited abroad had a direct effect in the United States, and that was sufficient to grant subject matter jurisdiction. The Court did not inquire where the sales of the securities involved here actually occured, where the agreements were signed, securities delivered, payments deposited, etc. That was not necessary it seems, since even if all of the acts had occurred abroad, the Court reasoned, a direct effect upon American investors would still suffice.[192]

3. *American citizens, residing abroad:* The preparatory activities within the United States, too insignificant to warrant subject matter jurisdiction with respect to foreigners abroad, were held sufficient when the injury was to Americans abroad, approximately 400 of whom purchased the fraud-infected securities. With respect to these Americans, the preparatory activities were of material importance and had significantly contributed to the injuries suffered.[193]

Section 30(b) was not discussed; nor was the theory of interstate commerce facilities use.[194]

3.3.7.2 IIT v. Vencap, Ltd.[195]

Here, a civil action was brought under Section 10(b) and Rule 10b-5[196] by IIT, an investment trust organized under the laws of Luxembourg, and its liquidators from that country, alleging fraud, conversion and corporate waste. The defendants were Vencap, a Bahamian venture capital enterprise, and, at least, two individuals — Pistell and Blackman — both American citizens resident in the Bahamas. After having induced IIT to invest money in Vencap — IIT became a preferred shareholder of Vencap — Pistell caused a substantial amount of the investments to be converted to his personal use. The investment was negotiated, concluded and realized outside the United States.

Process of localization: Due to insufficient findings of fact, the Court faced difficulties when attempting to define the fraudulent act. Five theories of fraud were discussed and only two of these would, according to the Court, support jurisdiction. One of these implied that Pistell had misrepresented the type of management that Vencap would be afforded, the other that IIT sued as a shareholder in Vencap for having been fraudulently induced to purchase securities for Pistell's personal benefit.[197] Were these two theories to be accepted, the Court reasoned, activities taking place within the United States posterior to the conclusion of the primary investment agreement — a New York office was used as a base for Vencap's business transactions — would constitute a part of the fraudulent scheme. Thereby, at least part of the fraud could be localized to the United States.[198] On the other hand, if any of the residual three theories were to be accepted,[199] the fraud would have been consummated at the time of the conclusion of the primary investment agreement, and the only act occurring within the United States would be the exchange by the American attorneys of IIT and Vencap of drafts of that agreement.[200] These theories, if accepted, would have compelled the Court to localize the fraud, in its totality, to foreign countries.

Jurisdiction criteria: Three grounds for subject matter jurisdiction were under scrutiny. The Court rejected the first according to which jurisdiction over the fraudulent conduct was to be aquired, because of Pistell's — the performer's — United States' citizenship. While international law principles, as defined in the Restatement (2d) of Foreign Relations Law, would authorize Congress to prescribe the conduct of its nationals everywhere in the world, the Court explained, Congress may not always have exercised that power. And it has not done so with respect to securities laws, the Court concluded, at least not in the sense that nationality *alone* would suffice for jurisdiction.[201] The second ground, according to which Pistell's activi-

ties had a significant effect in the United States, since approzimately 300 of IIT's fundholders were American citizens and residents, was likewise rejected. The effect, the Court found, was too insubstantial to fall within the ambit of Section 18 of the Restatement: merely 0,2 % of IIT's fundholders were Americans, owning 0,5 %, at the most, of the trust. Moreover, the effect was indirect: the fraud, if there was one, was not directed towards the American owners; the shares of IIT were not even intended, according to the prospectus of IIT, to be offered or sold to Americans, but to IIT alone.[202]

The third ground of jurisdiction rested on the above mentioned theories that activities, consummating the fraud, occured within the United States. These activities, the Court held, if viewed as the perpetration of fraudulent acts — and not as merely preparatory in nature — could provide a basis for subject matter jurisdiction. (Whether they were to be the basis would depend upon further findings of facts).[203] "We do not think", said the Court, that "Congress intended to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners. This country would surely look askance if one of our neighbours stood by silently and permitted misrepresented securities to be poured into the United States."[204] The Section 30(b) exemption was not mentioned, nor was the interstate commerce facilities test.[205]

3.3.8 A summary of the Bersch and IIT cases and conclusions

Protection of American investors is the foremost parameter of subject matter jurisdiction. The *Schoenbaum*[206] court proclaimed this, and so did the courts in *Bersch*[207] and *IIT*.[208] Thus, the bases for subject matter jurisdiction could be summarized as follows.

1. When Americans, residing in the United States, are the target of a fraud directed entirely from abroad, there is jurisdiction. The situation may be described in two ways: a) the foreign fraud has a direct effect upon American investors, *i.e.,* they are damaged by purchasing the fraud-infected securities and directly so, if they themselves are defrauded by relying, for instance, on misrepresentations or false prospectuses. The effect is, however, *indirect* upon American investors, as was said in *IIT,*[209] if the target of the fraud is a foreign corporation in which the Americans hold shares (see below: derivative actions); b) by communicating the fraudulent statements, representations, etc. to Americans in the United States, the fraud has been consummated there, which is tantamount to stating that the fraud has occurred in the United States.[210]

The *Bersch* court, guided by the principles stated in Section 17 and 18 of the Restatement, chose, as we have seen, alternative a.[211]

In *Schoenbaum* the fact situation was analogous to that in *Bersch:* American investors, residing in the United States, were defrauded, not, to be sure, by means of positive acts directed from abroad, but by a non-disclosure, *i.e.,* an omission to act where foreign "insiders" had a duty to act.[212] In both cases, American investors lost money, and consequently jurisdiction was established. The criteria added in *Schoenbaum,* that the transactions must involve stock registered and listed on an American exchange — criteria not present in *Bersch* (there simply was no such stock involved) — are explainable: the *duty* upon *foreigners* to disclose material information would probably not have existed, were the stock not so listed and registered. In this way, *Schoenbaum* and *Bersch* can be reconciled.[213]

In *Leasco,* however, the court expressed doubt as to whether impact on American investors — a company and its shareholders — would suffice alone to support applicability.[214] That doubt was obviously removed in *Bersch.* Did *Bersch* hold distinguishing features? Or did the court in *Bersch* implicitly argue that *Leasco* implied no exhaustion of the jurisdictional limits under the securities laws, and that, therefore, the holding in *Bersch* was merely a further development within those limits.[215]

In *Bersch* the American investor was not only residing, but also actually present in the United States at the time of the fraud, whereas in *Leasco,* the American investor went to London and was defrauded there. Is this fact a distinguishable feature?[216] Similarly, is it a distinguishable feature that in *Bersch,* the American investor was an individual, while in *Leasco* it was a corporation (implying that the individual has a wider range of protection than a corporation)? These differences do not, in fact, at first sight amount to distinguishing features. It is hardly probable that the jurisdictional criteria would change significantly, on the sole ground that the American investor was persuaded to *momentarily* leave the United States and be subjected to fraud on the other side of the border. Moreover, consideration of where the American was at the time of the fraud, would, to follow *Bersch,* result in an extended classification of plaintiffs according to their citizenship, their residence and now also the place of temporary presence, an extension not indicated by the *Bersch* court.

Furthermore, any distinction between individuals and corporations in terms of protection should be a matter of substantive, and not jurisdictional, law, at least if the rationale for affording individuals more protection is that they are normally less experienced — in law and economics — than are corporations, and therefore more susceptible to fraud.[217] Yet,

there is one more aspect. An American corporation operating on a worldwide basis, engaged in transactions in various countries, may be too international to be placed in the same category as an American resident. Such "multinationals" cannot expect United States' law to afford a protective shield in every instance of securities transactions, to the same extent as an American resident. This was intimated in *Leasco,* and this was said in *Bersch* with respect to American non-residents. The American interest in jurisdiction becomes weaker the more related the plaintiff is to foreign countries.[218]

Thus, the multinational character of the plaintiff in *Leasco* may be a distinguishing factor.

Still, the dominant impression is that in *Bersch,* the *Leasco* decision was limited to its specific facts and understood as non-exhaustive with respect to the jurisdictional limits under the antifraud provisions of the securities laws, that the court in *Bersch,* consequently, developed the jurisdictional law within those limits and that *Leasco,* in other words, did not draw the line.[219]

2. The conclusion stated above is, *inter alia,* supported by the fact that a fraud directed against American investors residing abroad, as held in *Bersch,* is within the ambit of the law when preparatory activities have taken place within the United States.[220] In comparison, the *Leasco* court required "substantial misrepresentations" (or acitivities constituting "an essential link" of the fraud).[221] "Substantial misrepresentations" is surely something more comprehensive than "preparatory activities".[222]

3. With respect to non-Americans residing abroad, subject matter jurisdiction, according to both *Bersch* and *IIT,* presupposes the "perpetration of fraudulent acts themselves" within United States territory. Thus the fraud itself or at least any or several of its constituent elements must have been carried out in the United States.[223]

4. Another category of plaintiffs would be foreigners residing in the United States. As regards this category, the jurisdictional rule has not yet been formed. However, the United States' constitutional standard of equal protection (in the Fifth Amendment) seems to require that foreigners and Americans who reside in the United States be treated equally — also under the securities laws. The suggestion is therefore that the law applies equally to United States residents, whether they are American citizens or not.[224]

The list of variables presented — individuals contra corporations, American citizens contra foreigners (probably including foreign corporations),[225] American residents contra non-residents — could be prolonged by adding issues related to *derivative actions.* In the *IIT* case, for instance,

the court (relying on *Schoenbaum,* also involving a derivative suit) posed the following hypothetical situation: "We cannot believe that Congress would have intended the anti-fraud provisions of the securities laws to apply if [the defendant]..., in London, had defrauded a British investment trust by selling foreign securities to it simply because half of one per cent of its assets was held by Americans."[226] Not even the fact that there were to be 300 American residents and citizens owning some 0,5 % of the foreign trust would alter that conclusion, at least not in the absence of an intention to solicit American interest. The effect would be too indirect, too insubstantial. Had the fraud been addressed directly to the American investors, as in *Bersch,* statistics concerning ownership, etc., would have been immaterial.[227]

In which category of plaintiffs is the Securities Exchange Commission (S.E.C.) to be placed? In *SEC v. United Financial Group, Inc.,*[228] jurisdiction was granted after a showing of substantial activities within the United States and impact upon a few non-resident American investors. In *IIT,* there was substantial activity coupled with an injured *foreign* investor, and the court there noted: "If there would be subject matter jurisdiction over a suit by the S.E.C. to prevent to concoction of securities frauds in the United States for export, [referring to *SEC v. United Financial Group, Inc.*] there would also seem to be jurisdiction over a suit for damages or rescission by a defrauded foreign individual."[229] The indication here seems to be that the jurisdictional reach in cases where the S.E.C. is a plaintiff is coextensive with those cases where the plaintiff is an individual (or a corporation) irrespective of nationality.

There remains the question, not yet commented upon, of whether or not the fact that the suit is a class action has any bearing on the jurisdictional issue. This has a bearing only insofar as each member of the class has to be categorized according to his nationality, etc., and the jurisdictional rule formulated thereafter, all in line with the principles outlined above. Yet, the court in *IIT* indicated that while a suit by a foreign individual may be jurisdictionally covered, class actions with foreign participants, may stand differently, at least if the class included a vast amount of foreigners. In such cases, it seems, courts may refrain from taking jurisdiction on the ground, *inter alia,* that a judgment, for or against the plaintiff, may have a dubious binding effect on absent foreign plaintiffs and may not shelter the defendant from renewed actions — on the same ground — abroad.[230]

That the nationality of the *defendant* only has a peripheral bearing on the jurisdictional issue should be noted.[231]

It is also notable that the Section 30(b) exemption is passed over in

silence in both *Bersch* and *IIT*. The exemption is inapplicable, as was held in *Schoenbaum,*[232] where the fraud occurred within the territory of the United States, which should explain the silence in *IIT*. In *Bersch,* however, the transactions were, as the court described it, "predominantly foreign".[233] Was it that the transactions were characterized as "isolated" — the other exception to the Section 30(b) exemption — or was it simply that no argument on the point was advanced by the defendants? The point was argued in the district court by the foreign brokers and dealers, and would have been considered in the appellate court, if the complaint had not been dismissed with respect to these defendants because of lack of *in personam* jurisdiction.[234] Finally, it is notable that the doctrine of interstate commerce facilities use, once invoked in *Schoenbaum,*[235] has not been employed, at least not explicitly, either in *Bersch* or in *IIT*.

3.3.9 The post-Bersch and IIT-period

The authority of *Bersch* and *IIT,*[236] in the period to follow, can hardly be overestimated. In a series of cases the principles developed in *Bersch* and *IIT* have been implemented almost without exception, although *Schoenbaum, Leasco* and other cases are occassionally referred to.[237] This is true of, *inter alia, Straub v. Vaisman & Co., Inc.,*[238] *SEC v. Kasser,*[239] *United States c. Cook*[240] and *Continental Grain, Etc. v. Pacific Oilseeds, Inc.*[241] Since these cases hold nearly identical jurisdictional traits, our purposes will be best served by analyzing them in concert. (Other, post-*Bersch-IIT*-cases, will be dealt with separately). All of these cases, hereinafter referred to as *"Straub", "Kasser", "Cook"* and *"Continental Grain",* involved United States defendants (in some instances foreign co-defendants) who allegedly defrauded non-resident *foreign nationals* — individuals and corporations. Thus the applicability of the anti-fraud provisions was at issue.[242] In *Straub* and *Continental Grain* the defrauded victim himself brought the — civil — action. In *Kasser,* the SEC was the plaintiff, seeking injunctive relief. The *Cook* case, however, was a *criminal* action, where the defendant Cook appealed from the District Court, which had sentenced him to five years' imprisonment for each offense. Despite these differences with respect to the character of the action — civil, criminal or in equity — there is not the slightest indication in the opinions to the effect that jurisdictional criteria would vary accordingly.

On the contrary, in all of the cases referred to, the sole jurisdictional question was, since the victims were foreigners, whether there was enough activity within the United States on which to base subject matter jurisdic-

tion.[243] In all of the cases, *Bersch* and *IIT* (both civil actions) were adhered to. Thus in a case of foreign victims, "merely preparatory" activities within the United States do not suffice; the conduct therein must have — to use another phrase from *Bersch* — "directly caused" the injuries to these foreigners. (Perpetration of fraudulent acts themselves" in *IIT* language).[244] Furthermore, in each of the cases jurisdiction was granted.[245] The following activities were held more than "merely preparatory" and "directly causing" the losses to the foreigners:

a. In *Straub* the fraudulent scheme was conceived in the United States by American citizens, involved stock in an American corporation traded on an American exchange and an American securities broker, from his office in the United States, was responsible for failure to disclose inside information. The purchase of stock by Straub and other plaintiffs was solicited partly by the sending of a telex and the making of telephone calls from the United States to a foreign country some of which were misrepresentative. The subsequent transaction was executed primarily in the United States. This was not a predominantly foreign transaction, the Court concluded.[246]

b. In *Kasser* the court gave emphasis to the following conduct which occurred in the United States:

1. various negotiations preceding the crucial transactions;
2. execution of one of several contracts;
3. use of the interstate foreign commerce facilities in furtherance of the fraud;
4. incorporation of defendant companies, or at least the establishment of corporate offices;
5. use of New York office of a Swiss bank as a conduit for money received from the defrauded foreign coporation;
6. maintenance of books and records;
7. drafting of agreements; and
8. transmission of proceeds from the transactions to and from the United States.

On the other hand, none of the securities involved were traded or listed on an American exchange. All but one of the agreements were executed outside the United States, and the negotiations preceding the agreements were also conducted abroad. Several foreign banks were utilized. Misrepresentations were made abroad.[247]

However, the Court concluded that the U.S. based conduct was significant, substantial and essential to the fraud as a whole.[248]

c. In the *Cook* case, the defendants defrauded the nonresident foreign nationals by means of false and misleading advertisements in European newpapers and periodicals. Contracts were negotiated and signed in Europe and then returned to the United States for recording. Payments, repayments and information travelled between the United States and Europe. Some investors were defrauded, in part, in the United States. The securities transacted were American and the centre of operations was in the United States.[249]

d. In *Continental Grain* the foreign plaintiff was fraudulently induced to buy a foreign corporation — foreign securities — by the American defendants. The agreement was executed in the United States, although the closing was intentionally held outside the U.S. through U.S. foreign commerce facilities. Stock certificates were delivered and payments were originally received abroad (later transmitted to the United States). The fraud consisted of a nondisclosure of material facts pertaining to the take-over.[250]

The nondisclosure was the result of intensive use of United States interstate-foreign commerce facilities, to the degree, the Court concluded, that the fraud was devised and completed in the United States. While recognizing that the case involved a substantially foreign transaction, the Court came to the conclusion that the U.S. based conduct was sufficiently significant (in fact the court held it constituted the organization and completion of the fraud) to warrant jurisdiction.[251]

In yet another case, *Recaman v. Barish,* the Court was unable to find sufficient U.S. based conduct in order to grant jurisdiction.[252] There, again, nonresident foreign nationals requested damages, and again, several American citizens and residents were defendants. The complaint alleged that U.S. residents, by means of false statements and misrepresentations, induced the plaintiffs to purchase shares of a Bahamian trust company, United States Investment Funds. All solicitations, negotiations, inducements and subsequent transactions took place abroad, with one exception: the funds to be used in making the purchases were in the United States and the transfer of these funds to the Bahama Islands was arranged for by use of foreign commerce facilities (one plaintiff and some defendants — or their representatives — *inter alia,* travelled to the United States for this purpose). No securities were listed or traded on American exchanges; nor were they transacted by American dealers or brokers.[253]

As an alternative to the jurisdictional test based on conduct within the United States, the Court advanced the effects test. That test, the Court claimed, would be satisfied if either the securities transacted had been registered on an American Exchange — but they were not — or if the in-

jured plaintiffs had been American nationals, which they were not.[254]

In *Des Brisay v. Goldfield Corp.*,[255] which factually resembled the aforementioned cases in that the plaintiffs were non-resident foreigners and the defendants Americans, the Court was faced with a substantially foreign fraud, in origin and consummation — all transactions relevant to the fraud had been performed in Canada. Since, however, part of the securities involved in the transactions were registered and listed on an American exchange and the foreign transaction adversely affected buyers, sellers and holders of those securities, the Court upheld jurisdiction. Included in the group of affected buyers, sellers and holders were, it seems, not only the plaintiffs, but other traders in the pertinent securities' market as well.[256]

Jurisdiction was denied in *IIT v. Cornfeld.*[257] The foreign plaintiffs — the same defendants as in *IIT v. Vencap* — sued under the antifraud provisions. Among the defendants were several United States nationals. The actual misrepresentations, while facilitated by misleading prospectuses prepared in the United States, were made in Luxembourg. "Since virtually all the fundholders were foreigners residing in foreign countries, the deception", the Court inferred, "*must* have occured outside of the United States."[258]

The defendants' use of an American exchange for the transaction of the securities involved, was given little significance.

3.3.10 Conclusions

The post-*Bersch*[259] and *IIT*[260] case law, briefly analyzed above, is restricted to situations where a nonresident foreign national is defrauded and injured by primarily Americans. Following *Bersch* and *IIT,* the courts have, under these circumstances, searched for U.S. based conduct more than "preparatory" in character, in order to establish jurisdiction.[261] The guiding principle has been that United States is not to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled solely to foreigners.[262] More specific guidelines as to what conduct, or how much, provides a base for jurisdiction than what is in than the phrase "the perpetration of the fraudulent acts themselves" or "acts directly causing the injuries", was not afforded in *Bersch* or *IIT,* a fact that has saddled the case law attaching thereto.[263] One puzzle has been whether the conduct-test is to be *quantitative* or *qualitative,* that is, whether it has to reach a certain degree of substantiality in the quantitative sense or whether a certain or *any* element constituting the fraud would suffice. A related question is whether the U.S. based conduct has to be dominant compared to the conduct occur-

ring abroad (a comparative test), or merely significant in the sense that a significant part of the offense occurred in the United States; what occurred abroad is irrelevant. Reading *Bersch,* where the court confronted transactions which were "on any view predominantly foreign" and where the United States conduct was insubstantial and "relatively small in comparison to [what occurred] abroad", might suggest a *quantitative* and *comparative* test.[264] The "merely preparatory" activities at hand in *Bersch* were, furthermore, described as "significant" or as being of "material importance".[265] *IIT* seems to suggest likewise: where "the bulk of the activity was performed in foreign countries", the court there said, jurisdiction with respect to nonresident foreigners would not lie. "The securities laws are not to apply", it continued, "in every instance where something has happened in the United States".[266]

Some commentators, however, entertain the view that the *Bersch* and *IIT* conduct test is primarily qualitative.[267] Accordingly, only such acts that constitute elements of a substantive violation of an antifraud provision are encompassed. Exactly what acts are defined as constituent elements of a fraud, is not entirely clear, but, for instance, the deception — whether misrepresentation, false statement or non-disclosure — and the actual sale should be included therein.[268] For jurisdictional purposes, the occurrence of *any* constituent element within the United States would apparently suffice.[269] This interpretation coincides with that of at least two of the cases briefed or noted above, *IIT v. Cornfeld* and *F.O.F. Proprietary Funds, Ltd. v. Arthur Young & Co.* (there, both the sales and the misrepresentations occurred abroad).[270] The opinions in *Straub v. Vaisman & Co., Inc.,* and *United States v. Cook* seem to hold indications to the same effect.[271] From *Recaman v. Barish* one learns nothing regarding this point.[272] The opinion in *SEC v. Kasser* breathes ambivalence: on the one hand the court proposed that "where at least some activity designed to further a fraudulent scheme occurs within this country" jurisdiction would vest, thereby indicating a quantitative, but not comparative, test.[273] On the other hand, the court in that case took all the trouble of reconciling the holding with that of *Bersch* and *IIT,* and ended up by characterizing the activities at issue as substantial, essential to the fraud and directly causing the foreign losses.[274] As construed in *Continental Grain, Etc. v. Pacific Oilseeds, Inc.,* the *Kasser* case extended the *Bersch — IIT* boundaries of the necessary domestic conduct required.[275] As a consequence, the acquisition of jurisdiction over a *substantially foreign transaction* there was secured on the ground that significant activities, in furtherance of the fraud, took place within the United States.[276] Hereby, the *Continental Grain* court brought

the case within the ambit of the American Law Institute's proposed Federal Securities Code, specifically Section 1905 (a) (I) (D) (i), which provides that conduct "whose constituent elements occur to a substantial [but not necessarily predominant] extent within the United States" is the jurisdictional prerequisite in addition to the effects test.[277] The insertion of the phrase "constituent elements" must not be misunderstood. The Section requires only that such an element — not the whole fraud — be performed to a substantial (not predominant) extent within the United States, a wording broad enough to cover, for instance, a sale consummated in England pursuant to negotiations in both England and the United States, even though the only misrepresentations occurred in the negotiations abroad.[278] This, of course, is a far cry from *Bersch* and *IIT*.[279]

Hence, the light of the post-*Bersch-IIT* case law and the proposed Code upon the conduct test is indefinite and weak. Whether, as matter of *lex lata,* the test is qualitative or quantitative — or both — is still highly disputable. *De lege ferenda,* the qualitative test is preferable, — although both tests have disadvantages,[280] — primarily on the ground that it defines the acts — the constituent elements of the fraud — more clearly than the quantitative test. In this way the category of acts, the occurrence of which within the United States forms the basis for jurisdiction, is somewhat restricted. Under the quantitative test, at least as applied in *Kasser* and *Continental Grain,* any conduct, some of which has only a tangential causal connection to the fraud, may be embraced. The modifiers employed there, such as "substantial", significant", "crucial", "essential", etc., merely serve a conclusive function, and without further explanations they leave the conduct test unbounded and obscure.[281]

While the conduct test may seem cloudy, the status of nationality as a jurisdictional ground is less uncertain. The principles moulded in *Bersch* and *IIT* apply throughout.[282] Thus, the fact that the defendants are Americans, has no independent jurisdictional significance — it cannot stand alone. Nevertheless, the American nationality of the defendants was viewed as part of the jurisdictional framework in, *e.g., Straub, Kasser* and *Continental Grain,* explicitly, when referred to as one U.S. contact among others, implicitly, when strenghtening the impression of U.S. based conduct: the probability that the fraud has an American situs increases where the defendant is American and even more when he is a United States resident.[283]

In several of the post-*Bersch-IIT* cases, especially in those where jurisdiction rests on a limited amount of U.S. activities, complementary considerations of policy were brought to the fore. In *Straub,* for instance, there was

sufficient conduct to meet the standards of Section 17 of the Restatement (2d) of Foreign Relations Law. The question was, however, whether jurisdiction *should* be upheld on policy grounds. Enhancing world confidence in United States securities market, was mentioned as one policy rationale.[284] *Kasser* and *Continental Grain* added United States' interest in elevating a high standard of conduct in securities transactions, in preventing United States from becoming a "Barbary Coast" in securities, harboring international securities pirates, in avoiding unfavourable reciprocal responses by other nations and in encouraging effective antifraud enforcement internationally.[285]

In *IIT v Cornfeld,* however, considerations of policy lead to a *denial* of jurisdiction. To grant jurisdiction, the court believed, would tend to "Americanize" the corporation laws of the entire world and duties would be imposed under the antifraud provisions, controlling the management of foreign directors in foreign corporations, whenever American securities were invested in.[286]

The interstate-commerce-facilities-use-test, developed in *Schoenbaum,*[287] has apparently been observed only in *Continental Grain.*[288] Analytically, the court said, there are two questions: first, whether there is subject matter jurisdiction; secondly, whether there is sufficient use of mail or interstate (foreign) commerce to satisfy the jurisdictional requirements of Section 10(b). Where the U.S.-based conduct necessarily involves use of interstate commerce facilities, the court reasoned, the questions substantially coincide.[289] This may also be the explanation for the scarce occurrence of that test in the cases following *Schoenbaum.*

Finally, Section 30(b), whether relevant or not, has not been invoked in any case. The section has not been analyzed, not even discussed.

Notes, chapter II

[1] See generally L. Loss, Securities Regulation (2d vol.), at 784 n. 2, (3d vol.), at 1421 ff.; D. Ratner, Securities Regulation (1975), at 78; A. Choka, An Introduction to Securities Regulation.

The Securities Exchange Commission (S.E.C.) was established 1934 through the enactment of the Securities Exchange Act of 1934. It is an independent, quasi-judicial agency with a center in Washington, directed by five commissioners, assisted by some 1.500 employees divided into several offices and divisions. See further e.g. P. Tyler, Securities, Exchanges and the SEC (1965), and R. DeBetds, The New Deal's SEC: The Formative Years.

[2] 15 U.S.C. §§ 77a-77aa (1976) and 15 U.S.C. §§ 78a-78hh (1976). The remaining statutes are: the Public Utility Holding Company Act of 1935 (15 U.S.C §§ 79-79z-6 (1976); the Trust In-

denture Act of 1939 (15 U.S.C. §§ 77aaa-77bbbb (1976); the Investment Company Act of 1940 (15 U.S.C. §§ 80a-1-80a-52 (1976); the Investment Advisers Act of 1940 (15 U.S.C. §§ 80b-1-80b-21 (1976) and — one not administered by the S.E.C. — the Federal Bankruptcy Act of 1938 (11 U.S.C. §§ 501-676). A later day product is the Securities Investor Protection Act of 1970 (15 U.S.C. §§ 78aaa-78lll (1976).

[3] See Section 5 of the Act (15 U.S.C. o 77e (1976)). Securities exempted are listed in (15 U.S.C. §§ 77c(a)(I) — 77c(a)(II) and 77c(b)), Section 3(a)(I)-3(a)(II) and 3(b). Transactions exempted are listed in Section 5(1)-4(4) (15 U.S.C. §§ 77d(1)-77d(2)).

[4] Schedule A of the Act gives specifics as to the information and documents to be provided in a registration statement made by a corporation or a private issuer, Schedule B when the registrator is a foreign government (15 U.S.C. § 77a (1976)). Also see Guides for Preparation and Filing of Registration Statements, S.E.C. Securities Act Release No. 4936 (Dec. 9, 1968); I CCH Fed. Sec. L. Rep. π π 7121—7129.

[5] See *supra* n. 3 and 4 and *cf.* S.E.C. Rule 153.

[6] See Section 5 of the Act (15 U.S.C. §§ 77e (1976)), where criminal sanctions are imposed for dealings in securities without effecting a registration statement, upon the transmission of an improper prospectus and upon the delivering of securities not accompanied or preceded by a proper prospectus. Section 11 and 12, (15 U.S.C. §§ 77k and 771 (1976)), where civil sanctions are imposed upon the supplial of false registration statements and upon the sale of securities in violation of Section 5, or by means of untrue or incomplete information.

[7] Securities Act of 1933, Section 17(a) (15 U.S.C. § 77q (1976) provides:
(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly
(1) to employ any device, scheme, or artifice to defraud, or
(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Compare the Securities Exchange Act of 1934, Section 10(b) and S.E.C. Reg. 10b-5 promulgated thereunder (15 U.S.C. § 78j (1976) and 17 C.F.R. § 240.10b-5 (1975)), briefly outlined immediately below, which, in combination with Section 17(a) of the Securities Act and Section 15(c) (1) of the Securities Exchange Act (15 U.S.C. § 78(o)(c)(1) (1976)), form the basic antifraud provisions in the securities legislation.

[8] See Section 6, 19, 15, 12, 13, 14, 10(b) and 16 (15 U.S.C. §§ 78f, 78s, 78o, 78l, 78m, 77n, 78j and 79s (1976)).

[9] See Section 15 (criminal liability for acting as broker without registering) (15 U.S.C. § 780 (1976)); Section 18 (civil liability for misleading reports) (15 U.S.C. § 78r (1976)); Section 29(b) (civil remedies for violation of the Act including sales by unregistered brokers) (15 U.S.C. § (1976)). As to the "insider" trading remedies see *infra* n.10 ff.

[10] Securities Exchange Act of 1934, Section 10(b), 15 U.S.C. § 78j)1976) and S.E.C. Reg. 10b-5, 17 C.F.R. § 240.10b-5 (1975).

[11] For instance, managers, directors or even persons closely related to these. See e.g. List v. Fashion Park, Inc., 340 F.2d 457 (2nd Cir. 1965); S.E.C. v. Texas Gulf Sulphur Co., 401 F.2d 833 (2nd Cir. 1968) and S.E.C. v. Texas Gulf Sulphur Co. 446 F.2d 1301 (2nd Cir. 1971).

[12] See e.g. Kohler v. Kohler Co., 319 F.2d 634, at 642 (7th Cir. 1963) and List v. Fashion Park, Inc., 340 F.2d 457, at 462 (2d Cir. 1965).

[13] See e.g. S.E.C. v. Nat'l Securities, Inc., 393 U.S. 453 (1969); Dasho v. Susquehanna Corp., 380 F.2d 262 (7th Cir. 1967) and Ruckle v. Roto American Corp., 339 F.2d 24 (2nd Cir. 1964).

[14] The term "security" has been defined in Section 2(1) of the Securities Act of 1933 (15 U.S.C § 77b (1) (1976) and roughly parallels the definition contained in Section 3(a) (10) of the Securities Exchange Act of 1934 (15 U.S.C. § (1976)).

See e.g. Continental Marketing Corp. v. S.E.C., 387 F.2d 466 (10th Cir. 1967), where various types of contracts were held to be "investment contracts" and thereby securities; S.E.C. v. Variable Annuity Life Ins. Co, 359 U.S. 65 (1959), where variable annuities were held to be securities.

[15] The "codification" has proceeded under the aegis of the American Law Institute and the Code has been issued in a series of drafts commencing with Tentative Draft No. 1 (April 25, 1972), continuing through an additional five tentative drafts and ending up with the Proposed Official Draft, March 15, 1978. See further L. Loss, The American Law Institute's Federal Securities Code Project, 25 Bus. Law. 27 (1969); ABA Committee on Federal Regulation of Securities, ALI Proposed Federal Securities Code, 34 Bus. Law. 345 (1978); Symposium: The American Law Institute's Proposed Federal Code, 32 Vand.L.Rev. 455 (1979) — a follow-up of a symposium on the same subject in 30 Vand.L.Rev. 311 (1977).

[16] 15 U.S.C. § 78aa (1976) and 15 U.S.C. § 77v (a) (1976). These are essentially the words of Section 12, Clayton Act, see *supra* p. 10 ff.

[17] 28 U.S.C. § 1391(d) (1976), see further *supra* p. 10 ff.

[18] 468 F.2d 1326 (2nd Cir. 1976).

[19] *Id.*, at 1340.

[20] *Id.*, at 1339 f.

[21] Specifically the court mentioned §§ 27, 35, 36 and 37 concerning individuals, and §§ 47, 49 and 50 concerning corporations. As to the contence of some of these, see *infra* n. 30 and 32.

[22] 468 F.2d 1326, at 1340.

[23] *Cf.* American Law Institute, Federal Securities Code, Proposed Official Code (March 15, 1978) Section 1905 (e)(3).

[24] See *id.*, at 1344. The court here cited Burt v. Isthmus Development Co., 218 F.2d 353, at 357, *cert. denied*, 349 U.S. 922 (1955). Also see L. Loss, Extraterritoriality in the Federal Securities Code, 20 Harv. Int. L.J. 305, at 321 ff. (1979).

[25] See *supra* p. 10 ff.

[26] 473 F.2d 515, at 529 f. (8th Cir. 1973).

[27] 519 F.2d 974, at 998 (2nd Cir. 1975).

[28] See further, *id.*, at 998.

[29] This was pointed out in the decision of the court below, 389 F. Supp. 446 (S.D.N.Y. 1974).

[30] Section 36 provides in its first part: under the title "Doing an Act in State": "a state has

power to exercise judicial jurisdiction over an individual who has done, or has caused to be done, an act in the state with respect to any cause of action in tort arising from the act."

[31] See 519 F.2d 974, at 999 f. As to the defendant I.O.S., see also the lower court's decision, *supra* n. 29, at 460.

[32] Section 37 provides:
"A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the indivual's relationship to the state make the exercise of such jurisdiction unreasonable." Also compare Section 47, 49 and 50.

[33] 519 F.2d 974, at 1000. Here, Section 18 of the Restatement (2nd) of Foreign Relations Law served as a model.

[34] For a short summary of the legislative history, see 2 L. Loss, Securities Regulation, at 784 n. 2 (2nd ed. 1961).

[35] 519 f.2d 974, at 993 (footnote omitted) (2nd Cir. 1975).

[36] See Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, at 118 (1804); "[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains....". Also see Lauritzen v. Larsen, 345 U.S. 571, at 577 ff. (1953); The Queen v. Jameson [1896] 2 Q.B. 425, at 430; Foley Bros., Inc. v. Filardo, 336 U.S. 281, at 285 (1949); McCull och v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, at 21 f. (1963). *Cf.* the Restatement (2nd) of Foreign Relations Law, § 3(3). However, as long as Congress stays within the limits of the U.S. constitution, it is free to enact laws contrary to international law standards, see e.g. Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, at 1334 (2nd Cir. 1972) and compare United States v. Aluminum Co. of America 148 F.2d 416, at 443 (2nd Cir. 1945).

[37] 15 U.S.C. § 77b(7) and 15 U.S.C. § 78c(a)(17)(1976). As to the interstate and foreign commerce tests in antitrust law, see *supra* p.38 ff.

[38] *Id.* Also see the 1933 Act, 15 U.S.C. §§ 77a to 77bbbb (1976) and the 1934 Act 15 U.S.C. §§ 78a to 78kk (1976), where "foreign commerce" is nowhere defined. The jurisdictional reach of the Securities Act of 1933 and the Securities Exchange Act of 1934 is held to be coextensive, see *Recaman v. Barish,* 408 F.Supp. 1189 (E.D. Pa. 1975), at 1194; *Bersch v. Drexel Firestone, Inc.,* 389 F. Supp. 446 (S.D.N.Y. 1974), at 453, *aff'd in part,* 519 F.2d 974 (2nd Cir. 1975); *Leasco Data Processing Corp. v. Maxwell,* 468 F.2d 1326 (2nd Cir. 1972), at 1335 f.; *SEC v. United Financial Group, Inc.*, 474 F.2d 354 (9th Cir. 1973), at 356. *Cf.* the preamble of the Exchange Act. Also see the Investment Advisers Act, Section 202(a)(10), 15 U.S.C. § 80b-2(a)(10)(1976) and the Investment Company Act, Section 2(a)(18), 15 U.S.C. § 80a-2(a)(18)(1976), where similar definitions are afforded. In the Proposed Official Draft (March 15, 1978) of the American Law Institute Federal Securities Code, the term "interstate commerce", as defined in the securities laws, was abandoned since it — as a generic term — failed to include foreign commerce (Reporter's Notes, Tentative Draft No. 3, at 126). "Interstate commerce" is there substituted for "federal commerce" defined to include trade, commerce, transportation, or communication among the states or between a state and a foreign country or other location outside the state (§ 258). "Commerce" is defined to include securities see 15 U.S.C. § 77b(7)(1976).

[39] As to subject matter jurisdiction in antitrust law, see *supra* at p.

[40] A use of the mails or other instrumentalities of the interstate commerce that is merely "incidental" or "indirect", may suffice for the federal securities acts to apply. Transactions in

securities that are exclusively *intra*state are governed by state (common law) rules. See L. Loss, 3 Securities Regulation, at 1519 ff. (2nd ed., 1961). *Cf.* Fratt v. Robinson, 203 F.2d 627 (9th Cir. 1953) and Ellis v. Carter, 291 F.2d 270 (9th Cir. 1961). Use of such instrumentalities by a third person, if reasonably foreseeable, may also fall within the federal scope.

[41] See e.g. *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2nd Cir. 1975); *Des Brisay v. Goldfield Corp.*, 549 F.2d 133 (9th Cir. 1977); *United States v. Cook*, 573 F.2d 281 (5th Cir. 1978); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2nd Cir. 1975). Also see Loomis & Grant, The U.S. Securities And Exchange Commission, Financial Institutions Outside the U.S. and Extraterritorial Application of the U.S. Securities Laws, 1 J. Comp. Corp. L. & Sec. Reg. 3, at 6 (1978) and Rohall, P.J.M., Extraterritorial Effect of the Registration Requirements of the Securities Act of 1933, 24 Vill. L. Rev. 729, at 735 (1978—79); Comment, Subject Matter Jurisdiction in Transnational Securities Fraud Cases, 17 B. C. Ind. & Com. L. Rev. 413, at 419 and 424 (1976); McGuiness K.G., Impact of United States Securities Laws on Distribution and Trading of Foreign Securities, 12 Int. Law. 133, at 137 (1978). *Cf.* Comment, Securities Law — Subject Matter Jurisdiction in Transnational Securities Fraud, 9 N.Y.U.J. Int'l L. & Pol. 113, at 143 ff. (1976), where the author suggests that the interstate commerce clause alone should mandate application of the Securities Exchange Act of 1934 (a view seemingly advanced *de lege ferenda).*

The appropriateness of drawing analogies from antitrust cases is questioned by Neubauer R. D. in Securities and Exchange Commission v. Kasser: Extraterritorial Jurisdiction in Securities and Exchange Cases, 4 Syr. J. Int'l & Com. 141, at 152, n. 52 (1976) The intent behind the statute should controll, not analogies; the two fields of law are too different for such, Neubauer believes. But if an intent is not otherwise available, should not the words of the statutes be guiding, and should not the fact that the statutes are, under these circumstances, equally phrased deserve some significance, especially when we are dealing with regulatory laws in the field of business and economics.

[42] These sections regulate jurisdiction federal *vis-à-vis* state courts. 15 U.S.C. § 78aa and 15 U.S.C. § 77v(a) (1976).

[43] 15 U.S.C. § 78dd(b) (1976).

[44] See e.g. Note, Extraterritorial Application of the Securities Exchange Act of 1934, 69 Colum L. Rev. 94, at 103 ff. (1969); Toth G., Registration and Regulation of Foreign Securities Businesses, 12 Int. Law. 159, at 161 ff. (1978); Norton J.J., United States Securities Laws: A Transnational Perspective, 7 Anglo-Amer. L. Rev. 81, at 95 f. (1978); Loss L., Extraterritoriality in the Federal Securities Code, 20 Harv. Int'l L.J. 305, at 307 (1979); Tisman S.E., Jurisdiction — Extraterritorial Application of United States Securities Laws — Section 30(b) of Securities Exchange Act of 1934 — Liability of Foreign Insiders for Short-Swing Transactions in American Listed Securities: Roth v. Fund of Funds (2d Cir. 1968), 10 Colum. J. Transn. L. 150, at 161 f. (1971).

[45] See e.g. Goldman M.E. & Magrino J.L., Jr., Some Foreign Aspects of Securities Regulation: Towards a Reevaluation of Section 30(b) of the Securities Exchange Act of 1934, 55 Va. L. Rev. 1015, at 1022 f. and 1039 f. (1969); Comment, The Transnational Reach of Rule 10b-5, 121(2) U.Pa.L.R. 1363 at 1390 ff. (1972—72); Bruen J.G., Jr., Offshore Mutual Funds: Extraterritorial Application of the Securities Exchange Act of 1934, 13(2) B.C. Ind. & Com. L. Rev. 1225, at 1253 ff. (1971—72); Case-note, Extraterritorial Application of the Securities Exchange Act of 1934, 1.L. & Pol. Int'l Bus. 168, at 172 ff. (1969—70).

The position taken by the *Securities Exchange Commission* was initially expressed in a *amicus curiae* brief on a rehearing of *Schoenbaum v. Firstbrook,* 405 F.2d 200 (2nd Cir.), *rev'd on rehearing on other grounds,* 405 F.2d 215 (2nd Cir., 1968) *cert. denied,* 395 U.S. 906 (1969). (Hereinafter refered to as the "Commission's view"). See further, *infra.*

Also see Note, United States Taxation and Regulation of Offshore Mutual Funds, 83 Harv.

L. Rev. 404, at 450 ff. (1969). Further *cf.* Maclean D.C., The Transnational Investment Company and the Federal Securities Laws, 12 Colum. J. Transn. L. 73, 108 ff. (1973); Cohen, International Security Markets: Their Regulation, 46 St. John's L. Rev. 264 (1971); Rice, The Expanding Requirement for Registration as "Broker-Dealer" under the Securities Exchange Act of 1934, 50 Notre Dame Law. 199 (1974); Mizrack, Recent Developments in the Extraterritorial Application of Section 10(b) of the Securities and Exchange Act of 1934, 30 Bus. Law. 367 (1975).

[46] *Supra*, p. 34 f.

[47] See *supra* n. 45. Specifically the Commission maintained that certain transactions are "without the jurisdiction of the United States" when they are neither 1) occurring within the (territory of) United States; 2) directly or indirectly connected to the U.S., by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange; nor 3) involving a registered security (under the provisions of the (Exchange) Act applicable only to registered securities). See *amicus curiae* brief at 23 f. For criticism, see Note, Extraterritorial Application of the Securities Exchange Act of 1934, *supra* n. 44, at 103 f. and Tisman, *supra* n. 44, at 161 f.

[48] Goldman & Magrino, *supra* n. 45, at 1023.

[49] Note here the old presumtion that all legislation is *prima facie* territorial, unless Congress has clearly indicated a contrary intent, employed e.g. in American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), at 357.

[50] See Golman & Magrino, *supra* n. 45, at 1023 ff. and 1039 f.

[51] Bruen, *supra* n. 45, at 1253 ff.
The "protective principle" in Bruen's view gives a state the right to regulate nondomestic transactions "threatening substantial harm to domestic markets and investors".

[52] Comment, The Transnational Reach of Rule 10b-5, *supra* n. 45, at 1390 ff.

[53] For those who believe that it would not make any difference, see *supra*, the development in the antitrust case law, where a major shift with respect to the attitude towards the territoriality of legislation occurred. But also se *infra*, the development in securities law.

[54] See 2 L. Loss, Securities Regulation 784, n. 2 (2nd ed., 1961), for a short survey of the legislative history of the Exchange Act. As to Section 30(b) in Particular, see Note, Extraterritorial Application of the Securities Exchange Act of 1934, *supra* n. 44, at 106, with references. *But* see Case-note, Extraterritorial Application of the Securities Exchange Act of 1934, *supra* n. 45, at 172, where the author finds that Section 30(a) and Section 30(b), which must be read in concert, were inserted in order to prevent that traders in securities would transfer their business from the strictly regulated American exchanges to foreign exchanges, concluding: "Thus, it could be argued that section 30(b) was designed to apply to transactions in the stock of American corporations already listed and traded abroad, and allow our individual investors — not brokers or dealers — to trade abroad with impunity." (Note omitted).

[55] *Cf.* Section 1905 in American Law Institute Federal Securities Code, Proposed Official Draft (March 15, 1978), This section specifies the outer perimeters with respect to jurisdiction by providing: "Within the limits of international law, this Code (as defined in section 225), *i.e.*, including rules or orders by the Commission) applies with respect to...". Hereby the section will allow the courts to take account of international law as it developes from time to time.

[56] See e.g. Note, Extraterritorial Application of the Securities Exchange Act of 1934, 69 Colum. L. Rev. 94, at 104 (1969) ("such a construction would render 30(b) entirely superflu-

ous"); Toth G., *supra* n.44, at 161 ("illogical"); Tisman, *supra* n. 44, at 161; Norton *supra* n. 44 ("logically and legally it makes no sense").

[57] Norton, *id.*

[58] See *supra* p. 205 f.

[59] See *supra* p. 204, especially n. 7. Also see Note, American Adjudication of Transnational Securities Fraud, 89 Harv. L. Rev. 553, at 554 f. (1976).

[60] Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (2nd Cir. 1972), at 1334.

[61] As to antitrust law see *supra* p. 132 ff. and securities law, *infra* p. 240 ff.

[62] That the trend of international law is away from strict territoriality towards a broader basis for jurisdiction, part two of the present study, *infra,* will demonstrate.

[63] Toth, *supra* n. 44, at 164 ff.

[64] *Id.* at 166.

[65] 15 U.S.C. § 78e (1976).

[66] See for instance the Restatement (2nd) of Foreign Relations Law, Section 18, further analysed *infra* chapters XV and XVI.

[67] *Supra* p. 11 f.

[68] See *supra* p. 209 f.

[69] Section 7 and 15(a), for instance, apply in part only to a "broker" or "dealer", defined in Sections 3(a)(3) and 3(a)(4) of the Exchange Act. "Broker" is a person who trades as agent for another person, while a "dealer" trades principally for his own account. A "person" may be any person, irrespective of nationality.

[70] See e.g. Section 10(b) and 10b-5, *supra* p. 204 f.

[71] See *supra* p. 65 f.

[72] 182 F. Supp. 388 (S.D.N.Y. 1960).

[73] Section 7(c) of the Securities Exchange Act provides in part: "It shall be unlawful for.... any broker or dealer who transacts a business in securities through the medium of any such member, directly or indirectly to extend or maintain credit or arrange for the extension or maintenance of credit to or for any customer....". (15 U.S.C. § 78g(c) (1976). The amount — in percentage of the purchase price — of credit permitted, varies from time to time, all according to regulations issued by the Board of Governors of the Federal Reserve System, see 12 Code of Federal Regulations (C.F.R.) §§ 220.1—224.6.

See further Loss, 2 Securities Regulation, at 1239 ff.; Comment, Credit Regulation in the Securities Market: An Analysis or Regulation T, 62 Nw.U.L.Rev. 587 (1967); Lipton M., Some Recent Innovations to Avoid the Margin Regulation, 46 N.Y.U.L.Rev. 1 (1971).

[74] 182 F.Supp. 388, at 389 f.

[75] *Id.*

[76] *Id.*, at 389.

[77] *Id.*, at 390 f.

[78] *Id.*, at 390.

[79] *Cf. Metro-Goldwyn-Mayer v. Trans-America Corporation,* 303 F.Supp. 1354 (S.D.N.Y. 1969); *United States v. Weisscredit Banca Commerciale e d'Investimenti,* 325 F.Supp. 1385 (S.D.N.Y. 1971) and *Bank of Bermuda Ltd.* v. *Rosenbloom,* CCH Fed.Sec.Law Rep. π 95,820 (S.D.N.Y. 1976). In two of these cases subject matter was denied, not on the ground that the essential acts occurred outside United States territory, but because Section 7 was held applicable only to domestic lending institutions or domestic brokers-dealers (303 F.Supp., at 1357 f. and CCH Fed.Sec.Law Rep. π 95,820, at 90,953). The acts of foreign lending institutions were outside the scope of the Exchange Act. In the third case (*Weisscredit*) the court held likewise, although the outcome was another (Weisscredit was deemed to be a domestic lender, due to its close relationship with a broker in the United States).

But see *UFITEC, S.A. v. Carter,* CCH Fed.Sec.Law Rep. π 94,841 (Super.Ct.Cal. 1974 and CCH Fed.Sec.Law Rep. π 95,874 (Ct.App.Cal. 1977). While the Superior Court in principle followed the abovementioned *Weisscredit* case (*id.*, at 96,831), the Court of Appeal founded subject matter jurisdiction primarily on other grounds, such as the location of agreement and other acts, but above all the potential impact on the domestic economy. In general terms, the court noted: "The unrestricted use of foreign credit in domestic securities speculation can only result in significant and deleterious impact on the domestic securities market, domestic investors and in fact the national economy." (*Id.*, at 91,220).

[80] 223 F.Supp. 987 (S.D.Fla. 1963).

[81] As to the contence of these sections, se *supra* p. 209 ff.

[82] 223 F.Supp. 987, at 990 and 994.

[83] *Id.*

[84] *Id.*, at 990 f.

[85] *Id.*, at 994 f. (emphasis added).

[86] *Id.*, at 995.

[87] *Id.*

If use of interstate facilities is the jurisdictional base (or a sufficient base), one may wonder why the Court felt obliged to make the detour around the construction of an American offer by assuming that Canadian newspapers were circulated in the U.S. to interested Americans, etc.

[88] 259 F.Supp. 842 (S.D.N.Y. 1966). Also see the prior hearing of the same court in CCH Fed.Sec.Law Rep. π 91,615 (S.D.N.Y. 1965).

[89] See *supra* p. 209 ff.

[90] 259 F.Supp. 842, at 845 f.

[91] This was a class action brought by a former shareholder on behalf of himself and other similarly situated shareholders the nationality or residency of which are not noted in the case.

[92] 259 F.Supp. 842, at 846.

[93] *Id.*

[94] *Id.*

[95] That section was however discussed on the prior hearing before the Court, see *supra* n. 88, where it was interpreted to support the conclusion that the "without jurisdiction" clause re-

ferred to territory, *Id.* at 95,310 f. ("we see nothing in the statute or its legislative history suggesting that Congress intended it to apply to acts committed outside the territorial jurisdiction of the United States"). This interpretation was not departed from on the rehearing, *i.e.*, in the instant case, for the complaint was amended and the Court was given the opportunity to localize acts to U.S. territory. The Court further held that Section 30(b) did not distinguish between transactions made by persons engaged in securities business and single isolated sales of securities: both categories are exempted under the Section, if made outside United States territory, *id.* at 95,317.

[96] Also see SEC v. North American Research & Development Corp., 280 F.Supp. 106 (S.D.N.Y. 1968), which seems to fit in the same pattern. The case is nothing more than an extrapolation of *Ferraioli v. Cantor,* see *supra* p. 217, when it is said therein that acts made *exclusively* outside of the United States (territory) are outside the scope of the securities acts, and when furthermore the principle, that legislation is presumed not to apply extraterritorially, is referred to (the court here cited American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), at 357 and United States v. Pizzarusso, 388 F.2d 8 (2nd Cir. 1968), *Id.* at 123.

For further comments on the early case law, see e.g. Maclean D.C., The Transnational Investment Company and the Federal Securities Laws, 12 Colum. J. Transnat. L. 73, at 78 ff. (1973); Goldman & Magrino, Some Foreign Aspects of Securities Regulation Towards a Reevaluation of Section 30(b) of the Securities Exchange Act of 1934, 55 Va L.Rev. 1015, at 1027 ff.; Bruen J.G., Offshore Mutual Funds: Extraterritorial Application of the Securities Exchange Act of 1934, 13(2) B.C. Ind. & Com.L.Rev. 1225 at 1232 ff. (1971—72); Stürmer, at 60 ff. and 127 ff.; Note, Extraterritorial Application of the Securities Exchange Act of 1934, 69 Colum. L.Rev. 94, at 99 ff. (1969); Wambold J.J., The Extraterritorial Application of the Antifraud Provisions of the Securities Act, 11 Cornell Int.L.J. 137, at 138 ff. (1978).

[97] 182 F.Supp. 388 (S.D.N.Y. 1960).

[98] *Supra* p. 215.

[99] 223 F.Supp. 987 (S.D.Fla. 1963).

[100] *Supra* p. 216.

[101] 259 F.Supp. 842 (S.D.N.Y. 1966).

[102] It is worth noticing however that Section 7(c) of the Securities Exchange Act not only provides that the *extension* of credit is unlawful, but also the *arrangement* for the extension and even the arrangement for the maintenance of credit.

[103] *Supra* p. 216 f.

[104] 268 F.Supp. 385 (S.D.N.Y. 1967) and 405 F.2d 200 (2nd Cir. 1968).

[105] As to these sections, se *supra* p. 209 f.

[106] 268 F.Supp. 385, 391 f. and 394. 405 F.2d 200, at 204, 206 and 208.

[107] *Id.*

[108] *Id.*, at 393 f. and 209 f.

[109] *Id.*, at 391 ff. and 206 ff. None of the courts discussed whether an omission to disclose vital information should be localized to the place where the omitting person is present or to the place where that person had a duty to disclose.

[110] *Id.*, at 392. *Kook v. Crang* (*supra* p. 215) and *Ferraioli v. Cantor* (*supra* p. 217) were

held controlling. Absent directives in the legislative history and in the statute itself, the securities law was only to apply within the territory of United States, the Court argued.

[111] *Id.* "The normal presumtion of territoriality is reinforced by the specific mandate of Section 30(b)".

[112] *Id.*, at 393. Reference is made to, *inter alia, United States v. Aluminum Co. of America,* 148 F.2d 416 (2nd Cir. 1945). The principle is described as the "protective principle" of jurisdiction. Thus, suddenly, the presumtion for territoriality invoked at the outset of the court's opinion, is departed from.

[113] *Id.*, at 394 (emphasis added). Also see *id.*, at 393.

[114] 405 F.2nd 200, at 206.

[115] *Id.*, at 208. The fact that Banff's stock also was traded more extensively on the Toronto Stock Exchange, and that the impact upon Canadian investors probably was far greater than the harm inflicted on Americans, was not a matter for argument.

[116] *Id.*, at 207 f. Section 30(b), the Court said, is designed to take the Securities Exchange Commission "out of the business of regulating foreign securities exchange unless the Commission deems regulation necessary to prevent evasion of the domestic regulatory scheme. The exemption relieves the Commission of the impossible task of enforcing American securities law upon persons whom it could not subject to the sanctions of the Act for actions which it could not bring its investigatory powers to bear." *Kook v. Crang,* 182 F.Supp. 388 (S.N.D.Y. 1960) was cited as good law in this aspect, *id.* at. 208.

[117] *Id.*, at 208 f.

[118] *Id.*, 209 f.

[119] 279 F.Supp. 935 (S.D.N.Y. 1968), and 405 f.2d. 421 (2nd Cir. 1968), *cert. denied,* 394 U.S. 975 (1969).

[120] Section 16(b), 15 U.S.C. § 78p(b).

[121] 279 F.Supp. 935, at 935 f. and 405 F.2d 421, at 422.

[122] *Id.*

[123] *Id.*

[124] 405 F.2d 421, at 422.

[125] 316 F.Supp. 1345 (S.D.N.Y. 1970).

[126] As to these sections, se *supra* p. 209 f.

[127] 316 F.Supp. 1345, at 1346 ff.

[128] *Id.*, at 1347.

[129] *Id.*, at 1348.

[130] *Id.*, at 1348 f.

[131] 405 F.2d 200 (2nd Cir. 1968).

[132] *Id.*, at 1349. Closely related to the case now analysed are *Investment Properties International Ltd v. I.O.S., Ltd.* CCH Fed.Sec. L.Rep. ¶ 93,011 (S.D.N.Y. April 21, 1971), *aff'd,*

File NO 71-1415 (2nd Cir. May 6, 1971) and *Manus* v. *The Bank of Bermuda, Ltd.*, CCH Fed. Sec.L.Rep. ¶ 93,299 (S.D.N.Y. Dec 9, 1971). In these cases, with primarily foreign parties, the fraud and other transactions were localized to foreign countries, and in addition no effects were found within the United States (The former case, at 90,735 and the latter, at 93,300).

[133] 468 F.2d 1326 (2nd Cir. 1972). Also see the lower court's decision, 319 F.Supp. 1256 (S.D.N.Y. 1970), which, however, will not be dealt with here.

[134] As to these sections, see *supra* p. 209 f.

[135] 468 F.2d 1326, at 1330 ff.

[136] *Id.* Also see *id.*, at 1337 f., where the status, ownership, etc. of the Netherlands Antilles' corporation is discussed at length.

[137] *Id.*

[138] *Id.*, at 1335 and 1337.

[139] These sections will be discussed in detail, *infra* chapters XV and XVI.

[140] 468 F.2d 1326, at 1334 f.

[141] *Cf. supra* p. 210 ff. "It would be erroneous", the court said, "to assume that the legislature always means to go to the full extent permitted." *Id.*, at 1334.

[142] According to Section 18, a state has, under certain conditions, jurisdicion over conduct that occurs outside its territory and causes an effect within its territory.

[143] 468 F.2d 1326, at 1337.

[144] *Id.*, at 1336, n. 6. As to the Schoenbaum case, se *supra* p. 218 f.

[145] See e.g. *id.*, at 1330 ff. and 1335.

[146] See e.g. *id.*, at 1334: "When no fraud has been practised in this country and the purchase or sale has not been made here, we would be hard pressed to find justification for going beyond *Schoenbaum.*"

[147] For individual comments on the *Leasco* and *Schoenbaum* cases, see e.g. Comment, The Transnational Reach of Rule 10b-5,121(2) U.Pa.L.R. 1363 (1972—73); Rehbinder, E., Neue amerikanische Entscheidungen zur extraterritorialen Anwendung des Securities Exchange Act von 1934, AWD (Aussenwirtschaftsdienst des Betriebs-Beraters) 1969, p. 425; Note, Extraterritorial Application of the Securities Exchange Act of 1934, 69 Colum. L.Rev. 94, at 101 ff. (1969); Note, Extraterritorial Application of the Securities Exchange Act of 1934, 1 L. & Pol.Int.Bus. 168 (1969—70); Loss, L., Extraterritoriality in The Federal Securities Code, 20 Harv.Int.L.J. 305, at 312 ff. (1979) Rohall, P.J.M., Extraterritorial Effect of the Registration Requirements of the Securities Act of 1933, 24 Vill.L.Rev. 729, at 744 ff. (1978—79); Grosser, T.D., Extraterritorial Application of § 10(b) of the Securities Exchange Act of 1934 — The Implications of *Bersch v. Drexel Firestone, Inc.* and *IIT v. Vencap. Ltd.*, 33 Wash. & Lee L.Rev. 397, at 404 ff. (1976); Wambold, J.J., The Extraterritorial Application of the Antifraud Provisions of the Securities Acts, 11 Cornell Int. L.J. 137, at 141 ff. (1978); Note, American Adjudication of Transnational Securities Fraud, 89 Harv,L.Rev. 553 (1976); Taylor III, G.M., Extraterritorial Application of the Federal Securities of the Federal Securities Code: An Examination of the Role of International Law In American Courts, 11 Vand. J.Transnat.L. 711, at 727 ff. and 738 ff. (1978); Stürmer, at 64 f. and 71 f. Braddock I.H., Jurisdiction — Securities Exchange Act of 1934 — Section 10(b) Applies to a Transaction

in Unlisted Foreign Securities When Significant Fraudulent Conduct Occurs in the United States, 6 Vand. J. Transnat. L. 687 (1972—73).

[148] 473 F.2d 515 (8th Cir. 1973). Also see the opinion of the lower court, 331 F.Supp. 797 (E.D. Miss. 1971), which was reversed and remanded.

[149] As to these sections, see *supra* p. 209 f.

[150] 473 F.2d 515, at 518 f.

[151] *Id.*, at 518 f. and 526.

[152] *Id.*, at 524 ff.

[153] In an additional, second, claim, the plaintiff alleged that the defendants had been engaged in "self-dealing" in connection with the aforementioned sales of securities, which is actionable under Section 10(b) and Rule 10b-5 (See *supra* n. 149). The self-dealing, the Court found, was carried through entirely in Canada, *id.*, at 527 f.

With respect to the localization of the telephone calls and the sending of letters, the Court remarked: "Is it clear that both the place of sending and place of reciept constitute locations in which conduct takes place when the mails or instrumentalities of interstate commerce are used to transmit communications." *Cf.* Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (2nd Cir. 1972), at 1335, *supra* p. 221.

[154] *Id.*, at 524 and 526.

[155] Section 17 of the Restatement was referred to. With respect to the second claim — the self-dealing — the Court applied Section 18 of the Restatement, and accordingly based jurisdiction on the effects of the foreign conduct within the United States.

[156] *Cf.* the *Leasco* case, where the court employed a similar method, see *supra* n. 153).

[157] *Id.*, at 526, n. 21.

[158] *Id.*

[159] *Id.*, at 524 and 526 with accompanying notes.

[160] *Id.*, 524 (emphasis added).

The Court seemingly regarded subject matter jurisdiction under the securities acts as being co-extensive with jurisdiction under international law, which, as we have seen (*supra* p. 222 f.) was not at all the standpoint of the *Leasco* court.

A like misconception can be found elsewhere, for instance, in one comment where *Leasco* is believed to have founded subject matter jurisdiction on Section 17 of the Restatement alone (see Neubauer, R.D., Securities and Exchange Commission v. Kasser: Extraterritorial Jurisdiction In Securities and Exchange Cases, 4 Syr.J. Int'l L. & Com. 141, at 158 (1976)). Also see Gorman, J.J., Securities Regulations — Extraterritorial Application of the Antifraud Provisions — Federal Securities Laws Grant Jurisdiction When There Is Some Activity in Furtherance of a Fraudulent Scheme Committed Within the United States, 11 Vand, J. Transnat. L. 173, at 176 (1978); Grosser, T.D., Extraterritorial Application of § 10(b) of the Securities Exchange Act of 1934 — The Implications of *Bersch v. Drexel Firestone, Inc.* and *IIT v. Vencap, Ltd*, 33. Wash & Lee L.Rev. 397, 406 (1976); Rohall, P.J.M. Extraterritorial Effect of the Registration Requirements of the Securities Act of 1933, 24 Vill. L. Rev. 729, at 747 (1978—79): Friedman, D.I, Jurisdiction — Securities Exchange Act of 1934 — Section 10(b) Applies to Fraudulent Transaction in Unlisted Foreign Securities When the Only Conduct Within the United States is the Use of the Mails and the Telephone, 7 Vand. J Transnat. L. 770 (1973—74).

[161] 474 F.2d 354 (9th Cir. 1973). Also see the decision of the lower court, CCH Fed. Sec. L. Rep. ¶ 93,383, at 91,968 (D.Ore. 1972).

[162] As to these sections, see *supra* p. 209 f.

[163] 474 F.2d 354, at 355 f.

[164] *Id.*, at 355 f. Also see the Complaint of the SEC for Injunction of Jan. 17, 1972 and its Supplemental Memorandum, Az: CIV 72—41 (D.Ore. 1972).

[165] *Id.*, at 356.

[166] *Id.*, at 356 f. where the Court said: "In this case, focus would be upon appellants' activities *within* the United States and the impact of *those* activities upon American investors. Here, there was a showing of very substantial activities by appelants *within* the United States and a showing that, as a result of *those* activities, at least three American investors....." (were damaged. Emphasis here). But see e.g. Stürmer, at 75, who maintains that the Court here employed the effects doctrine as a basis for jurisdiction. This would only be the case, it is submitted, had the Court referred to the impact of foreign activities. Wambold, J.J. makes the same mistake, see The Extraterritorial Application of the Antifraud Provisions of the Securities Acts, 11 Cornell Int.L.J. 137, at 143 (1978). *Cf Bersch v. Drexel Firestone Inc,* 519 F.2d 974 (2nd cir. 1975), at 992, see *infra* p. 230.

[167] *Id.*, at 356. This conclusion, the Court claimed, is supported by the well-known case of McGee v. International Life Ins. Co, 355 U.S. 220 (1957), where personal jurisdiction was upheld on the ground of *one* intrastate transaction. Case law concerning personal jurisdiction, as developed between the several state of the United States, was thus relied upon to justify subject matter jurisdiction.

[168] *Id.*, at 357. The Court did not reject the "interstate commerce facilities used" theory, as Stürmer suggests (at 44), it even recognized that the theory may have some merit. Since, however, the theory was unnecessary to the Court's decision in the case, the Court expressed no opinion as to the soundness of the theory, but merely noted that if the theory was accepted, jurisdiction would have farreaching implications.

SEC's argument was that Congress, by virtue of its plenary power over the use of the facilities, may outlaw any use, however incidental, which is connected with fraudulent purposes. *Id.*, n. 6.

[169] Here Court cited Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir. 1968), 207 f. and Roth v. Fund of Funds, Ltd., 405 F.2d 421 (2d Cir., 1968), see *supra* p. 213 and 215. But surely this must be a misinterpretation of these cases. "Territorial limits" was exactly what these courts were referring to when construing the term "jurisdiction", and nothing else.

[170] 365 F.Supp. 1382 (E.D.Pa. 1973).

[171] As to these sections, see *supra* p. 209 f.

[172] 365 F.Supp. 1382, at 1386.

[173] *Id.*

[174] *Id. Cf.* Ferraioli v. Cantor, 259 F.Supp. 842 (S.D.N.Y. 1966), where the factual situation was the reverse and the actual transfer of ownership, taking place within the United States, was held and inseparable part of the whole fraud *supra* p. 217.

[175] *Id. Leasco,* no doubt, stood as model for the choice of jurisdictional criteria (468 F.2d 1326 (2d Cir. 1972), at 1337, see *supra* p. 221 f.). The impact there, however, was directly upon the plaintiff, an American investor. Here the impact was indirectly upon the share-

holders of the defendant corporation, who were not parties.

Cf. United States v. Clark, a criminal action, 359 F.Supp. 131 (S.D.N.Y. 1973), where the court stated: "If we consider the cumulative effect of *Schoenbaum* and *Leasco*, it would appear that § 10(b) of the 1934 Act, and § 17(a) of the 1933 Act, cover at least charges of fraudulent conduct in the United States resulting in sales of securities abroad which have a substantial detrimental effect upon the interests of American investors", *id.*, at 134.

[176] 385 F.Supp. 415 (S.D.N.Y. 1974).

[177] *Id.*, 417 f.

[178] *Id.*

[179] *Id.*

[180] 405 F.2d 200 (2nd Cir. 1968) and 405 F.2d 421 (2nd Cir. 1968), see *supra* p. 218 and 220.

[181] Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (2nd Cir. 1972), se *supra* p. 221.

[182] See *supra* n. 180.

[183] 385 F.Supp. 415, at 418.

[184] 519 F.2d 974 (2nd Cir. 1975). Also see the decision of the district court, 389 F.Supp. 446 (S.D.N.Y. 1974).

[185] As to these, see *supra* p. 209 f.

[186] 519 F.2d 974, at 977 ff.

[187] *Id.*, at 985. Also see 389 F.Supp. 446, at 455 ff.

[188] *Id.*

[189] *Id.*, at 987.

[190] *Id.*, at 985.

[191] *Id.*, at 986 ff.

[192] *Id.*, at 990 ff.

[193] *Id.*, at 992 f.

[194] Conclusionary remarks will follow after the review of *IIT v. Vencap, Ltd.* right below, a case decided by the same court and on the very same day as *Bersch*, with the same judge (Friendly) delivering the opinion.

[195] 519 F.2d 1001 (2nd Cir. 1975).

[196] As to these sections, see *supra* p. 209 f.

[197] 519 F.2d 1001, at 1011 and 1013 f. The two theories here alluded to are designated as number (4) and (5) in the opinion.

[198] *Id.*, at 1017 f.

[199] Theories (1), (2) and (3), *id.*, at 1011 f.

[200] *Id.*, at 1018.

[201] *Id.*, at 1016. See the Restatement, Section 30(1)(a). And the Court added: "It is simply unimaginable that Congress would have wished the anti-fraud provisions of the securities laws to apply if, for example, Pistell while in London had done all the acts here charged and had defrauded only European investors."

[202] *Id.*, at 1016 f. A combination of the first and the second ground of jurisdiction was not discussed.

[203] *Id.*, at 1017 f.

[204] *Id.*, at 1017.

[205] See *supra* p. 218 ff.

[206] Schoenbaum v. Firstbrook, 405 F.2d 200 (2nd Cir. 1968); se *supra* p. 218.

[207] Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2nd Cir. 1975); see *supra* p. 230.

[208] IIT v. Vencap, Ltd., 519 F.2d 1001 (2nd Cir. 1975); see *supra* p. 232.

[209] *Id.*, at 1016 f.

[210] *Cf.* Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (2nd Cir. 1972), at 1335; "[W]e see no reason why, for purposes of jurisdiction to impose a rule, making telephone calls and sending mail to the United States should not be deemed to constitute conduct within it." Also see Note, American Adjudication of Transnational Securities Fraud, 89 Harv. L. Rev. 553 (1976), at 559: "It should be clear, however, that fraud by mail is closely related to a conduct-based theory of jurisdiction since no fraud can arise until receipt of a communication within the United States." And *id.*, at 564: "[T]he situation is virtually indistinguishable from one in which the defendant has actually acted within the United States."

Cf. Travis v. Anthes Imperial Limited, 473 F.2d 515 (8th Cir. 1973), at 524 ff. *Cf.* Curtis J.W., The Extraterritorial Application of the Federal Securities Code: A Further Analysis, 9 Conn. L. Rev. 67 (1976), at 90. But see Karmel, R.S., The Extraterritorial Application of the Federal Securities Code, 7. Conn. L. Rev. 669 (1975), at 685.

[211] See supra n. 207, at 991: "[*A*]*ction* in the United States is *not necessary* when subject matter jurisdiction is predicated on a direct effect here". (Emphasis added).

[212] See *supra* n. 206.

[213] Furthermore, *Schoenbaum* was a derivative action, which, no doubt, has *some* bearing on this: see *infra* p. 235 f.

[214] *Supra* n. 210, at 1334 and 1337. In addition the *Leasco* court required, as we have seen, acts forming an essential link of the whole fraud. *Cf.* Selzer v. Bank of Bermuda Ltd., 385 F.Supp. 415 (S.D.N.Y. 1974), at 418; *supra* p. 227.

[215] Significative is the utterance in *IIT supra* n. 208, at 1017: "[E]ven though *Schoenbaum* does not necessarily set the outmost reaches for subject matter juriisdiction..." Or, as a third alternative, was *Bersch* an outright expansion of the limits of the jurisdictional domain as defined in *Leasco*? *Cf.* Grosser, T.D., Extraterritorial Application of § 10(b) of the Securities Exchange Act of 1934 — The Implications of *Bersch v. Drexel Firestone, Inc.* and *IIT v. Vencap, Ltd.*, 33 Wash. & Lee L. Rev. 397 (1976), at 409. (Mark the distinction between staying within the limits and expanding the same).

[216] The term "residence" as used here and, it is believed, in the cases now referred to, denotes some permanence as compared to mere actual presence which is wholly temporary. As to "residence" and similar concepts, see e.g. Leflar, at 30 ff. and Ehrenzweig, at 94 f.

[217] See e.g. the *IIT* case, *supra*, n. 208, at 1011, where such a distinction as a matter of substantive law is presumed.

[218] Simultaneously, foreign interest in adjudication no doubt grows stronger.

[219] A revealing observation in *IIT:* "But the position we are taking here itself extends the application of the securities laws to transnational transactions beyond prior decisions and the line has to be drawn somewhere....". *Supra* n. 208, at 1018. *Cf.* the *Bersch* case, *supra* n. 207, at 987. It should be noted, again, that Judge Friendly was writing for the court in *Leasco* as well as in *Bersch* and *IIT.*

[220] See the case, *supra* n. 207, at 992.

[221] *Supra* n. 210, at 1335 and 1337.

[222] *Cf.* the fact-pattern in these cases, *supra* p. 221 and p. 230. Also observe the fact-pattern in SEC v. United Financial Group, Inc. 474 F.2d 354 (9th Cir. 1973), also involving American non-resident investors. The court there found "very substantial activities" within the United-States, on which to rest jurisdiction, *id.*, at 357.

Moreover, the above stated conclusion is supported by the way in which *Leasco* was construed in *IIT* (or at least the court seems to have accepted the defendants" contention in this regard) that a *direct effect* upon American investors was present in *Leasco* (as it was in *Bersch* with respect to *American residents). See the IIT* case, *supra* n. 208, at 1017.

[223] See *Bersch, supra* n. 207 at 987 f. 992 f. and *IIT, supra* n.208, at 1018. *Cf.* Finch v. Marathon Securities Corp., 316 F.Supp. 1345 (S.D.N.Y. 1970), specifically at 1349 and Selas of America (Nederland) N.V. v. Selas Corporation of America, 365 F.Supp. 1382 (E.D.Pa. 1973), at 1386. As to the constituent elements, see a summary in Henn, at 599 f. with accompanying notes and references. Also see Bromberg, A., Securities Law (2) §§ 8.1—9 (1973).

[224] For a general treatment of this subject, see Comment, The Constitutional Status of State and Federal Governmental Discrimination Against Resident Aliens, 16 Harv. Int'l L.J. 113 (1975). Also see Note, *supra* n. 210, at 569, where even the discrimation between American non-residents and foreigners is questioned from that very same angle (it "contravenes the spirit of equal protection, even if it might not actually violate the fifth amendment"). An equal treatment of Americans and foreigners, the same author suggests, is provided for in the Restatement (2nd) of the Foreign Relations Law, in particular in Sections 165 (Comment a.), 166, 178 (first illustration) and 180(1). Treaty commitments are also referred to, *id.*, n. 96.

[225] *Cf.* the *Selas* case, *supra* n. 223.

[226] *Supra* n. 208, at 1017.

[227] *Cf.* SEC v. United Financial Group, Inc., *supra* n. 222, at 356, *in fine.* Whether the fraud was adressed directly to the American investors in *Schoenbaum, supra* n. 206, is, of course, a matter of interpretation. The fact is that *Schoenbaum* too was a derivative action. *Schoenbaum* may be distinguished, however, on the ground that jurisdiction there rested not only on effects, but also on the fact that the securities were listed and registered on an American Exchange and thus, *inter alia,* the foreseeability, on the part of the defendants, of the fact that Americans would be defrauded, must have been stronger in *Schoenbaum.* See further, Note, *supra* n. 210. at 567 f.

[228] *Supra* n. 222.

[229] *Supra* n. 208, at 1017 f.

[230] See *IIT, supra* n. 208, at 1018, n. 31 and *Bersch, supra* n. 207, at 986.

[231] The *IIT* case *supra* n. 208, at 1016.

[232] *Supra* n. 206.

[233] *Supra* n. 207, at 985.

[234] See 389 F.Supp. 446 (S.D.N.Y. 1974), at 458, and 519 F.2d 974 (2nd Cir. 1975), at 1000, n. 60.

[235] *Supra* p. 218.

[236] Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2nd Cir. 1975) and IIT v. Vencap, Ltd., 519 F.2d 1001 (2nd Cir. 1975); see *supra* p. 230 and 232.

[237] Schoenbaum v. Firstbrook, 405 F.2d 200 (2nd Cir. 1968) and Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (2nd Cir. 1972); see *supra* p. 213 and 216.

[238] 540 F.2d 591 (3rd Cir. 1976).

[239] 548 F.2d 109 (3rd Cir. 1977), *cert. denied,* 431 U.S. 938 (1977).

[240] 573 F.2d 281 (5th Cir. 1978).

[241] 592 F.2d 409 (8th Cir. 1979). Here, however the *Bersch — IIT* conduct test was somewhat modified, see *infra* p. 240 ff. Also see Fidenas AG v. Compagnie Internationale Pour L'Informatique C 11 Honeywell Bull, [1979] Fed. Sec.L. Rep. (CCH) ¶ 96,947 (2d Cir. Aug. 6, 1979).

[242] As to these provisions, see *supra* p. 209 f.

[243] *Cf. supra* p. 235. In accord is e.g., as regards *SEC v. Kasser,* see *supra* n. 239, Guritzky, G.C., Securities — Transnational Application of Anti-Fraud Provisions of the Federal Securities Law Expanded — *SEC v. Kassler* (citation omitted), 8 Seton Hall L.Rev. 795 (1978), at 812. See the *Straub* case, *supra* n. 238, at 595; *Kasser, supra* n. 239, at 114 ff.; *Cook, supra* n. 240, at 283; and *Continental Grain, supra* n. 241, at 420 ff.

[244] *Bersch, supra* n. 236, at 987, 992 and 993; *IIT, supra* n. 236, at 1017 f.

[245] Mark that the *American nationality* of the defendants had no independent jurisdictional significance in any of the cases. This can be inferred from the fact that *Bersch* and *IIT* were relied on: In *IIT,* nationality of the defendant was explicitly rejected as an independent basis for jurisdiction, *supra* n. 236, at 1016. But, foremostly, this is clearly stated, for instance, in *Continental Grain, supra* n. 241, at 417 and 420, and in *Straub, supra* n. 238, at 595. Just as clear is the absence of that jurisdictional ground in *Kasser* and *Cook, supra* n. 239 and 240. The lack of *independent* significance, however, does not imply the lack of *any* significance; see further, *infra* p. 240 ff. Also see *Arthur Lipper Corp. v. SEC.* 547 F.2d 171 (2d Cir. 1976), holding similar traits.

[246] *Supra* n. 238, at 594 f.

[247] *Supra* n. 239, at 111 f.

[248] *Id.,* at 115.

[249] *Supra* n. 240 at 282 f.

[250] *Supra* n. 241, at 411 ff and 420.

[251] *Id.,* at 420 f. Since Continental Grain — the plaintiff — was owned by an American corporation, the argument was also raised that the losses of Continental Grain, as reflected in the financial statements of its parent American corporation, constituted an impact substantial

enough to warrant an application of the effects test. *Id.*, at 417. Following *Bersch* and *IIT, supra* n. 236, at 988 and 1017 the Court rejected that argument. The effect, the Court held, was too indirect and too insubstantial.

[252] 408 F.Supp. 1189 (E.D.Pa. 1975).

[253] *Id.*, at 1197 f. and 1200.

On the other hand, the proceeds channelled into USIF were reinvested in United States real estate under the management of a Bahamian corporation in which American citizens and residents held controlling positions; USIF was managed partly by Americans; USIF controlled a large number of American corporations; and, American banks were employed to finance sales of USIF shares.

For purposes of subject matter jurisdiction, however, these factors were held too unrelated to the offense complained of. *Id.*, at 1200 f.

[254] As too indirect, the Court described the effects that the United States real estate business and its securities market, might have been exposed to as a result of the alleged fraud. *Id.*, at 1198 f. *Cf.* supra n. 251.

[255] 549 F.2d 133 (9th Cir. 1977).

[256] *Id.*, at 135 f.

[257] 462 F.Supp. 209 (S.D.N.Y. 1978).

[258] *Id.*, at 224. The effects test was held inapplicable on the same grounds as in *IIT v. Vencap,* supra n. 236, at 1016 f. and *Bersch,* supra n. 236, at 987 ff., *id.* at 223. A case very much resembling *IIT v. Cornfeld,* as far as the jurisdictional reasoning is concerned, is *F.O.F. Proprietary Funds, Ltd. v. Arthur Young & Co.*, where subject matter jurisdiction was denied despite certain conduct within the United States: "[T]he sale of the [securities] and communication to purchasers of the allegedly misleading information" occurred outside of the United States. See CCH Fed.Sec.L.Rep. ¶ 95,514 (S.D.N.Y. 1975), at 98,516 f.

[259] Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2nd Cir. 1975).

[260] IIT v. Vencap, Ltd., 519 F.2d 1001 (2nd Cir. 1975).

[261] *Supra* n. 259, at 992 f. and n. 260, at 1018.

[262] See *supra* n.260, at 1017. *Cf.* SEC v. Kasser, 548 F.2d 109 (3rd Cir. 1977), at 116; United States v. Cook, 573 F.2d 281 (5th Cir. 1978), at 284; Continental Grain, Etc.v. Pacific Oilseeds, Inc., 592 F.2d 409 (8th Cir. 1979), at 421 f.

[263] See *supra* n. 261.

[264] *Supra* n. 259, at 985 and 987.

[265] *Id.*, at 992 f.

[266] *Supra* n. 260. at 1018.

[267] See e.g. Note, American Adjudication of Transnational Securities Fraud, 89 Harv.L.Rev. 553 (1976), at 562 f. and 570 f.; Wambold, J.J., The Extraterritorial Application of the Antifraud Provisions of the Securities Acts, 11 Cornell Int. L.J. 137 (1978), at 144 ff. and 149 f.; Guritzky, G.C., Securities — Transnational Application of Antifraud Provisions of the Federal Securities Laws Expanded — *SEC v. Kasser* (citation omitted), 8 Seton Hall L.Rev. 795 (1978), at 804 f.; Schiro, S.A., Comment: Jurisdiction in Transnational Securities Fraud Cases — *SEC v. Kasser* (citation omitted), 7 Denver J.Int. L. & Pol. 279 (1978), at 297 f.

[268] For a brief discussion of the constituent elements, see Henn, 599 f. Also see Bromberg, A., Securities Law: Fraud §§ 8.1-9 (1973) and Note, *supra* n. 267, at 562 f. and 570 f.

[269] See *supra* n. 267.

[270] 462 F.Supp. 209 (S.D.N.Y. 1978) and CCH Fed.Sec.L.Rep. ¶ 95,514 (S.D.N.Y. 1975), *supra* p. 234 f.

[271] 540 F.2d 591 (3rd Cir. 1976) and 573 F.2d 281 (5th Cir. 1978), *supra* p. 238 and p. 239.

[272] 408 F.Supp. 1189 (E.D.Pa. 1975), *supra* p. 239.

[273] 548 F.2d 109 (3rd Cir. 1977), at 114.

[274] *Id.*, at 114 f. See further e.g. Schiro, *supra* n. 267, at 294 ff.; Wambold, *supra* n. 267, at 149 f.; Rohall, P.J.M., Extraterritorial Effect of the Registration Requirements of the Securities Act of 1933, 24 Vill.L.Rev. 729 (1978—79), at 754 f.; Taylor, III., Extraterritorial Application of the Federal Securities Code: An Examination of the Role of International Law in American Courts, 11 Vand. J. Transnat.L. 711 (1978), at 734 f. But see e.g. Neubauer, R.D., Securities and Exchange Commission v. Kasser: Extraterritorial Jurisdiction in Securities Securities and Exchange Cases, 4 Syracuse J.Int.L. & Com. 141, at 164 f.

[275] 592 F.2d 409 (8th Cir. 1979), at 418 f. As to *Bersch* and *IIT*, see *supra* n. 259 and 260.

[276] *Id.*, at 421.

[277] Proposed Official Draft, Mar.15, 1978, see *supra* p. 205.

[278] See Reporter's Revision of Text of Tentative Drafts Nos. 1—3 (Oct.1, 1974), at 233—34. Also see Loss, L., Extraterritoriality In The Federal Securities Code, 20 Harv.Int.L.J. 305 (1979), at 312 ff., especially at 314.

[279] *Cf.* Loss, *id.*, at 314 n. 34. *Cf.* Curtis, J.W., The Extraterritorial Application of the Federal Securities Code: A Further Analysis, 9 Conn.L.Rev. 67 (1976), specifically p. 73 and 83 ff.

[280] For instance, the lack of criteria for localizing conduct. One illustration: In *IIT v. Cornfeld, supra* n. 270, the court was certain that when foreigners residing in foreign countries are defrauded, the fraud *must* have occurred abroad. What if fraudulent prospectuses were mailed from the United States or if the fraud was communicated by means of telephone calls from there?

[281] Nor does the method of argumentation of the *Kasser* court, that the activities in that case were "much more substantial" than the U.S.-based activities in *IIT* and *Bersch (supra* n. 259 and 260) bring any clarity, in the absence of further explanatory directives, *supra* n. 273 at 115.

[282] *Supra* n. 259 and 260, at 986 ff. and 1016.

[283] *Supra* n. 271, at 595; n. 213, at 111 and n. 275, at 420. Also see *Des Brisay v. Goldfield Corp.*, 549 F.2d 133 (9th Cir. 1977), at 136.

[284] *Supra* n. 271, at 595.

[285] *Supra* n. 273, at 116 and n. 17, at 421 f.

[286] *Supra* n. 270, at 225.

[287] *Supra* n. 275, at 415 and 421.

[288] Schoenbaum v. Firstbrook, 405 F.2d 200 (2nd Cir. 1968), at 209 f.

[289] *Id.*

Chapter III
The competition law of the Common Market — in comparison

1. Introduction

The structure of the Common Market's competition law reveals that the antitrust law of the United States has served as its foremost model.[1] Very much like the Sherman Act, the principal provisions regarding competition in the Treaty of Rome — Articles 85 and 86 — although somewhat more detailed than their model, are broadly phrased and have a general application. In line with the Sherman Act Sections 1 and 2, Articles 85 and 86 deal with anticompetitive agreements and abuse of dominant market power (monopolizing), respectively.

The opening part of Article 85(1) states:

"The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market ...".

The equivalent of Article 86 is the following section: "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States."

These provisions, supplemented by examples on anticompetitive agreements and abuses, form the core of the Common Market competition law.[2]

The object henceforth is to determine, with some degree of exactitude, the substantive scope of Articles 85 and 86, within the framework of a comparative analysis.

At the very outset however, it has to be made clear that *express* rules governing subject matter jurisdiction are lacking.[3] Such rules, if they exist at all, can consequently only be established by way of interpretation of the

substantive provisions themselves: the suggestion is that the jurisdictional rule lies embedded in Articles 85 and 86. This is, as we shall see, the prevailing view, shared by the Court of Justice (the "Court"), the Commission of the European Communities (the "Commission"), as well as the commentators.[4]

Yet, although everybody seems to agree on *where* to look for the controling jurisdictional rule, the opinions as to the formulation of the rule — presented by the Commission and several commentators pursuant to an analysis of the Articles — differ widely.

While subject matter jurisdiction has been vividly discussed both by the official bodies of the Common Market and amongst scholars, the notion of jurisdiction in personam has stirred only occassional comments and very little analysis.[5] The position of personal jurisdiction within the legal system of the Common Market is unclear. The distinction upheld in American antitrust law between subject matter jurisdiction and personal jurisdiction has only a very blurred counterpart in the Common Market competition law. It has even been suggested that personal jurisdiction extends as far as jurisdiction over the subject matter, implying that the former type of jurisdiction is present the moment the latter is procured; or in reality: that personal jurisdiction has no independent role at all. Under these circumstances, the purposes of this section will best be served if the disposition of the former chapters of the present study is modified to the extent that subject matter jurisdiction is examined prior to jurisdiction in personam.

2. Subject matter jurisdiction

2.1 The controlling provisions

The jurisdictional criteria that determine the reach of the common market antitrust rules thus lie implicit in the substantive provisions, specifically in Articles 85 and 86 of the Rome Treaty. Reading the Articles in concert they seem, at first blush, to hold at the minimum three clauses which, at least potentially, have a limiting effect upon the substantive scope of the competition rules. Prohibited are agreements, abuses, etc.:

a) by *undertakings;*
b) which, according to Article 85, have as *their object or effect* the prevention, etc. of competition *within the Common Market;* or — according

to Article 86 — abuses of a dominant position *within the Common Market or in a substantial part thereof*;

c) and which *may affect* (Article 85) — *insofar as it may affect* (Article 86) — *trade between Member States*.[6]

Whether or to what extent these clauses have the said limiting effect turns upon the interpretation of the terms emphasized.

2.2 Principles of interpretation

The Treaty of Rome lacks specific principles of interpretation.[7] Rejecting a strict adherence to the letter as a method of interpretation, and rejecting also a method based on an inquiry into the (subjective) intention of the contracting parties, most legal writers in this field — and the Court of Justice, it seems — have advocated the teleological approach. The foundation of this approach is a combination of fundamental principles regarding interpretation of international treaties in general: a treaty rule shall be given the interpretation which best conforms with the purposes of the treaty; ambiguities shall be resolved so as to give full effectiveness to the treaty ("principle of effectiveness"); and an international organization must be deemed to have those powers which are conferred upon it by necessary implication as being essential to the performance of its duties ("implied powers").[8] The point of departure should, however, always be the wording — read in its context — of the treaty itself.[9]

Applying the teleological approach to Articles 85 and 86, these provisons are to be interpreted in light of the facts that the Common Market was established foremostly for the purpose of economic integration, that the institutions and functions of the Community are particularly moulded for the furthering of a such integration towards the creation of a single market for the benefit of business and consumers, and in light of the objective of "ensuring within the common market the system of a free economy, based on competition, in which there is freedom of individual economic planning and in which both production and distribution of commodities regulate each other entirely or predominantly in accordance with the play of free competition."[10] Free competition, coordination and increased integration towards the development of a single market, are thus the guiding interpretative data.

2.3 The absence of a foreign commerce clause

In contrast to the American antitrust law, Common Market competition law does not contain a foreign commerce clause.[11] Only interstate commerce — trade between Member States — is protected. One may, of course, argue, that an unhampered and undistorted competition within the Common Market requires the accumulation of the two clauses. That would, however, be to stretch the wording of Articles 85 and 86 far beyond their connotations.

The absence of a foreign commerce clause indicates, for instance, that an agreement as to exports or imports between "undertakings" in a single Member State and a non-member country are not covered by Article 85, in so far as it does not, or may not affect trade between Member States. It further seems to indicate that agreements made, for instance, between American and Japanese enterprises dividing the world market, and for these purposes treating the Common Market as one unit, are similarily not covered; nor are boycotts of the whole market as such or monopolization outside the market, all under the condition that interstate trade is unaffected.

The likelihood of the type of agreements exemplified here not falling under the aegis of Articles 85 or 86, is, of course, dependent upon the interpretation of interstate commerce clauses, *i.e.*, an analysis of the questions what constitutes (or may constitute) an effect on trade between Member States and when does an agreement have as its object or effect the prevention, etc. of competition within the Common Market.

2.4 "Undertakings"

Unlike the ECSC Treaty (Article 80) the Rome Treaty does not define the term "undertakings". The view has been advanced that by way of analogy from Article 80 in the ECSC Treaty, Articles 85 and 86 are confined to undertakings performing (engaged in) economic activities within the Common Market.[12] It can no longer, however, be doubted that "undertakings", as understood in the Rome Treaty, comprehends all corporations, enterprises, partnerships, associations, etc., private or public, wherever situated. The seat of the undertaking is thus jurisdictionally irrelevant. This has been made abundantly clear in the case law, and the commentators are in accord.[13]

2.5 The interstate commerce clause

With the exclusion of a foreign commerce clause and the term "undertakings" from the area of possible jurisdictional criteria, there remains the interstate commerce clause. It is here where the difficulties arise. For, which are the jurisdictional elements that can be extracted from the phrase "may affect trade between Member States and which have as their object or effect the prevention, ... etc. of competition within the common market", as stated in Article 85, or abuse of "dominant position within the common market ... in so far as it may affect trade between Member States", as stated in Article 86? What does, for instance, the term "object" denote? Is it a substantive or jurisdictional element, or both; and what about the concepts "effect" and "may affect"? These issues deserve further analysis.

However, that the evil has to occur within the Common Market, whatever that evil is seems ascertainable; thus far, there are consequently geographical limitations.

In the following, the interpretations given by the Commission and the Court as formulated in negative clearances issued, exemptions granted under Article 85(3) and cases decided will be reviewed.[14] In order to further illuminate the official views of the Commission and the Court, the doctrine will thereafter be consulted.

2.6 The case law

2.6.1 Bequelin Import Co. v. G.L. Import Export SA[15]

Facts: In March, 1967, the Belgian company Beguelin Import Co. and its wholly controlled French subsidiary each concluded an agreement with the Japanese firm Oshawa under which they were appointed exclusive distributors for Belgium and France respectively for WIN gas pocket lighters. A similar exclusive concession was given to a German company for the territory of Germany.

In 1969, G.L. Import Export SA, a French company, imported into France — through Germany from the named German distributor — some 18.000 WIN lighters. For this the Beguelin companies brought an action before the Tribunal de Commerce de Nice for injunction and for damages. The defendants submitted that the agreement between Oshawa and the French Beguelin was void as contrary to Article 85. The case was referred by the French court under Article 177 in the Rome Treaty to the European Court of Justice (the "Court"), with respect to the application of Article 85.

Localization of the acts: Aside from the fact that the agreement might have been concluded outside the Common Market — the reports do not say and it was probably deemed irrelevant — all other acts of interest occured in the Common Market, and could not be otherwise.

Jurisdictional criteria: Adhering to the submissions of the Advocate General[16] in this respect, the Court first ruled that the fact that *one* of the undertakings (Oshawa), participating in the agreement, was situated in a non-member country was no obstacle to the application of Article 85, so long as the agreement *produces its effects in the territory of the Common Market.*[17] To be incompatible with the Common Market and prohibited under Article 85, the Court proceeded, an agreement must be capable of affecting trade between Member States and have the object or effect of interfering with competition within the Common Market.[18] Whether these requisites are to be regarded as merely substantive or as jurisdictional criteria as well, the Court did not make clear.

In judging whether the aforementioned criteria — whatever their legal character — are fulfilled, the Court proposed an overall evaluation of the agreement in light of the economic and legal context within which it was situated, the possible existence of similar agreements as components of a broader scheme and in light of the situation that would present itself in the absence of the agreement(s) subject to scrutiny.[19]

Factors determining whether trade between the Member States is *noticeably* (perceptibly, "spürbar") *affected,* as the Court set forth, is *inter alia,* the nature and quantity of the products involved, the position and importance of the grantor of the concession — as well as the concessionaire — in the relevant market, the existence or non-existence of a broader scheme and the severity of the clauses furnishing the exclusive rights, particularly the options left open to other commercial dealings in the same product through re-exports or parallell imports.[20]

2.6.1.1 Conclusions

From the ruling that the foreignness of one of the parties to the agreement is of no significance for jurisdictional purposes, so long as the agreement produces its effects within the common market, most writers draw the conclusion that here, in essence, the Court laid down the principle of effects as a basis for jurisdiction.[21]

The phrase "produces its effects in the territory of the common market" seems too unequivocal to allow any other understanding. By implementing the principle of effects, however, the Court gives rise to a line of consequential questions, such as:

1) Would the fact that not only one, but both, participants to the agreement were situated in non-member states, have warranted a different ruling? Thus, would the principle of effects have been applied in a case, for instance, where a Japanese company grants an American company exclusive distributorship in France?
2) What is the substance of the principle of effects? When the Court construed the two requisites "may affect trade between the Member States" and "object or effect the restriction, etc. of competition within the Common Market" (henceforward the "interstate commerce clause" and the "restriction of competition clause"), did it consider them as purely substantive, or jurisdictional as well? Were these requisites to be regarded as both substantive and jurisdictional, then the principle of effects certainly is qualified, and the answer to the first question, posed above, would be close at hand. On the other hand, should the Court consider the principle of effects as a jurisdictional test independent of the named requisites, then the principle is given no substance at all.
3) What significance should be attached to the fact that the case was, in all essentials, of domestic concern? (This is so even though one of the parties to the agreements was Japanese and the products were manufactured in Japan; it should be noted, however, that the Japanese company was in no way directly involved in the case). Should the principle of effects be limited to the facts of the case, or be afforded a more general application? Is not the statement of the principle of effects *obiter dictum?*[22] These questions will be specifically attended to in the following analysis.

2.6.2 Imperial Chemical Industries Ltd. v. E.C. Commission[23]

Background and facts: In the middle of the 1960s, the Commission undertook investigations in order to establish whether the increases in the prices of dye-stuffs, which had occured in the Common Market since 1964, were imposed by common agreement between the enterprises concerned. Having traced a pattern of uniform price increases in three instances (1964, 1965, 1967), the Commission instituted proceedings in 1967, *ex officio,* against a number of undertakings which were believed to have participated in a concerted practise of price-fixing in relation to dye-stuffs. In 1969 the Commission decided to impose fines, amounting to 50.000 units of account, on several undertakings situated both in the Community and in non-member countries, for infringement of Article 85(1). Most of these undertakings lodged an appeal with the Court of Justice.

The procedure was *characterized* as *administrative.*[24]

Process of localization: All the price-increases took place within the Common Market, and consequently concerned dye-stuffs sold within that market. Prior to the last (1967) increase, a meeting was held in Basle, Switzerland, at which most of the undertakings were represented. The decisions to increase prices adopted by the corporations from the non-member countries — one British and three Swiss — were carried out by their subsidiaries within the Common Market. The products sold by the subsidiaries were supplied by the manufacturers now referred to — located outside the Common Market — under c.i.f. contracts.[25]

Jurisdictional criteria: The *Commission,* following the dicta in the *Beguelin* case, applied the principle of effects, declaring swiftly that Article 85(1) covers all restrictions which produce, within the Common Market, the effects covered by that Article and that the seat of the undertaking is immaterial.[26] In arguing before the Court of Justice, however, the Commission invoked two alternative sets of criteria: 1) The Commission justified jurisdiction primarily on the ground that the foreign producers had performed anticompetitive acts within the Common Market through their subsidiaries there. Hereby the Commission advanced the theory of enterprise entity (economic unity). 2) Only secondarily did the Commission base jurisdiction upon the principle of effects.[27]

The *Advocate General* supported only the Commission's second alternative — the principle of effects — and presented ample submissions as to the conditions and limits of that principle with due regard to principles of public international law.[28]

According to the Advocate General the principle of effects subsumed four cumulative conditions:[29]

1) The agreement or concerted practise must cause a *direct and immediate restriction* on competition within the Common Market. Agreements having an effect only at the second degree, or via economic mechanisms themselves operating abroad, are consequently outside the scope of Article 85.
2) The effect must be *reasonably foreseeable,* without necessary being intentional.
3) The effect must be *substantial.*
4) The effect must be one of the constituent elements of the infringement.

These conditions, the Advocate General submitted, were met in the present case:[30] the linear and uniform increases in the prices, practised by the undertakings concerned, were *directly* and *immediately applicable* in the Common Market. The effect was the distortion of competition there.

Furthermore, the effect was *foreseeable* (even intended, deliberate) the result of a concerted effort, and it was *substantial* by reason of the amount of the increases, the fact that the whole of the dye-stuffs was involved and the fact that the producers controlled four-fifths of the dye-stuffs market.

Finally, the effect was a constituent element of the prohibited restraint in Article 85(1).

The *Court,* however, seemed to wholly disregard the principle of effects as outlined by the Advocate General. Instead it based jurisdiction over the foreign parties on the theory of enterprise entity, with the following introduction: "In a case of concerted practice, it is first necessary to ascertain whether the behaviour of the applicant manifested itself in the Common Market. It follows from what has been said that the increases in question took effect in the Common Market and concerned competition between manufacturers operating therein. Hence, the actions for which the fine in question has been imposed constitute *practises carried on directly within* the Common Market."[31]

Invoking the theory of enterprise entity, the Court concluded that the foreign producers had acted through their subsidiaries in the Common Market or, stated differently, that the conduct of the subsidiaries was imputed to the companies. This was true, particularly since the subsidiaries did not enjoy real autonomy but simply carried out the instructions of their parents.[32] Thus, as expressed by the Court itself: "[J]urisdiction is not based merely on the effects of actions committed outside the Community, but on activities attributable to the claimant within the Common Market area."[33]

Remedy: The amount of fines imposed by the Commission — 50.000 units of account — was found adequate.[34]

2.6.2.1 Conclusions

The terse and unexpounded decision laid down by the Commission does not provide much substance.[35] It seems that the only certain conclusion one can draw from the decision, is that *if* the Commission applied a jurisdictional rule, this rule lies implicit in Article 85(1). Any other conclusion would only be pure guesswork, especially in light of the fact that the Commission — before the Court — *altered* its jurisdictional approach. The jurisdictional rule of the Court seems, at least ostensibly, more tangible: restrictive practices carried out directly within the Common Market are covered. One cannot doubt that the Court, by restrictive practices, referred to such concerted practices — the concerted increase of prices — which had the effect (or object) of preventing competition within the Common Mar-

ket and affecting trade between Member States. Before it reached the jurisdictional issue, namely, the Court had already discussed the effect of the concerted practices on competition and trade.[36] For jurisdictional purposes, however, the Court seemingly argued, it does not suffice that concerted practices generate those effects; the concerted practices *as such,* the carrying out of the price increase in concert, must have taken place within the Common Market.[37] Assuming, *arguendo,* that the non-resident producers had distributed their dye-stuffs through independent dealers within the Common Market, would a concerted increase of prices among the producers be characterized as practices carried out within the Common Market? It does not seem so. One of the arguments presented by I.C.I. was that it did not act within the Common Market, it merely supplied dye-stuffs under c.i.f. contracts to its subsidiary.[38] And the Court responded: I.C.I. controlled its subsidiary fully, and thus indeed *itself,* through its subsidiary, carried out concerted practices within the Common Market.[39] Without control, one might assume, there would have been no jurisdiction under this specific approach. Or take the following example: three non-resident competing undertakings, from Canada, the United States and Japan respectively, who distribute their goods to the Common Market through independent dealers therein, all agree to uniformly increase prices 20%, with the effect that the dealers are forced to carry through increases more or less corresponding to that of their suppliers. It the price-agreement carried out within the Common Market? The answer, again, is apparently no.

But let us proceed further: Assume that the non-resident undertakings in the foregoing example, not only agree to uniformly raise prices, but also to make agreements with their dealers with respect to the prices — so-called resale price maintenance agreements — and in this way implement the price-increase within the Common Market. Are the foreign undertakings carrying out anticompetitive acts within the Community on account of the resale price maintenance agreements eventually concluded? Only, it would seem, if the resident dealers are regarded as impersonations of the non-resident producers, by virtue of the agreements. The legal situation here, however, is far from clear.

How did the Court define the act that took place within the Common Market in the instant case? It is obvious that the making of an agreement — the concluding or signing of a contract — was non-essential. The orders given by a parent company (at least once) through telex messages, determining, in a manner binding on its subsidiary the prices and other conditions of sale which if was obliged to impose in relation to its customers, were essential only for the purpose of proving that the parent and its sub-

sidiary formed a single unit. The essential act was rather, as has been indicated above, the increase of the sales-prices in concert with others. And this was done by the non-resident undertakings within the Common Market. Or to use the shooting-over-the-border allegory: I.C.I. was standing with one foot in the Common Market and the other in Great Britain, shooting a man in the Common Market.[40] *Meessen* would disagree. Employing the same allegory, Meessen would suggest that I.C.I. pulled the trigger — by dispatching the orders — and that the effects of that act occurred in the Common Market.[41] The essential acts, he claims, took place outside the Common Market. Even the concerted practice was, in his view, foreign. Moreover, he finds that this was the view of the Court. In reality, Meessen concludes, the Court, contrary to its original intentions, based its jurisdiction entirely on the principle of effects.[42]

To criticize the Court for its reasoning, is one thing, to construe the opinion as it is, is quite another.[43] Meessen's analysis is, in this part at least strictly interpretative. How is it possible then to extract a principle of effects from the decision of the Court? The submission is, it is not possible. What Meessen overlooks is that, in the view of the Court, it was I.C.I. who carried out the concerted practice within the Common Market.[44] This is recognized by *Mann* and *Steindorff,* and they, therefore, take that circumstance as a basis for criticism.[45] *Haymann,* on the other hand, takes the following excerpt from the decision as an argument for the theory that the Court applied *both* the place of conduct rule and the principle of effects in order to establish jurisdiction:[46] "[J]urisdiction is not based merely on the effects of actions committed outside the Community, but on activities attributable to the claimant within the Common Market area."[47] The passage must be read in connection with the contention by I.C.I. that the Commission had no jurisdiction to impose fines upon it merely because of the effects produced in the Common Market by acts it may have committed outside the Community.[48] In light of this contention and of the whole reasoning of the Court, one finds it hard to concur with Haymann. True, the passage quoted, is somewhat misleading and may easily be misunderstood. What *Haymann* reads is "[J]urisdiction is *based, not merely* on the effects ..., *but also* on activities ...". The distinction is slight, but vital.

The principle of effect is thus not invoked in combination with the place of conduct rule as a ground for jurisdiction. On the other hand, however, it is *not expressly rejected* by the Court as inapplicable in general terms. The Court avoids taking a definite position in this respect.[49] Although the Court had an excellent opportunity to invoke the principle of effects, it found the place of conduct rule more appropriate. Hence, what we know is

that the Court did not apply the principle of effects *in casu;* on the applicability of the principle in general, it gave no opinion.[50]

Finally, there are the most intricate questions: What exactly was the ramification of the jurisdictional test actually applied, and what were its implications? There are at least two alternatives: 1) Jurisdiction was founded upon solely the fact that the non-resident undertakings carried out anticompetitive acts directly within the Community; or 2) Jurisdiction was founded upon the fact that the non-resident undertakings carried out anticompetitive acts within the Community, the effect or object of which was the prevention, etc. of competition within the Community and which may affect trade between Member States. Are the requisites "prevention of competition" and "affect the trade between Member States" merely substantive requisites, or jurisdictional as well? The requisites are not discussed under the title "On the Jurisdiction of the Commission". To conclude from that factor that the requisites are not jurisdictional would be too formalistic. This area of questions will be left open for the moment but will be discussed further subsequent to the analysis of the case law.[51]

2.6.3 Commercial Solvents Corp. v. Commission of the European Communities[52]

Background and facts: Early in 1970, Commercial Solvents Corp. (CSC), an American undertaking in the chemicals business, decided that it would no longer supply nitropropane and aminobutanol (products used in the manufacture of an anti-tuberculosis drug) to the Common Market. Later the same year its Italian subsidiary Instituto Chemioterapico Italiano SpA (Institute), acting as reseller until the abovementioned decision, received an order for aminobutanol from Laboratio Chemico Farmaceutico Giorgio Zoja (Zoja), and by reason thereof requested CSC to supply the product for resale to Zoja. CSC replied that none was available.

Zoja applied to the Commission for the institution of proceedings against CSC and Instituto. On Dec. 14, 1972, the Commission adopted a decision which implied that CSC had abused its dominant position within the Community according to Article 86 and required CSC and Instituto to supply the relevant products and submit proposals for the subsequent supply to Zoja (all under penalty of a fine of 1.000 units of account per day of delay), and imposed a fine of 200.000 units of account.[53]

The procedures were characterized as administrative.[54]

Process of localization: The refusal to sell by CSC, through Instituto, occurred within the Common Market.

Jurisdictional criteria: On account of the fact that the refusal to sell occurred within the Community, jurisdiction was sustained. CSC had the power to control Instituto and exercised its control in fact at least with respect to Instituto's relations with Zoja. Therefore, the Commission, as well as the Court, argued that there was no ground for distinguishing between the will and acts of CSC and those of Instituto.[55] Regarding the relations with Zoja, CSC and Instituto thus constituted one economic unity. To support that conclusion the Commission and the Court pointed at several factors, such as: CSC held 51 per cent of Instituto's share capital; half of the members of Instituto's Board of Directors were high-ranking executives of CSC, one of them being the Chairman with a casting vote; half of the members of Instituto's Executive Committee were nominees of CSC; CSC imposed on its distributors, including Instituto, a resale and an export prohibition on the products in question; and CSC must have controlled Instituto's unsuccessful merger negotiations in 1968 and 1969 with Zoja.[56]

These factors, together with several others, fulfilled the *two criteria for economic unity* formulated by the Commission and, it may be assumed, acknowledged by the Court:

1) The existence of power of control, *e.g.*, by the holding of the majority of capital; and
2) The actual exercise of that power in the particular case.[57]

Subsidiarily the Commission invoked the *principle of effects:* "[T]he conduct of CSC in question produces effects in the territory of the Common Market which are direct and immediate, reasonably foreseeable and substantial."[58] The principle was scarcely commented upon by the Advocate General,[59] and passed over in silence by the Court.

Vigorously argued, instead, was whether *interstate trade* was affected by the alleged abuse. CSC and Instituto attempted to demonstrate that, since Zojas 90 per cent of production was exported outside the Common Market, the world market was primarily affected — the Common Market, however, only to a very limited extent. The sales outlets of Zoja in the Common Market, they argued, were further reduced by the fact that, in many Member States, Zoja was blocked by the patents of other companies, and finally, there was in practice no market for anti-tuberculosis drugs in the Common Market, since the disease was virtually eradicated therein.[60]

The Court's decision on this point deserves to be quoted in its full length:

"This expression ('in so far as it may affect trade between Member States') is intended to define the sphere of application of Community rules in relation to national laws. *It cannot therefore be interpreted as limiting the*

field of application of the prohibition which it contains to industrial and commercial activities supplying the Member States.

The prohibitions of Articles 85 and 86 must in fact be interpreted and applied in the light of Article 3(f) of the Treaty, which provides that the activities of the Community shall include the institution of a system ensuring that competition in the Common Market is not distorted, and Article 2 of the Treaty, which gives the Community the task of promoting 'throughout the Community harmonious development of economic activities'. By prohibiting the abuse of a dominant position within the market in so far as it may affect trade between Member States, Article 86 therefore covers abuse which may directly prejudice consumers as well as abuse which indirectly prejudices them by impairing the effective competitive structure as envisaged by Article 3(f) of the Treaty.

The Community authorities must therefore consider all the consequences of the conduct complained of for the competitive structure in the Common Market *without distinguishing between production intended for sale within the market and that intended for export.* When an undertaking in a dominant position with the Common Market abuses its position in such a way that a competitor in the Common Market is likely to be eliminated, *it does not matter whether the conduct relates to the latter's exports or its trade within the Common Market, once it has been established that this elimination will have repercussions on the competitive structure within the Common Market.*"[61]

Moreover, the Court added, the very fact that Zoja did export to other Member States — which the Commission succeeded in showing — indicates that interstate trade may be affected.[62]

Remedy: The fine imposed by the Commission was reduced to 100.000 units of account.[63]

2.6.3.1 Conclusions

As in the *Dyestuffs*[64] and the *Continental Can*[65] cases, the theory of enterprise entity (economic unity) was the foundation upon which jurisdiction was built, and as in these cases, the principle of effects was avoided.

Yet unsettled, it seems, is the question of what the jurisdictional test is composed of and, in particular, whether the "may affect trade between the Member States" requisite is a jurisdictional element. The quoted section above, especially the emphasized lines, seems to intimate that interstate trade, for jurisdictional purposes (probably for substantive as well), does not necessarily have to be affected. And *Harding* concludes with regard hereto, that the interstate requisite as a jurisdictional criterion is "virtually extinguished" from the Article 86 arena — "an undoubted extension of Community jurisdiction which would enable the Commission to grapple with practices whose implications go beyond the simple flow of goods be-

tween member states."[66]

Prior to the Commercial Solvents décision the opinion of the commentators was almost unanimous: The interstate trade requisite *is* a jurisdictional element[67] (hereby nothing is said as to the view *after* the decision). Does the Court's decision thus represent a breaking-point? By its ambiguous language, the Court left the field open for various constructions. Before approaching the problem further, however, a few more cases will be analyzed.[68]

2.6.4 United Brands Co. and United Brands Continentaal B.V. v. Commission of the European Communities[69]

Background and facts: United Brands Co. ("UBC"), a major American undertaking in the banana business, was, in a decision adopted by the Commission Dec. 17, 1975, found to have been engaged in an abuse of a dominant position within the Common Market (Article 86) in that it, *inter alia,* had required its distributors within the Community to refrain from reselling their bananas while still green, differentiated prices for its distributors, and in that it had refused to sell bananas to a Danish reseller.

UBC operated in the Community through a very solidly constructed distribution network coordinated by three wholly owned subsidiaries in the Netherlands (United Brands Continentaal), the United Kingdom and Italy respectively.

The proceedings were administrative. (A fine of one million units of account was imposed by the Commission on UBC.)

Process of localization: All relevant acts were localized to the Common Market.

Jurisdictional criteria: UBC had acted — abused its dominant position — within the Common Market, since UBC together with its subsidiaries (the one in the Netherlands in particular), which possessed no real autonomy, formed a single economic unit. Thus ruled the Commission, and the matter was not discussed further in the Court.[70]

Again, however, the interstate trade requisite was brought to the fore. UBC argued that the refusal to sell to the Danish reseller (Th. Olesen) did not have an appreciable effect on trade between Member States, since the bananas only passed through Germany ex Hamburg and ex Bremerhafen. These transactions therefore did not constitute intra-Community trade, but in fact trade between Denmark and the third countries from which the bananas were shipped. The mere transit of products from third countries in the Community would not be enough to constitute intra-Community trade, UBC concluded.[71]

In much the same way as in the Commercial Solvents case, the Court proclaimed: "[I]f the occupier of a dominant position, established in the common market, aims at eliminating a competitor who is also established in the Common Market, *it is immaterial whether this behaviour relates to trade between Member States* once it has been shown that such elimination will have repercussions on the patterns of competition in the Common Market."[72] Directly attached hereto was the consideration: "Consequently the refusal to supply a long standing regular customer who buys with a view to reselling in another Member State has an influence on the normal movement of trade and an appreciable effect on trade between Member States."[73] Article 86 was therefore held applicable.

Remedy: The fines were reduced to 850.000 units of account.[74]

2.6.4.1 Conclusions

Here, as in the former cases,[75] the theory of enterprise entity (economic unity) was invoked and the principle of effects left aside. And here, as in the Commercial Solvents case,[76] the Court's position as regards the role of the interstate trade concept was expressed equivocally. A seemingly important factor, though, is the potential competitiveness of the corporation against which the refusal to sell is directed, in particular the potentiality of the corporation to expand over the borders.[77]

2.6.5 Hugin Kassaregister AB and Hugin Cash Registers Ltd. v. Commission of the European Communities[78]

Background and facts: Hugin Kassaregister AB (Hugin AB), a major Swedish manufacturer of cash registers dealing in the Common Market through wholly owned subsidiaries — including Hugin Cash Registers Ltd. (Hugin UK) in London — and independent distributors, was, together with Hugin UK, by a decision of the Commission of Dec. 8, 1977, found to have infringed Article 86 by refusing to supply spare parts for Hugin cash registers to Liptons Cash Registers and Business Equipment Ltd. (Lipton) in the United Kingdom from 1973 onwards, and by prohibiting its subsidiaries and distributors within the Common Market from selling such spare parts outside its distribution network.

A fine of 50.000 units of account and a periodic penalty of 1000 units of account for each day of delay was imposed.

The proceedings were administrative.

Process of localization: All relevant acts were localized to the Common Market.

Jurisdictional criteria: Again, the theory of enterprise entity (economic unity) was held controlling — Hugin AB and its subsidiaries, in particular Hugin UK, constituted a unity; any acts committed by the subsidiary within the Common Market were also committed by Hugin AB. (The principle of effects was not mentioned).[79] Again, the *interstate trade* requisite was an issue of great controversy.[80] Before seeking to establish whether Hugin's conduct in the market was an abuse of its dominant position,[81] the Court examined whether the conduct was such that it may affect trade between Member States. The purpose of that condition, the Court explained, is to define, within the framework of competition law, the *boundary* between the areas respectively covered by Community law and the law of the Member States. While *Community law* covers any practice capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market in the Community, in particular by partitioning and conserving the national markets or by affecting the structure of competition within the common market, the *national legal orders* govern conduct, the effects of which are confined to the territory of a single Member State. For the purposes of applying the interstate trade requisite, the Court made a distinction between 1) effects on Lipton's commercial activities, and 2) effects on trade in spare parts in general, of the conduct, in the latter case, especially with respect to the re-export obstacles.

1) In view of the type of activities involved (the provision of services relating to cash registers), the limited area in which the activities took place (the London region) and the whole structure of the market in which Lipton was a part, interstate trade was not likely to be affected, neither actually nor potentially, the Court concluded.
2) As regards the re-export obstacles and their effects on interstate trade, the Court analyzed whether such trade *would* have existed *in the absence of* the refusal to sell by Hugin. It would not, the Court inferred. In the absence of the refusal, Lipton would have bought the spare parts from Hugin UK or Hugin AB, and not from any of the distributors in the other Member States, in particular since the spare parts — due to their insignificant value — were not such as to constitute a commodity of commercial interest, and, secondly, because it would not have been economically advantageous.[82] In the absence of the refusal there would thus exist no normal pattern of trade between the Member States in spare parts, whether actual or potential. Therefore, Hugin's conduct was not capable of affecting interstate trade; it did not have the effect of diverting the movement of goods from their normal channels.

2.6.5.1 Conclusions

While the question marks with respect to the *Commercial Solvents*[83] and the *United Brands*[84] decisions are not wholly straightened out as far as the applicability of the interstate trade requisite is concerned, the *Hugin* case makes it singularly clear that the "may affect trade between Member States" passage *is* an independent requisite, at least for the purposes of substantive law. Whether it is a jurisdictional criterion as well, cannot be deduced from that fact alone.

2.6.6 Europemballage Corp. and Continental Can Co. Inc. v. Commission of the European Communities[85]

Background and facts: Continental Can Co. Inc. of New York, at the time of the proceedings the world's number one producer of, *inter alia,* metal packages, acquired an 85,8 per cent holding in the German firm Schmalbach-Lubeca-Werke AG of Brunswick (Schmalbach) in 1969. In 1970 it formed a company, Europemballage Corp., in Delaware, which opened an office in New York and in Brussels, and a few weeks later it acquired 91,07 per cent of the shares in a Dutch company, Thomassen & Drijver-Verblifa (Thomassen). The following day the Commission instituted proceedings against Continental Can and Europemballage and on Dec. 9, 1971, the Commission decided that Continental Can had abused its dominant position in the Common Market (held through the German firm Schmalbach) by the purchase made by Europemballage of the Dutch undertaking Thomassen, and ordered Continental Can to submit a scheme for divestiture (Article 86).[86]

The proceedings were administrative.[87]

Process of localization: The abuse, if there was one, was localized to the Community area.

Jurisdictional criteria: In lengthy submissions, Continental Can (and Europemballage) maintained that the conduct of Europemballage was not attributable to Continental Can, and that, according to principles of public international law, Continental Can — being located outside the Community — was not subject to the jurisdiction of the Commission.[88]

Since Europemballage is a subsidiary of Continental Can, the Court rebutted, which has no option to determine its market behaviour autonomously, but mainly follows the instructions of its parent, the conduct of Europemballage can be imputed to the parent company, in spite of the subsidiary's independent legal personality. The purchase of Thomassen was consequently *attributed* to Continental Can. The fact that Continental Can

had no seat in the Community was insufficient to remove it from the jurisdiction of Community competition law.[89] Hence, the theory of *enterprise entity* (economic unity) once again constituted the jurisdictional basis.

Remedy: The decision and order of the Commission was *annulled* on other grounds.[90]

2.6.7 Hoffmann-La Roche & Co. AG v. Commission of the European Communities[91]

Background and facts: The Swiss company Hoffman-La Roche and Company AG (Roche), the world's largest manufacturer of bulk vitamins, was by a decision of the Commission of June 9, 1976, found to have infringed Article 86, firstly, by concluding agreements containing obligations upon purchasers in six Member States to buy all or most of their requirements exclusively or in preference from Hoffmann-La Roche, and, secondly, by granting fidelity rebates offering these purchasers an incentive to buy exclusively from Hoffmann-La Roche. (Abuse of dominant position).[92] Roche was enjoined to terminate the infringement.

A fine of 300.000 units of account was imposed.

The proceedings were administrative.

Process of localization: All acts of relevance were localized to the Common Market.

Jurisdictional criteria: The Commission very laconically noted that Roche had its registered office outside the Common Market but had numerous subsidiaries within the Market, thereby advocating the applicability of the theory of enterprise entity (economic unity).[93] The matter was not in controversy.

As far as the "trade between Member States" requisite was concerned, the Court by and large repeated the statements of principle made in *Commercial Solvents,*[94] with one crucial elucidation, however. The issue now, as formulated by the Court, was whether there was an effect on competition *and* trade between Member States. The Court first analyzed the effect on competition, and was able to establish such. Thereafter it examined the effect on trade. The agreements, the Court found, enabled Roche to maintain the partitioning of markets within the Common Market, making it possible for it to differentiate prices.

The conduct of Roche therefore, the Court concluded, was capable of both affecting competition and affecting trade between Member States.[95]

Remedy: The fines were reduced to 200.000 units of account.[96]

2.6.7.1 Conclusion

By requiring both an effect on competition within the Common Market and trade between Member States, the Court seems to have removed the doubts that its ruling in *Commercial Solvents*[97] gave rise to, namely whether the "affect the trade between the Member States" clause in Articles 85 and 86 was an independent requisite at all. The decision in the Hoffman-La Roche case clearly suggest that it is. Whether it simultaneously is a jurisdictional criterion, however, the decision does not indicate. Jurisdiction was foremostly based on conduct within the Common Market by the non-resident undertaking through its subsidiaries; together the parent and the subsidiaries constituted an enterprise entity.

2.7 General conclusions

With the exception of certain *dicta* and indications in the case law of the European Court of Justice, the principle of effects has not yet been upheld by the Court.[98] Thus far, the Court has chosen to apply the doctrine of economic unity.[99] This does not, of course, exclude the possibility that the Court will adopt (or even implicitly has adopted) the principle of effects. It is clear, namely, that the Court has so far *not rejected* the principle: with the exception of some *dicta* that *may* be construed in favour of the principle, the Court has — consciously or not — avoided giving an opinion on its applicability. As a natural result, one cannot by merely studying the case law draw any conclusions as to the elements of a possible effects-principle. Resort must be had to other sources: the view of the Commission and the opinions presented by the commentators.

2.8 The standpoint of the Commission

As has been indicated in the preceding analysis of the case law of the Court, the Commission has repeatedly applied, and argued for the application of the principle of effects. Already in its first decision under the competition rules of the Common Market, *Grosfillex/Fillistorf,*[100] the Commission, it seems, partly relied on the principle. Here, a negative clearance was granted with respect to an agreement prohibiting the Swiss company Fillistorf, the exclusive distributor of the French manufacturer Grosfillex, from competing with the latter within the Common Market. The Commission seems to have assumed that it had subject matter jurisdiction; the issue was not discussed.

In *obiter dictum* in the *Bendix/Mertens & Straet*[101] decision, also involv-

ing a negative clearance with respect to an agreement between the American company Bendix and the Belgian distributor Mertens & Straet, the Commission noted the jurisdictional problem. The fact that the manufacturer is located outside the Common Market, the Commission concluded, does not as such prevent the application of Article 85 of the Rome Treaty, when the agreements have effects within the Common Market.

In numerous subsequent decisions (mostly negative clearances), the Commission has assumed jurisdiction without explicit discussion on the matter, even though the cases have involved foreign elements.[102]

In arguing before the Court in the *Dyestuffs* case (ICI v. Commission), the Commission made its standpoint clear:

"[S]hould it be the case ... that the conduct of the applicant company took place wholly outside the Community, the jurisdiction of the Community is justified by reason of the economic effects that this conduct has produced in the Common Market and of the resultant disruption of the public policy of the Community as regards competition law. To reach this result it is enough to make a prudent application of the doctrine of economic effects, taking into account the extent of the direct economic effects resulting from the conduct of the applicant, and in particular the successive price increases in the Common Market. In the present case this result is in accordance with the principles laid down by the International Court of Justice in the Lotus case. This conclusion also accords with the previous practice of the Commission, as appears from its decisions in the cases of Grosfillex (JO 1964, p. 915), Bendix (JO 1964, p. 1426), Vitapro (JO 1964, p. 2287), Transocean (JO 1967, No 163, p. 10) and European Machine Tool Exhibition (JO 1969, No L 69, p. 13)."[103]

The Commission's position was repeated in an opinion published in October 1972 regarding imports of Japanese products into the Common Market[104] and further implemented in the *Franco-Japanese Ballbearings* and *Franco-Taiwanese Mushroom Packers* decisions.[105] In the Sixth Report on Competition Policy, published in 1977, the Commission restated its view concluding that the Community authorities "can act against restrictions of competition whose effects are felt within the territory under their jurisdiction, even if the companies involved are located and doing business outside that territory, are of foreign nationality, have no link with that territory and are acting under an agreement governed by foreign law."[106] In two recent decisions — *The Community v. Members of the Genuine Vegetable Parchment Association* and *The Community v. Associated Lead Manufacturers Ltd.*,[107] subject matter jurisdiction was again based on the principle of effects.[108]

Thus, the Commission has taken an unequivocal view on the applica-

bility of the principle of effects. The elements of that principle have been elaborated upon primarily in submissions and arguments to the European Court of Justice. In the *Dyestuffs* case the Commission argued that the principle of effects as construed in the American case law and especially in the *Alcoa* case, was far too broad.[109] A state's jurisdiction, the Commission pointed out, cannot rest on "some vague and indirect" relationship between the anticompetitive conduct and that state's economy. On the other hand, the Commission continued, it cannot be required that the connection between the foreign conduct and its effects within the Common Market is too strong so as to be comparable, the Commission seemed to have reasoned, with the shot across the border. The Commission therefore looked for a compromise, which it found in the criterion direct effects in combination with a principle concerning the protection of essential interests — the interests in maintaining the economic structure of the state and in allowing the instruments of that economy the freedom to act.[110] This construction of the principle of effects the Commission added, is not broader than the effects-principle advanced in Section 18 of the Restatement (2d) of Foreign Relations Law.[111] Section 18 was also, as we have seen, the basis of Advocate-General Mayras' understanding of the effects-principle in the same case: direct, immediate, reasonably foreseeable and substantial effects on competition within the Common Market.[112] This effects formula advanced by Advocate-General Mayras was later adopted by the Commission in the *Commercial Solvents* case.[113] Thus for the Commission, it seems that Section 18 of the Restatement of Foreign Relations Law, as interpreted by Advocate-General Mayras in the *Dyestuffs* case, is guiding as regards the basis of jurisdiction: Jurisdiction may be assumed when the foreign conduct by foreign enterprises have direct, immediate, reasonably foreseeable and substantial effects within the Common Market.[114] This jurisdictional test, the Commission's suggestion seems to be, is applicable to foreign enterprises only, that is, enterprises incorporated and seated outside the Common Market — as regards enterprises incorporated and seated within the Common Market, the substantive provisions of the Common Market competition law apply directly. Moreover, the jurisdictional test is required by international law. Articles 85 and 86 are consequently applicable to foreign enterprises, not acting through agents within the Common Market, under the double condition that first, the jurisdictional test is met, and second, that the substantive requisites of these provisions are fulfilled.

In examining the jurisdictional test — the effects formula — more closely in light of Advocate-General Mayras' opinion in the *Dyestuffs*

cases, one finds that the element "direct and immediate" concerns the causal relationship between the conduct and the effects — the agreement or other conduct must be directly applicable within the Common Market.[115] This element thus has a qualititative character. "Reasonable foreseeability", further, is an objective standard, *i.e.*, requires no proof of a subjective intent. "Substantiality", finally, implies quantity: in the *Dyestuffs* case this requisite was met, according to the Advocate-General, because of the rate of the price increases agreed upon, because the increases applied to dyestuffs as a whole and because of the fact the enterprises in question controlled four-fifths of the dyestuffs market.

However, many questions remain unanswered. Is there, for instance, a minimum for "substantiality", and if so, what is that minimum? What is, further, "reasonable foreseeability"? Still, the most troublesome question is, effects on what? While Advocate-General Mayras seems to suggest that the foreign conduct shall have effects on the competition within the Common Market,[116] the Commission speaks merely of "economic effects" or of "effects", without more, within the Common Market.[117] Particularly unclear is whether the jurisdictional test encompasses the requisite that the anticompetitive conduct effects, or may affect, the trade between Member States, in other words, whether the interstate commerce clause is a jurisdictional element. This question will have a central position when we now proceed to examine some opinions advanced in the literature.

2.9 The views of some commentators

There is a general consensus among legal writers that subject matter jurisdiction rests on the principle of effects, that the competition rules of the Rome Treaty are applicable to anticompetitive conduct that has effects within the Common Market irrespective of the seat of the enterprise behind the conduct.[118] Most writers also agree that the interstate commerce clause is a jurisdictional element, that the principle of effects is qualified by the interstate commerce clause.[119] The reasoning of *Homburger* and *Jenny* is probably representative:[120] the conduct by foreign enterprises must have *anticompetitive* effects within the Common Market. This implies that competition within the Common Market, including the trade between Member States, must somehow be affected. As a matter of substantive law, the required effects are present when a particular conduct — agreement or abuse of dominant position — has as its object or effect the prevention, restriction or distortion of the freedom of any other enterprise (or person) within the Common Market to make contracts, to decide the content of the con-

tracts or to choose the persons with whom to make contracts; and when the particular conduct, in addition, is susceptible of affecting trade between Member States.

Since the jurisdictional rule is "hidden" in the substantive provisions, Homburger and Jenny proceed to examine each substantive requisite separately. Articles 85 and 86 are not only substantive rules, laying down the requisites for illegal conduct, they reason,[121] but they are also jurisdictional rules determining the scope of the law, including the question whether, and under what circumstances, the Common Market competition law is applicable to foreign anticompetitive conduct. Having defined such basic concepts as "undertaking", "agreement", "concerted practice", "decision", "dominant position", "abuse", "trade", etc., Homburger and Jenny continue to analyze the requisites "object or effect the prevention, restriction or distortion of competition within the common market" and "may affect trade between Member States". They emphasize that these two requisites must be read in concert, since the latter requisite qualifies the former. "Effect" on competition, they find, denotes an actual effect, whereas the "object" to prevent, etc. competition implies a subjective intent, an intent to prevent, etc. competition.[122] From the standpoint of substantive law, both situations are covered. "May" affect may denote either that the conduct objectively seen, directly or indirectly, may have effects on interstate trade, or that the conduct by virtue of its nature and objects may produce such effects.[123] "Affect", finally, must be understood in a neutral sense, Homburger and Jenny seem to conclude: the concept simply entails a requirement that the conduct is capable of bringing about an alteration of the natural flow of trade between Member States.

For jurisdictional purposes however, *i.e.,* when it comes to determining whether jurisdiction exists with respect to foreign enterprises, some restraint is required; the substantive requisites are moderated for jurisdictional purposes. Homburger and Jenny consequently suggest that the competition rules of the Treaty of Rome shall apply to the conduct of foreign enterprises only where it *actually* prevents, restricts or distorts competition within the Common Market, and when the *probability* that the conduct will *substantially* affect trade between Member States is *considerable.*[124] The jurisdictional rule suggested here is thus somewhat narrower in scope than the substantive rule.

Haymann's extensive analysis rests on a similar reasoning and leads to comparable results. Reaching the conclusion that the applicability of the Common Market competition law to the conduct of foreign enterprises is qualified by the interstate commerce clause, Haymann proceeds to examine

that clause more closely in light of the practice of the Commission and the Court, and in light of the object of the competition rules and the Treaty of Rome as such.[125] The jurisdictional rule subsequently formulated, based on the findings on substantive law — especially on what constitutes prohibited effects — but modified for jurisdictional purposes, is: the competition rules are applicable to any conduct by enterprises that actually and directly affects competition within the Common Market by restricting or removing the freedom of choice and action of the other enterprises within the relevant market in interstate commerce.[126] Excluded hereby is conduct having merely potential effects, as is conduct with indirect effects. Whether the effects are substantial or not, Haymann claims, is immaterial, as are the nationality of the enterprise and questions as to the intent or foreseeability of the person performing the anticompetitive act.[127]

Not covered by the competition rules are according to Haymann, for instance, the indirect effect on the Common Market produced by agreements between Community enterprises concerning exports (export cartels). Not covered are also other types of activities having indirect economic effects.[128] Outside the scope of the competition rules are also, Haymann continues, agreements regulating the commerce between a Member State and a third state, provided interstate commerce is unaffected, and agreements whereby the world market is allocated between foreign enterprises, provided the Common Market is treated as an entity.[129] Thus, an American and a Japanese company agreeing to divide the world market among themselves, and allocating to one of the companies the Common Market in its entirety, would, according to Haymann, not fall under the competition rules of the Treaty of Rome.

The approach of Homburger and Jenny is also adopted by *Stoephasius*. He first analyzes the substantive requisites of the competition rules. The results of the analysis essentially coincide with those of Homburger and Jenny, although some deviations in detail can be noted. For jurisdictional purposes, *i.e.*, for the purposes of applying the substantive provisions to conduct by foreign enterprises abroad, the substantive requisites are somewhat modified.[130] The modifications Stoephasius believes to be necessary in consideration of international law, especially the interests of other states, but also because of mere practical considerations. The jurisdictional rule eventually established reads: only such conduct by foreign enterprises abroad that has *actual* and *substantial* ("wesentliche") effects on the competition — "competition" as qualified by the interstate commerce clause — within the Common Market is covered by Articles 85 and 86 of the Treaty of Rome.[131]

Barack has also recently, it seems, adopted a similar approach. The rules of conflict of laws are "hidden" in substantive provisions of the Treaty of Rome.[132] Barack therefore starts out by briefly analyzing the terms in Articles 85 and 86 that imply jurisdictional limitations: "undertaking", "agreements", "may affect" interstate "trade", "object or effect", "within the Common Market", etc. Defined hereby are the substantive requisites for a violation of the competition rules. With respect to foreign enterprises, however, Barack concludes that "the general tests for prohibited effects in Community law are regarded by the Community as insufficient as a basis for jurisdiction".[133] The test with respect to foreign enterprises is different, modified on grounds of considerations of international law. The required effects should be "qualified". Controlling here is Section 18 of the Restatement (2d) of Foreign Relations Law in line with Advocate-General Mayras' opinion in the *Dyestuffs* case and the standpoint of the Commission in that case and in the *Commercial Solvents* case.[134]

2.10 Conclusion

In order to reach the anticompetitive conduct of foreign enterprises, Common Market competition law prescribes two basic instruments: the doctrine of economic unity and the principle of effects. Thus far the Court has chosen to apply the doctrine of economic unity for jurisdictional purposes, although the principle of effects probably would have been equally applicable. The principle of effects has not yet been conclusively upheld by the Court. The Commission, on the other hand, has from the very beginning espoused the principle and the commentators are in accord.

The doctrine of economic unity implies that the conduct within the Common Market by a company there (or other agent) will be imputed to the foreign enterprise having *de facto* control over that company.[135] Thus, foreign enterprises acting through agents in the Common Market will be deemed to have acted there themselves. The economic unity test, *inter alia,* involves the questions of whether the foreign enterprise has the power to control the company within the Common Market, whether that control has been exercised and whether it has been exercised in the specific case.

When formulating the principle of effects, the Commission has to a great extent been influenced by Section 18 of the Restatement of Foreign Relations laid down by the American Law Institute. Although this formulation of the principle of effects does not wholly coincide with the formulation advanced by many of the commentators, there are obvious similarities. Conduct by foreign enterprises abroad that has direct, actual and

substantial (maybe foreseeable as well) effects within the Common Market will consequently fall under the aegis of the competition law of the Treaty of Rome. As to the question, effects on what?, the answer is: effects on competition within the Common Market as defined in Articles 85 and 86 of the Treaty of Rome, or in other words, the effect of preventing, restricting, or distorting competition in interstate trade within the Common Market. The whole effects formula applicable to foreign enterprises would thus read: The acts of foreign enterprises, although committed abroad, fall under Articles 85 and 86, when they directly, actually, substantially and, it seems, foreseeably prevent, restrict or distort competition in interstate trade within the Common Market.

There is no doubt that the principle of effects formulated in this way is far narrower in scope than the principle of effects defined in the American case law, where mere economic effects on U.S. foreign commerce would suffice. In comparison, even the interstate commerce clause as construed by the United States courts seems to have a broader coverage. Not covered by the Common Market competition law are, it seems, if the formulation of the effects principle is correct, agreements between foreign enterprises whereby, for instance, the Common Market as a whole is allocated to one enterprise. Not covered are probably also price agreements between foreignenterprises selling to independent companies within the Common Market (since the agreement does not directly affect interstate trade). Agreements, further, that regulate the foreign commerce of one Member State are also outside the scope of the competition law, provided they do not affect interstate trade.[136]

Whether these predominantly theoretical reflections are correct, remains yet to be seen. In practice, the formulation of the effects principle may prove too narrow. The case law of the Community in this field is still too undeveloped to give any affirmative indications. As regards agreements regulating the foreign commerce of one Member State, the Commission has so far primarily chosen to take action against the contracting party (company) situated within the Common Market — here the competition rules apply directly without qualification.[137]

3. Personal Jurisdiction

There are no particular provisions in the Common Market competition law regulating personal jurisdiction. It is questionable whether this institution has any independent function in Community law at all. According to the so called German school in this field, the foremost representative of which is *Neumeyer,* personal jurisdiction and subject matter jurisdiction, although both distinct concepts, rest on the same elements: personal jurisdiction extends as far as the jurisdiction over the subject matter, at least as far as the enforcement of public and penal law is concerned.[138] This standpoint is adopted with respect to the Common Market competition law by, *inter alia, Kruithof, Hug* and *Barack.*[139] Others, again, have criticized this view of personal jurisdiction: If personal jurisdiction is a prerequisite for the institution of proceedings against foreign enterprises (or any enterprise), the parallelity of personal jurisdiction and subject matter jurisdiction would, on the one hand, deprive the enterprise against which proceedings are instituted the possibility of contesting the decision of the relevant authorities to take such action.[140] On the other hand, the parallelity would entail considerable practical problems for the relevant authorities: if proceedings cannot be instituted against foreign enterprises without first fulfilling the criteria for subject matter jurisdiction, the authorities would be unable to make the necessary investigations and obtain the necessary evidence for the purpose of proving that there is — precisely — subject matter jurisdiction; the authorities would be caught in a dilemma.[141]

In order to remedy this situation, *Haymann,* for instance, suggests the following (all based, he claims, on *lex lata*): the requisites of personal jurisdiction are first, that the foreign enterprise has some nexus to the territory of the Common Market (subsidiaries, agents, offices, participation in bidding, etc., but not the existence of property), and second, that there is a *well-founded suspicion* that the enterprises have performed an act which has the required effects in the Common Market.[142]

Whether this is a correct interpretation of the requisites for personal jurisdiction under Common Market competition law is unclear; they certainly seem commendable *de lege ferenda.*

Notes, chapter III

[1] As to the background see e.g. *Rahl,* 2 ff., 22 ff. and 90 f.; *Haymann,* at 22 and 53.

[2] From the general prohibitions in Article 85(1), exemptions can be made under Article 85(3) under certain specified conditions. Exemptions can either be granted in the form of an individual decision by the Commission or in the form of regulations issued by the Commission applying to certain type of agreements ("group exemptions"), see e.g. Regulation No. 67/67 and 2779/72 from 1972 (O.J. Special Edition 1967/10 and J.O. L 292/23).

See further e.g. *Van Bael/Bellis,* World Law of Competition, European Economic Community (Unit B 1), edited by von Kalinowski, § 3.04; *Oberdorfer/Gleiss/Hirsch,* Common Market Cartel Law (2nd ed.), at § 80 ff. with further references.

[3] A proposition yet unchallenged, for obvious reasons it may seem. See e.g. *Homburger/Jenny,* at 18; *Haymann,* at 37; *Rahl,* at 101 f.; *Stoephasius,* at 5; *Hug,* The Applicability of the Provisions of the European Community Treaties Against Restraints of Competition to Restraints of Competition Caused in Non-member States, but Affecting the Common Market, Cartel and Monopoly in Modern Law II, at 649 f.; *Deringer,* The Common Market Competition Rules, With Particular Reference to Non-member Nations, 1963 I.C.L.Q. 582, at 584.

[4] See e.g. *Hug, supra,* n. 3, at 651 f.; *Haymann,* at 37 f.; *Dembowski,* Die Anwendung kartellrechtlicher Vorschriften auf Aussenhandelsverträge im europäischen Markt, (Dissertation, Hamburg 1966), at 18 f., *Homburger/Jenny,* at 18, *Stoephasius,* at 7; *Schwartz, I.E.,* Anwendbarkeit nationalen Kartellrechts auf internationale Wettbewerbsbeschränkungen, Kartelle und Monopole II, at 680 ff.

As to the case-law, see *infra* p. 266 ff.

[5] One noteworthy exception is *Haymann,* at 217 ff. Also see *Barack,* at 221 ff. For further references, see *infra* p. 284 ff.

[6] Note that these are substantive requisites which are cumulative, *Homburger/Jenny,* at 34; *Haymann,* at 72 ff. and 77, with further references, n. 7. The provisions can certainly be more itemized. "Trade", for instance, has been given a very broad import. It covers every conceivable kind of commercial activity, including services. For a comprehensive survey, see *van Bael/Bellis,* at § 3.02(3). "Competition", again, refers to both actual and potential competition. See further *van Bael/Bellis,* at § 3.03(3); *Oberdorfer/Gleiss/Hirsch,* at § 14. The terms "prevention", "restriction" and "distortion" are used interchangeably, it seems, "prevention" being the principal term comprising the two others; see e.g. *Deringer,* Kommentar zum EWG-Wettbewerbsrecht nebst Durchführungsverordnungen, at Article 85, Sec. 1, n. 24. Also see *Homburger/Jenny,* at 31 f.; *Emmerich,* Die Auslegung von Art. 85 Abs. I EWG-Vertrag durch die bisherige Praxis der Kommission, 1971 Europarecht 295, at 314 (observe n. 112 f.); *van Bael/Bellis,* at § 3.03(3)(b); *Oberdorfer/Gleiss/Hirsch,* at § 14.

[7] See e.g.: *Hug, supra,* n. 3, at 651 and *Haymann,* at 21.

[8] See e.g. *Seidl-Hohenveldern,* Kartellbekämphung im Gemeinsamen Markt und das Völkerrecht, 1960 AWD (Aussenwirtschaftsdienst des Betriebs-Beraters) 225, at 229; *Haymann,* at 21 ff.; *Zuleeg,* Die Auslegung des europäischen Gemeinschaftsrechts, 1969 Europarecht 97; *Hug, supra,* n. 3, at 651 ff. For further references, see *Haymann,* at 23, n. 1.

For discussion on the aspect of international law, see e.g. *Brownlie,* at 610 f. and 664 f.; *Verdross,* at 174 f.; *Wengler,* 1212 f.; *Berber,* at 444.

[9] *Id.*

[10] *Hug, supra,* n. 3, at 653. The purposes of the Rome Treaty are outlined in its preamble and in Articles 2—3. Also see *Haymann,* at 23 ff. and 26 ff.; *Rahl,* at 22 ff.

[11] See *Kronstein,* Das Recht der internationale Kartelle (Berlin 1967), at 505; *Rahl,* at 101; *Haymann,* at 54 f. and 170; *Homburger/Jenny,* at 34 and 56; *Stoephasius,* at 17.

[12] See *Knebel,* Europäische Wettbewerbsregeln für Unternehmen nach dem Montan-Vertrag und dem Wirtschaftsgemeinschafts-Vertrag, (Dissertation, Köln 1958), at 67 f. and *Wilmanns,* Die Gültigkeit von Kartellen nach Art. 85 EWG-Vertrag und der Verordnung Nr. 17 unter besonderer Berücksichtigung des Problems des internationalen Anwendungsbereichs dieser Bestimmungen (Dissertation, Frankfurt 1963), at 133 f.

[13] *Seidl-Hohenveldern, supra* n. 2, at 230; *Rahl,* at 108; *Homburger/Jenny,* at 26 f.; *Deringer, supra* n. 1, at n. 16 and 29 ff.; *Stoephasius,* at 8 f.; *Kruithof,* The Application of the Common Market Anti-Trust Provisions to International Restraints of Trade, 2 C.M.L.R. 69 (1964—65), at 75; *Schwartz, I.E.,* Applicability of National Law on Restraints of Competition to International Restraints of Competition, in Cartel and Monopoly in Modern Law (Frankfurt 1961), at 709; *Hug, supra* n. 3, at 645; *Meessen,* at 135; *Barack,* at 40 ff.; *Haymann,* at 40 and 47; *van Bael/Bellis,* at § 3.02(2)(b) and references to case-law, *id.,* n. 7. (For more references to cases, see e.g. *Meessen,* at 135 ff.).

To the extent that one regards the principle of effects to be the sole jurisdictional rule applicable (see a list presented by *Haymann,* at 40, n. 1), one simultaneously eliminates the seat of the corporation as a jurisdictional criterion.

[14] The possibility of a negative clearance was created with the issuance of Regulation 17 (by the Council March 13, 1962, O.J. No. 13/62, at 204). After application ("notification") coupled with information by one or more participants to an agreement, the Commission may reach a decision that there is no occassion for it to take action against the particular agreement.

As to exemptions, see *supra* n. 2.

[15] Case 22/71, (1971) E.C.R. 949.

[16] *Id.,* at 964.

[17] *Id.,* at 959.

[18] *Id.*

[19] *Id.,* at 959 f.

[20] *Id.,* at 960.

[21] See e.g. *Haymann,* at 45; *Meessen,* at 138 f.; *Ellis,* in ILA 1972, at 154; *Harding, C.S.P.,* Jurisdiction in EEC Competition Law: Some Recent Developments 11 J. World Trade L. 422 (1977), at 425 f.; *van Bael/Bellis,* at § 1.03 (p. 1—6, n. 5); *Stenberg,* Studier i EG-rätt, at 313 f.

Also see the Commission's Sixth Report on Competition Policy (1977), at 31 f.

[22] See e.g. *van Bael/Bellis,* at § 1.03 (p. 1—6, n. 5), *Barack,* at 109 (with further references).

[23] (1972) C.M.L.R. 557. Also see (1972) E.C.R. 619. (The former series will be cited here).

[24] *Id.,* at 605. *Cf.* Regulation 17/62, Article 15(4).

[25] *Id.,* at 594 and 624 f.

[26] (1969) C.M.L.R. D23, at D33, considérant 28.

[27] *Id.,* at D28 and (1972) C.M.L.R. 557, at 602 f.

[28] (1972) C.M.L.R. 557, at 603.

[29] *Id.*, at 603 f. The Advocate General wholly transferred § 18(b) in the Restatement (2d) of Foreign Relations Law. An additional condition stated there, that the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems, is also discussed at length by the Advocate General, *id.*, at 595 ff.

[30] *Id.*, at 606.

[31] *Id.*, at 628 (emphasis added).

[32] *Id.*, at 629. As to the theory of enterprise entity (economic unity, unity of group, piercing the corporate veil, etc.) see *supra* p. 12 ff.

[33] *Id.*, at 640.

[34] See e.g. *id.*, at 630.

[35] One of the complaints concerned the form of the motivation of the Commission's decision. See *id.*, at 613. *Cf.* commentaries by *Steindorff,* 1972 C.M.L. Rev. 502, at 504 ff., Annotation on the Decisions of the European Court in the Dyestuff Cases of July 14, 1972, and *Haymann,* at 265.

[36] *Id.*, at 627 f.

[37] *Id.*, at 628.

[38] *Id.*, at 594.

[39] *Id.*, at 629.

[40] *Immenga* in Die extraterritoriale Anwendung des EWG-Kartellrechts nach dem Farbstoff-Urteil des Europäischen Gerichtshofes, 1972 Zeitschrift für Schweizerisches Recht (ZSR) 417, at 420 ff., while recognizing that the price-increases were characterized as concerted practises by the Court, puts the question: "Kann das Verhalten, die Veranlassung der Wettbewerbsbeschränkung, nicht bereits in der Abstimmung liegen, so dass die Preiserhöhung als Wirkung anzusehen ist?" "No", answers *Immenga* eventually, the price-increases are not effects of the concerted practises, they are part of whole anticompetitive act: "Es handelt sich daher ... um einen zweiteiligen Tatbestand." The act consists of "Abstimmung und das tatsächliche Zusammenwirken". Apart from this, it certainly seems strange to characterize the price-increases as effects, since those, together with the fact that we are dealing with concerted practises, are supposed to affect competition and interstate trade. The latter type of effects can hardly been characterized as the effects of the effects. The whole discussion shows, however, the hardship one confronts in attempting to define the act as distinguished from the effects of the act.

Cf. Meessen, at 141 f. Also see *Mestmäcker,* at 156.

[41] *Meessen,* at 141 f.: "Durch die Absendung der Anweisungen wird der Abzugshahn in Drittstaaten ausgelöst. Lediglich die tatbestandsmässige Wirkung — beim Schuss über die Grenze die tödliche Verletzung — tritt innerhalb des Gemeinsamen Marktes ein, und zwar unabhängig davon, ob man auf die Vornahme der Preiserhöhungen oder mit der Kommissionsentscheidung auf die spürbare Marktbeeinflussung abstellt."

[42] *Id.*, at 142: "[M]üssen wir feststellen, dass der Gerichtshof im Ergebnis entgegen seiner Intention die ausschliessliche Anknüpfung an den Ort der tatbestandsmässigen Wirkungen gebilligt hat. Das abgestimmte Verhalten hatte sich in Drittstaaten zugetragen". ... "Wie auch immer die Urteilsbegründung zu verstehen sein mag, in der Sache knüpft ... die Farbstoffe-Urteile wegen der Zwischenschaltung einer juristischen Person an den Ort der tatbestandsmässigen Wirkungen an." (*Id.*, at 143).

[43] *Immenga,* for one, observes that the Court *could* have chosen to take the position here proposed by *Meessen,* but interposes immediately that it did not. See *supra* n. 40, at 422 f.

[44] *Cf. Immenga, supra* n. 43: "Ungeachtet dieser Bedenken is für die Rechtspraxis festzuhalten, dass der EuGH im Falle abgestimmter Verhaltensweisen die Beteiligung ausländischer Unternehmen nicht als extraterritoriales Verhalten qualifiziert, wenn selbständige Tochtergesellschaften innerhalb des Gemeinsamen Marktes die Abstimmung verwirklichen."

[45] See *Mann, F.A.,* The Dyestuffs Case in the Court of Justice of the European Communities, 22 Int. & Comp. L.Q. 35 (1973), at 46 ff. and *Steindorff, supra* n. 35, at 506 ff. Also see *Howell, III J.W.,* Extraterritorial Application of Antitrust Legislation in the Common Market: The *Dyestuffs Cases* (European Court of Justice, 1972), 12 Colum. J. Transnat. L. 169 (1973), at 175 ff.

[46] *Haymann,* at 267 f. including 267, n. 5, 307 f. and 189.

[47] (1972) C.M.L.R. 557, at 640.

[48] *Id.,* at 594. Especially see the contention as formulated by the Court itself, *id.,* at 628.

[49] *Cf. Barack,* at 111.

[50] *Cf. Immenga, supra* n. 40, at 423, where he, with regard to the applicability of the principle of effects, concludes: "Der Gerichtshof sah sich aufgrund seiner Rechtsansicht zu keiner Stellungsnahme veranlasst." Also see *Steindorff, supra* n. 35, at 506 ("We do not know, however, whether [the Court] may be inclined to [apply the principle] on another occassion."); *Howell, supra* n. 45, at 178 ("[The Court] does not expressly reject the American concept of the "effects" doctrine; rather, it simply ignores it."); *Bellis,* International Trade and the Competition Law of the European Economic Community. 16 C.M.L. Rev. 647 (1979), at 648 f.; *van Bael/Bellis,* World Law of Competition, European Economic Community (ed. by *von Kalinowski*), 1, at § 1.03.; *Harding, C.S.P.,* Jurisdiction in EEC Competition Law: Some Recent Developments, 11 J. World Trade L. 422 (1977), at 428 and 430 f.; *Mestmäcker,* at 156; *Bellamy/Child,* Common Market Law of Competition (London, 1978), at 2—58; *Barack,* at 111 ff.

Doubtful is *Haymann,* at 266 f. and at 307 f. As to *Meessen,* see *supra* n. 41 f.

[51] See *infra* p. 281 ff.

[52] (1974) E.C.R. 223, Case No. 6 and 7/73.

[53] See *id.,* at 227. The decision of the Commission is reprinted in (1972) J.O.L. 299/51.

[54] *Id.,* at 247.

[55] *Id.,* at 228 ff. and 253 ff.

[56] *Id.* The Court gave particular weight to the two last factors here outlined.

[57] *Id.,* at 231 and 253 ff. *Cf.* the opinion of Advocate General Warner — *id.,* at 259 ff. — at 262 ff.

[58] *Id.,* at 230.

[59] *Id.,* at 265.

[60] *Id.,* at 238 f.

[61] *Id.,* at 252 f. (Emphasis added).

[62] *Id.,* at 253.

[63] *Id.*, at 257.

[64] See ICI v. Commission (1972) E.C.R. 619, Case no. 48/69. See *supra*.

[65] Europemballage and Continental Can v. Commission, (1973) E.C.R. 215, Case No. 6/72. See *supra*.

[66] *Harding, C.S.P.*, Jurisdiction in EEC Competition Law: Some Recent Developments, 11 J. World Trade L. 422 (1977), at 435. *Cf. Korah,* in 11 C.M.L. Rev. 248 (1974), at 265 ff. (in particular at 268); *Bellamy/Child,* Common Market Law of Competition, at 2—43; *van Bael/Bellis,* at § 3.02(4), p. 3—22 (see n. 28).

[67] See e.g. *Homburger/Jenny,* at 32 f.; *Rahl,* at 101; *Oberdorfer/Gleiss/Hirsch,* at 38 ff.; *Haymann,* at 184 ff.; *Stoephasius,* at 17.

[68] See further, *infra* p. 281 ff.

[69] (1978) E.C.R. 207, Case No. 27/76.

[70] (1976) 1 C.M.L.R. D28, at D46 f.

[71] (1978) E.C.R. 207, at 257.

[72] *Id.*, at 294.

[73] *Id.*

[74] *Id.*, at 306 f.

[75] See *supra*.

[76] Commercial Solvents v. Commission, (1974) E.C.R. 223, Case No. 6 and 7/73. See *supra* p. 273.

[77] See further, *infra* p. 281 ff.

[78] (1979) E.C.R. 1869, Case No. 22/78.

[79] See the decision of the Commission, *Liptons Cash Registers & Business Equipment Ltd. v. Hugin Kassaregister AB,* (1978) 1 C.M.L.R. D19, at D33 f.

[80] See the arguments of the parties, (1979) E.C.R. 1869, at 1888 f. and the decision of the Court, *id.*, at 1898 ff.

[81] On the market of its own spare parts, as against independent undertakings that require the spare parts, the Court held, Hugin was in a dominant position. See *id.*, at 1895 ff.

[82] It had not been alleged that Hugin applied differentiated prices on the various local markets, *id.*, at 1900.

[83] Commercial Solvents Corp. v. Commission of the European Communities, (1974) E.C.R. 223, Case No. 6 and 7/73. See *supra*.

[84] United Brands Co. and United Brands Continentaal B.V. v. Commission of the European Communities, (1978) E.C.R. 207, Case No. 27/76. See *supra* .

[85] (1973) E.C.R. 215, Case No. 6/72. Also See (1973) C.M.L.R. Part 68, 199. The latter series will here be referred to.

[86] See (1972) C.M.L.R. Part 64, D11, at D35.

[87] See e.g. (1973) C.M.L.R. Part 68, 199, at 219.

[88] (1973) E.C.R. 215, at ...

[89] (1973) C.M.L.R. Part 68, 199, at 221 f. Also see the Commission's decision (1972) C.M.L.R. Part 64, D11, at D27.

[90] (1973) C.M.L.R. Part 68, 199, at 228 f.

[91] (1979) E.C.R. 461, Case No. 85/76.

[92] See (1976) C.M.L.R. 11 D25.

[93] See *id.*, at D42.

[94] Commercial Solvents Corp. v. Commission, (1974) E.C.R. 223, at 252 f. See *supra*.

[95] (1979) E.C.R. 461, at 552 f.

[96] *Id.*, at 557.

[97] See *supra* n. 94.

[98] *Cf. van Bael/Bellis,* at 1—5; *Barack,* at 109 and 116.
Further dicta is provided for in the *EMI/CBS Cases,* see *EMI Records Ltd. v. CBS Grammofon A/S,* [1976] E.C.R. 871, at 906, para. 25 (Case No. 86/75).

[99] For a detailed analysis of the doctrine of economic unity as applied in the Common Market, see *Barack,* at 40 ff. and 53 ff.

[100] [1964] C.M.L.R. 237.

[101] J.O. 1964, p. 1426.

[102] See e.g. *"Kodak",* J.O. 1970 L 147, p. 24; *"Omega",* J.O. 1970 L 242, p. 22; *"Misal",* 1972 L 267, p. 20; *"Henkel/Palmolive",* 1972 L 14, p. 14.

[103] [1972 II] E.C.R. 619, at 629.

[104] Commission of the EEC, Opinion Governing the Applicability of the Treaty of Rome to the Importation of Japanese Products into the Community, J.O. 1972, CIII/13. Also see Second Report on Competition Policy, sections 17 and 24.

[105] [1975] 1 C.M.L.R. D8, J.O. 1974 L 343/9; [1975] C.M.L.R. D83, J.O. 1975 L 29/26.

[106] *Id.*, at 31, section 37, para. 2.

[107] [1978] 1 C.M.L.R. 534.

[108] For a summary of the case law, see e.g. *Bellis,* International Trade and the Competition Law of the European Economic Community, 16 C.M.L. Rev. 647 (1979).

[109] See *supra* n. 6, at 628. As to the *Alcoa* case, see *supra* p. 81.

[110] *Id.*, at 629.

[111] *Id.*, at 633.

[112] See *supra* p. 269 f.

[113] [1973] E.C.R. 223, at 230.

[114] *Cf. van Bael/Bellis,* at 3—28 ff.; *Barack,* at 121.

[115] See *supra* n. 103, at 694 ff.

[116] *Id.*, at 694 f.

[117] *Id.*, at 629. Also see the *Commercial Solvents* case, *supra* n. 113, at 230.

[118] See e.g. *Haymann*, at 40, 172 ff.; *Meessen*, at 134; *Barack*, at 97 ff.; *Homburger/Jenny*, at 34 ff. and 55; *Stoephasius*, at 36; *Rahl*, at 101 ff.; *van Bael/Bellis*, at 1—5 ff.; *Oberdorfer/Gleiss/Hirsch*, at 40 f.; *Mestmäcker*, at 154 ff.; *Rehbinder*, at 36; *Hug* in Cartel and Monopoly in Modern Law, at 658; *Kruithof* in C.M.L. Rev. (1964—65), at 74 f.; *Schwartz*, at 3. For numerous further references, see *Haymann*, at 40, n. 1.

[119] See e.g. *Haymann*, at 156; *Barack*, at 127; *Mestmäcker*, at 115; *Stoephasius*, at 36 ff.; *Homburger/Jenny*, at 34 ff.; *Oberdorfer/Gleiss/Hirsch*, at 41 f.; *Kruithof* in C.M.L. Rev. (1964—65), at 75; *Hug*, *supra* n. 118; *Meessen*, Der räumliche Anwendungsbereich des EWG-Kartellrechts und das allgemeine Völkerrecht, Europarecht (1973), p. 18, at 21.

[120] *Homburger/Jenny*, at 34 ff.

[121] *Id.*, at 18.

[122] *Id.*, at 36.

[123] Here, it seems, *Homburger* and *Jenny* do not take a definite stand.

[124] *Homburger/Jenny*, at 76 ff. and 85.

[125] *Haymann*, at 156 ff.

[126] *Id.*, at 214 f.

[127] *Id.*, at 211 f.

[128] *Id.*, at 180 ff.

[129] *Id.*, at 184 f.

[130] *Stoephasius*, at 114 f.

[131] *Id.*

[132] *Barack*, at 27.

[133] *Id.*, at 118.

[134] *Id.*, at 118 ff. Also see *supra* n. 16 and 18.

[135] See *supra* p. 12 ff. Also see *Barack*, at 53 ff.

[136] See further e.g. *Haymann*, at 184 ff.; *Rahl*, at 101 ff.; *Barack*, at 182 ff. and 190 ff.; *Oberdorfer/Gleiss/Hirsch*, at 41 f.

[137] See e.g. the *Franco-Jananese Ballbearings Decision* and the *Franco-Taiwanese Mushroom Packers Decision*, *supra* n. 8; the *IFTRA Decision*, [1975] 2 C.M.L.R. D20, J.O. 1975, L 228/3; *Rieckermann Decision*, [1968] C.M.L.R. D28, J.O. 1968, L 276/25. See further *van Bael/Bellis*, at 3—28 ff.; *Bellis*, *supra* n. 108; *Barack*, at 165 ff.

But see e.g. the recent cases *The Community v. Members of the Genuine Vegetable Parchment Association*, [1978] 1 C.M.L.R. 534; *The Community v. Associated Lead Manufacturers Ltd. and others*, [1979] 1 C.M.L.R. 463.

[138] See *Neumeyer* IV, at 71 ff., 155 and 471 f. Also see *Isay*, Internationales Finanzrecht, at 8 and 61 f.; *Reu*, at 22 ff., 41 ff. and 85 ff.

See further *Rehbinder,* at 342 ff.; *Homburger/Jenny,* at 66; *Schwartz,* at 137, 151 f. and 160 f.; *Haymann,* at 220 ff.; *Stoephasius,* at 72 ff.; *Rahl,* at 137 f.; *Bär,* at 347; *P.H. Neuhaus,* Internationales Zivilprocessrecht und internationales Privatrecht, Rabels Zeitschrift für ausländisches und internationales Privatrecht (1955), p. 201, at 250 f.

[139] *Kruithof* in C.M.L. Rev. (1964—65), at 92; *Hug* in Cartel and Monopoly in Modern Law, at 666; *Barack,* at 238.

[140] This presupposes that personal jurisdiction has no independent function. See e.g. *Haymann,* at 221 ff.; *Stoephasius,* at 75 ff. and 83 ff. As to the German Competition Law, see *Rehbinder,* at 346 ff. and *Schwartz,* at 160 f.

[141] See *Schwartz,* at 160; *Rehbinder,* at 346; *Brewster,* at 61; *Stoephasius,* at 77; *Haymann,* at 222.

[142] *Haymann,* at 224 ff. *Cf. Stoephasius,* at 85 ff. and 116 ff., who, however, seems to suggest that the existence of property within the Common Market will suffice as a nexus (*id.,* at 120). Also see *Schwartz,* at 161 f.; *Rehbinder,* at 346 ff.; *E. Steindorff,* Das Wettbewerbsrecht der Europäischen Gemeinschaften und das nationale Recht, Kartelle und Monopole im modernen Recht, Vol. 1, p. 157, at 188 (Karlsruhe 1961).

Chapter IV
The scope of the Swedish Competition Act

1. Introduction

The Swedish Competition Act of January 1, 1983,[1] is primarily based on a principle of misuse, incorporated in Section 2 of the act — the general clause — and two *per se* prohibitions. Section 2 is directed against restraints of competition that have harmful effects. It provides that a restraint of competition is deemed to have harmful effects when it, in a way contrary to public interest, *either* unduly affects the formation of prices, restrains productivity in business, *or* impedes or prevents the trade of others. The foremost remedy against restraints of competition falling under Section 2 of the Competition Act — both in theory and in practice — is negotiation. Within the framework of a system of negotiation, the antitrust authorities (the Competition Ombudsman and the Market Court) shall primarily endeavour to persuade the enterprises involved to voluntarily remove the harmful effects caused or expected to be caused by the restraints of competition carried out. As a secondary remedy, injunctions may be imposed.[2]

Section 2 of the Competition Act covers all types of restraints, except those regulated separately in the two prohibitory provisions — the *per se* prohibition against resale price maintenance (Section 13) and *per se* prohibition against collusive tendering (Section 14).[3] Section 2 also constitutes the main substantive provision against mergers, accompained by Section 5 and the following provisions of the Competition Act. Our attention will henceforth be focused primarily upon Section 2 and its jurisdictional scope.

2. The jurisdictional elements of Section 2 of the Competition Act

Section 2 of Competition Act, entitled "The elimination of harmful effects", provides that:

"If a restrictive business practice has harmful effects within the country, the Market Court may, in order to prevent such effects, decide upon measures according to this Act. Such a measure may be taken against an enterprise causing the harmful effects.

A restrictive business practice shall be deemed to have harmful effects if, contrary to the public interest, it

1 unduly affects the formation of prices,
2 restrains productivity in business, or
3 impedes or prevents the trade of others.

There are principally three jurisdictional elements: "Enterprise"; "Trade" and "harmful effects within Sweden".

An *enterprise* is defined to cover every person, psysical or legal, who carries on, by way of profession, activities of an economic nature, regardless of whether they are intended to be profitable or not. It is not required that the activities be carried out on a regular basis, or that the activities constitute the main occupation of the person concerned. This broad enterprise concept thus covers non-profit associations, part-time or leisure activities, as long as there is a minimum of professionality involved.[4] The *nationality, situs, country of incorporation* etc. is wholly immaterial. This is how the concept of "enterprise" is defined throughout the whole Competition Act — Section 2 (the general clause), Sections 5—9 (the merger provisions), Section 13 (the *per se* prohibition against resale price maintenances) and Section 14 (the *per se* prohibition against collusive tendering).[5] The only exception is the definition of the *acquired* person within the scope of the substantive merger provision-Section 5. For Section 5 to apply, the *acquired* person (or object) must be *doing business in Sweden*. By reading the legislative materials, the conclusion can be drawn that "doing business in Sweden" implies that the acquired person must be *seated* in the country.[6] The *situs* of the acquring person, however, is of no significance. Acquistions by Swedish as well as by foreign enterprises are covered.

The concept of "*trade*" is also broadly defined to cover all purchasing, selling, leasing, hiring out, etc., of goods, services (including the services of dentists, doctors, lawyers, etc.) real estate or any other item of value.[7] This is the definition of trade throughout the whole Act, with one *exception*: the *per se* prohibition against resale price maintenance (Section 13) is ap-

plicable only to the sale, lease or hiring out of *goods*.

The third jurisdictional element, finally, "harmful effects within Sweden", indicates that the jurisdictional basis of Section 2 of the Competition Act is the *principle of effects*. Only such restraints of competition which cause effects which occur within Sweden fall under Section 2. Exceptionally, however, as is provided in Section 12 of the Act, when it is required out of consideration for international agreements to which Sweden is a party, restraints that cause effects outside Sweden may also be covered. The *per se* prohibitions, however, are somewhat more territorially limited.

In the following, a separate analysis of the principle of effects as interpreted under the Swedish Competition Act shall be given.

3. The principle of effects

3.1 The basic approach

The essence of the principle of effects is that Section 2 of the Competition Act, as we have seen, is applicable whenever a restrictive business practice produces harmful effects in the Swedish market, irrespective of the place of conduct, the place of contracting and the nationality, *situs*, etc., of the persons carrying out the practice. The exact implications of the principle under Swedish competition law are far from clear, however. The case law is poor and the doctrine is practically silent. Moreover, the legislative background is meagre and somewhat confusing.

The basic approach adopted in the legislative materials is one of restraint and moderation. The legislator emphasizes the necessity for caution. The issue was touched upon by the Minister of Commerce, when introducing the new Competition Act. A distinction must be made, he suggested, between the formal applicability of the Competition Act, on the one hand, and the appropriateness of applying the Act to the fullest possible extent in the individual case, on the other.[8]

When foreign enterprises are involved, *principles of international law, general political aspects and aspects of practicability* nesessitate restraint. The principles of international law necessitating restraint are foremostly, the Minister of Commerce continued, the respect for the territorial integrity of other states and their exclusive jurisdiction within their own territories.[9] However, the principles of international law provide no clear guidance. The principles themselves are vague. Moreover, they are in a state of flux.[10] Therefore, all that can be said is that some self-restraint is warranted.

As a matter of *general policy*, further, the Minister of Commerce noted that an excessive exercise of jurisdiction could generate counter-activities from the states affected by the excercise of jurisdiction, such as the erection of trade barriers, trade restrictions, the enactment of counter-legislation, measures directed against Swedish companies doing business in the affected states, etc. Such counter-activities would be damaging for Swedish companies abroad.[11]

It may, finally, be *impractical*, or even wholly *impossible*, to reach the foreign enterprises involved in restrictive practices affecting the Swedish market. Since according to international law, the authorities of one state may not carry out enforcement activities in the territory of another (without the latters consent) the foreign enterprises may *in fact* be out of the reach of the Swedish antitrust authorities.[12]

These are the main factors in light of which the principle of effects in Swedish competition law must be construed. While the factors do not provide for detailed guidelines, they indicate the basis approach; and this approach is, as noted, one of restraint and moderation.

3.2 The elements of the principle of effects

As suggested in the legislative materials as well as in the doctrine (and to some extent in the case law), Section 2 of the Competition Act is applicable to restrictive trade practices carried out by foreign enterprises abroad, when they *directly* and *substantially* affect the Swedish market.[13] The element of *directness* implies, it seems, that only such practices — contracts, abuses, etc. — that apply directly to goods, services and other commodities are covered. Within the scope of Section 2 are thus the anticompetitive practices of foreign enterprises selling, leasing, hiring out or purchasing directly to (or from) the Swedish market. This implies, for instance, that horizontal agreements on prices or market divisions, boycotts, collusive tendering etc., between foreign enterprises selling, leasing or hiring out directly from such customers, or participating in biddings in Sweden, fall within the ambit of the Competition Act. In order for vertical agreements — *e.g.*, exclusive dealings, market divisions, price agreements, etc. — to be covered, one of the parties to the agreement must, it seems, be seated within Sweden. Within the reach of the Competition Act are also price-discriminations, provided, it would seem, that both the party discriminated against and the party favoured are enterprises *seated within* Sweden. Also covered are refusals to deal by foreign enterprises, provided these enterprises, it may be assumed, were transacting some business in Sweden prior

to the refusal. A mere refusal to sell to a Swedish company, in the absence of a minimum of prior business within Sweden, would thus, it appears, fall outside the jurisdictional limits of the Act. This issue arose in the *Bayer-Kerr* case[14], decided by the Market Court in 1977. Here two foreign enterprises, one from the federal Republic of Germany and the other from Switzerland, had refused to supply certain dental products to a Swedish company. In determining whether the Court had subject matter jurisdiction, the Court emphasized that the fact that the enterprises were foreign was immaterial. On the other hand, the assumtion of subject matter jurisdiction required that the foreign enterprises were substantially connected to the Swedish market (which the Court found the foreign enterprises involved in the case were by virtue of the extensive business carried out by them in Sweden for a longer period of time).

The theory advanced by the Court that subject matter jurisdiction must rest on a substantial connection between the foreign enterprise and the Swedish market, has not gained support in the doctrine, nor in the legislative materials.[15a] The theory is, therefore, probably not controlling today. Nevertheless, read in ligth of the specific facts of the case, the theory seemingly has one remaining implication: in cases where foreign enterprises refuse to deal with enterprises in the Swedish market, the assumption of subject matter jurisdiction requires, besides direct and substantial effects, that the foreign enterprise has, prior to the refusal, been transacting business in Sweden — business equal in nature to that involved in the refusal.

The element of *substantiality* is a quantitative requisite. It implies that the anticompetitive practices must have produced effects in the Swedish market of a certain significance and of a certain durability.[15b] Insignificant effects or effects only temporarily occuring in the Swedish market, consequently do not suffice. This requisite constitutes a *de minimis* rule.

A question not discussed in the legislative materials (nor in the doctrine), is whether the effects in the Swedish market must be *actual*, or whether mere *potential* effects will suffice. It is clear that restrictive practices carried out by enterprises within Sweden are covered already when the practices *may* (or are likely to) produce harmful effects. Whether Section 2 has such a preventive function with respect to foreign enterprises as well, is not clear. However, since the basic approach as regards the exercise of jurisdiction over the activities of foreign enterprises is one of restrictiveness, it may be presumed that the assumption of subject matter jurisdiction requires *actual* effects.

What remains to be examined is the question: effects on what? The answer lies in Section 2 of the Competition Act: Effects on the formation of prises, on the productivity, or on the trade of others.

a) *Effects on the formation of prices*: According to the legislative materials and the case law, the formation of prices is affected whenever a restrictive trade practice *has the effect* or *may have the effect* of raising prices or preserving a certain price-level in any line of business.[16] This is how the substantive provision is construed. For jurisdictional purposes, however, as we have noted, actual effects are required. Hence, the formation of prices is affected for jurisdictional purposes whenever a restrictive trade practice *has the effect* of raising prices or preserving a certain price-level in any line of business.The level of prices in the particular line of business where the restraint occurs is to be compared to the level of costs — on the basis of a strict cost/benefit analysis — in that business, with a reasonable margin for consolidation, rationalization and research, and with some attention paid to extraordinary trade conditions. Where there is a group of enterprises restricting trade, the costs of the most effective enterprises in that group, will form the basis for the comparison. Also to be compared is the price-level in the particular line of business, prior to the instigation of the restrictive practices. At times it is also relevant to compare the prices of the enterprises involved to the prices charged in other countries and on the Swedish export market.

b) *Effects on productivity in business*: For jurisdictional purposes, again, any restrictive trade practice that *has the effect* (for purposes of substantive laws, potential effects suffice) of

— restraining technical or organizational progress,
— impeding the desire to compete amongst enterprises,
— affording non-effecient companies artificial protection by giving too much weight to the conditions in enterprises with a high cost-level,
— over-stimulating the establishment of new enterprises within the trade (a certain amount of over-capacity may, on the other hand, be regarded as beneficial),
— allowing the level of costs to rise above what would have been possible in the abscence of the restraint, or
— restraining productivity in any other way,

falls within the scope of the Competition Act.[17]

c) *Effects on the trade of others*: One of the main objects of the Competition Act is to provide a basis for competition on equal terms in the market. Entrance to and expansion in the market must, furthermore, be kept free from private obstructions. The trade of others, regardless of whether it is newly introduced, on-going or expanding, is impeded or prevented particularly when

— systematically blocked by exclusive agreements (unilateral or bilateral) in which one party or the other is an organization of enterprises,
— organized boycotts are carried out by a group of enterprises,
— there are refusals to deal by enterprises dominating the market, or concerted refusals to deal, or
— there is concerted control of market entrance.[18]

This is a general answer to the question, effects on what? A more detailed analysis would take us too far afield, into the domains of substantive law. In conclusion, the jurisdictional formula thus seems to be as follows:

Restrictive trade practices, regardless of the situs of the enterprises behind such and regardless or the *locus delicti* or place of contracting, are within the scope of Section 2 of the Competition Act if they *directly, substantially* and *actually* either

1 affect the formation of prices in Sweden,
2 restrain the productivity in Sweden,
3 impede or prevent the trade of others in Sweden,

and provided that the prices, productivity and trade concerns goods, services or other commodities supplied in Sweden.

The only requisite in Section 2 of the Competition Act that is exclusively one of substantive law is the public interest requisite (see *supra*).

The *burden of proof* in jurisdictional matters is fulfilled by mere, reasonable, allegation that Swedish market conditions are directly, substantially and actually affected. The allegation will be taken as true for jurisdictional purposes.

4. The scope of the *per se* prohibitions

As regard the *per se* prohibition against collusive tendering (Section 14) the general jurisdictional rules, as outlined above, apply. Within the scope of the prohibition are thus agreements or concerted practices between enterprises participating in a tendering procedure *in Sweden* (*direct* effects). Such practices damaging Swedish export companies involved in a tendering procedure (either receiving tenders or participing otherwise in the procedure) outside Sweden, would consequently not be covered by the prohibition.

The prohibition against resale price maintenance (Section 13) is concerned only with minimum or specified prices on resales or leases of goods *in Sweden*. Thus, it does not apply to minimum or specified prices imposed by Swe-

dish or foreign enterprises upon resales taking place outside Sweden. Whether it applies to such restraints in cases where the reseller is Swedish but exports the goods, subject to the minimum or specified price, is not entirely clear. Since no harmful effects occur within Sweden, it would seem that this situation is outside the scope of the prohibition as well.[19] The fixing of minimum or specified prices by foreign enterprises upon foreign resellers exporting to Sweden, is also outside the scope of the prohibition.[20] Only such resale price maintenances that are *directly* imposed upon Swedish resellers, without intermediaries, fall under the prohibition.

5. The doctrine of enterprise entity

Even though the matter has not yet been entirely resolved in the case law, and has only been incidentally discussed in the doctrine, it seems that the Swedish antitrust authorities will invoke the doctrine of enterprise entity as construed, for instance, in the Common Market court practice and in the United States, where appropriate. Hence the restrictive trade practices within Sweden of Swedish subsidiaries or Swedish agents of foreign enterprises may be imputed to the latter if the subsidiaries or agents are *de facto* under the control of the foreign enterprises. Likewise, the anticompetitive activities of the foreign enterprises may be imputed to the subsidiaries or agents in Sweden, under the same circumstances.

6. Effects outside Sweden

Restrictive trade practices having effects outside Sweden (no direct effects within) do not generally fall under the ægis of the Competition Act. In exceptional cases, however, such practices may be reached in accordance with Section 12 of the Competition Act, which provides that Section 2 of the Act may be applied to practices having effects outside Sweden if permission for such application is granted by the Government. Such permission is granted only in so far as it is required out of consideration for agreements with Foreign Powers. Relevant here are the three agreements concluded between Sweden, on the one side, and EFTA, EEC and the European Coal and Steel Community, on the other. The competition rules embedded in these agreements may require that the Swedish Goverment, via the antitrust authorities, takes *action against Swedish enterprises* restricting trade outside Sweden. Permission to apply Section 2 is granted on a *ad hoc* basis.

Notes, chapter IV

[1] Konkurrenslagen, Svensk författningssamling (SFS) 1982:729. The basic principles of the Competition Act rest upon the provisions of its predecessor — the Restrictive Trade Practices Act of 1953, *as amended*, 1956 — and the court practice developed in Swedish competition law during the past three decades. The Competition Act of 1983 implies some significant changes, however: new provisions on mergers, an enlarged system of sanctions and an extended prohibition against collusive tendering.

[2] See Section 3 and Section 11 of the Compeition Act.

[3] A violation of any of the *per se* prohibitions is punishable by fines or imprisonment for not more than one year, or, in serious cases, two years (see Sections 34—36 of the Competition Act).

[4] See e.g. *Bernitz*, Svensk Marknadsrätt, at 9 ff.; *Regeringens proposition* 1981/82:165 med förslag till konkurrenslag, at 158 ff.

[5] See e.g. *Bernitz/Gorton/Grönfors*, Sjöfart och konkurrensrätt, at 75 ff.; *Proposition, supra* n. 4, at 164 ff.

[6] See *Proposition, supra* n. 4, at 263.

[7] See *Bernitz*, Svensk Marknadsrätt, at 9 ff. and 104 f.; *Proposition, supra* n. 4, at 158 ff.

[8] See *Proposition, supra* n. 4, at 174 f.

[9] *Id.*, at 175

[10] *Id.*

[11] *Id.*, at 174.

[12] Id., at 175 f.

[13] *Proposition, supra* n. 4, at 171: *Bernitz/Gorton/Grönfors, supra* n. 5, at 98 ff. Also see the minority (3/9) opionion in the *Bayer-Kerr* case, Marknadsdomstolens domar (MD) 1977:16, Pris- och kartellfrågor (PFK) 1977:8. Also see *Nerep*, World Law of Competition, Sweden, Unit B (edited by von Kalinowski, Matthew Bender, New York, 1983).

[14] *Supra* n. 13.

[15a] See the minority opinion referred to *supra* n. 13. Also see *Proposition, supra* n. 4, at 175.

[15b] See *Proposition, supra* n. 4, at 48 ff. Also see e.g. the *Dubbman* case, Marknadsdomstolens domar (MD) 1972:7, Pris- och kartellfrågor (PFK) 1972:5.

[17] See *Proposition, supra* n. 4, at 48 ff.

[18] *Id.*, at 49 f.

[19] See *Bernitz/Gorton/Grönfors, supra* n. 5, at 85 f.

[20] See *Martenius*, Lagstiftningen om konkurrensbegränsningen, at 72.

Part two
The international law perspective and aspects of Conflict of Laws

Chapter V
Points of departure

The seed from which part two of this study springs is the complex set of questions: *Can* there exist principles of international law that are binding on states in their exercise of jurisdiction?; if so, *do* they exist; and if so, what exactly do these principles imply? Finally there is the question, do the principles of jurisdiction as developed in national law in the antitrust field stand in harmony with those of international law?

That these questions must not be intermingled, but treated apart, is vital.[1] The proposition, for instance, that every nation is completely free to mould principles of jurisdiction at its own discretion, does not convey whether it is based on the assumption that international law cannot be binding on states, or that binding principles are non-existent from the present standpoint of international law, or merely that such principles do exist but that they do not govern the international antitrust law. When *Binding,* in the spirit of Hegel, laid down his oft-quoted (but seldom approved of) maxim that "Den Umfang seiner Strafrechte bestimmt jeder souveräne Staat souverän", he presupposed the absolute sovereignty of states to which no binding rules of a "higher" order can apply (which in itself is a tautology), since: "Nur der Staat hat das Recht sich zu berechtigen; er allein besitzt Kompetenz-Kompetenz...".[2] When *Cook,* almost half a century later, concluded that legislative jurisdiction is solely dependent upon a nation's own positive law, common or statutory, he was merely expressing his view on a matter of *substantive* international law.[3] Had he been asked where the "Kompetenz-Kompetenz" lay, he would surely have answered: "In international law".[4] And, again, when the suggestion is made that international law does not prevent the U.S. antitrust authorities from bringing actions against foreign corporations, this does not prejudice the questions whether international law *can,* and whether it *does,* regulate state jurisdiction.

Comprehensive answers to the questions stated require extensive analyses, to begin with of a more or less theoretical nature. The theory of law, and especially of international law, forms an indispensible part of any leading study in the field of international law. Law, as any other science, needs

a method, needs a system. For even if legal theory does not produce practical results, whether directly or indirectly, at least it facilitates communication between people and does away with misunderstandings and misconceptions along with a good portion of senseless discussion. In one sense, therefore, *Kunz* is correct in suggesting that "no *politics* of international law are possible without, first, a *scientific* treatment",[5] although he seems to be over-stating the exclusiveness of *legal* science as a basis for politics.

By the same token one cannot ignore the facts of life. The devotion to legal theory does not necessarily, and should not, isolate the scientist from the social environment. Or stated differently: Legal theory shall be an assistance in distinguishing law from other phenomena, not in isolating the law and the legal scientists from such. Legal analysis must therefore be supplemented with at least a sociological and a historical approach. Any reasonable proposal, *de lege ferenda,* must rest on a legal *and* a meta-legal analysis.[6]

This is all the more so in light of the changing structure and substance of international law and life. "We live in a period of transition", many a learned scholar has observed;[7] "and crisis", others have added.[8] The old "classical" international law is being replaced by a "new" international legal order; an order ready to cope with the new situation. This new situation — the "change" — the implications of the transition, has been eloquently described by such outstanding writers as *Friedmann, Falk, Jessup, Jenks, Kunz* and *Röling*.[9] Some of the components accelerating the transition process are described as follows:

1 The growing interdependence among nations in the economic and social field, and in the shadow of a threatening World War III or an ecological catastrophy.
2 The intensified intercourse and cooperation in all spheres of life between persons, groups and organizations from all countries.
3 The increasing emphasis on the individual in the international community.
4 The emergence of new nations following the de-colonization period.

The impact of these factors, and others, has given international law new dimensions, summarized by *Friedmann* in five perspectives:

"1 the widening of the scope of public international law through the inclusion of new subject-matters;
2 the inclusion, as active participants and subjects of international law, of public international organizations and to a lesser extent of private corporations and human individuals;

3 the horizontal extension of international law to non-Western civilisations and groups of states;
4 the role of international organization in the implementation and development of new types of international law;
5 the impact of political, social and economic principles of state organization on the universality of public international law."[10]

Richard Falk, who perceives the restructuring of international life in two principal features: increased central guidance and increased roles for non-territorial actors, goes so far in his striving towards a "paradigm shift" as to announce that the traditional law — what he calls the "statist paradigm" — has lost its role, since it no longer "works", and no longer "seems responsive to the main problems on the international agenda".[11] The argument is — and this is the challenge — that "international legal studies remain, by and large, ignorant of the systemchanging context, and that we (the international lawyers) compound the tragedies in store for us by not fashioning a new juridical expression which corresponds to the political realities that are moving the world system from one relatively decentralized, if hierarchically arranged, statism to relatively centralized, but *not yet predetermined,* rearrangements of managerial control and value priorities."[12] Thus Falk "draws fire" against those who persist in carrying out their inquiries within the realm of the "statist paradigm". Their products are trivial, he proclaims, owing either to the fact that they work on irrelevant problems or that they work on relevant problems with an inapposite procedure.[13]

Falk is concerned with solving the world crisis and he should be admired for that: The world is in urgent need of forerunners of his calibre. His prospectuses and proposals for a new world order, developed partly, it seems, to counterbalance the so called Kissinger doctrine,[14] are fully acceptable. (Whether they are realistic, will not be a subject of discussion here).[15] Yet the reader of Falk's program for a "scientific revolution" is left in a state of confusion as to what exactly the "paradigm shift" implies. Is Falk throwing the whole analytical science of international law overboard or is he merely weeding out some "intellectual taboos"?[16] (Which are these?) Is it Falk's intention to rule out the fact that international law is to a great extent founded on interstate relations? Is the "paradigm shift" to take place within the orbit of *lex lata* analysis? Or is he proposing that international lawyers shall leave the *lex lata* analysis behind and concentrate their efforts on futuristic constructions *de lege ferenda?* If so, the immediate objection is: Should not all proposals *de lege ferenda* rest on a *lex lata* analysis? Even

the fruits of Falk's work are grown on *lex lata* ground.[17]

International law is not a static legal system, which is something that Falk too obviously realizes.[18] International law is dynamic, and it contains the instruments that ensure development. That the process of development may be slow and at times inadequate lies not so much in the fact that the instruments are blunt as in human nature. And so is the effectiveness of, for instance, the United Nations nothing more and nothing less than a reflection of the conflicting interests of men. "Scientific revolutions" are for the natural sciences, not for international law. Falk should have listened to the warning words of Thomas Kuhn, to whom he refers, that the ideas of paradigms in natural sciences cannot easily be extrapolated to the disciplines of social science.[19] Or does Falk expect there ever to be a Kopernicus, a Newton, a Faraday or an Einstein in the field of international law?

For, whatever the "change" of international law, the traditional notions of "sovereignty", "territorial jurisdiction", "independence", "non-intervention", etc., are still very much alive.[20] If anything, the recent "Falklands-crisis" is an illustration of this. The characterization of "change" must then apply to some other part of international law. *Morgenthau,* in analysing the functional relationship between sociological forces and international law, comes to the conclusion that there exist two independent types of international law, two different sciences of international law with different subject matters: one founded on "permanent and stable interests", the other on "the temporary and fluctuating interests of states"; one concerning concepts such as territorial jurisdiction, diplomatic privileges, extradition, arbitral procedure, etc., the other, political agreements, treaties of alliance and their modern substitutes in particular; two independent sciences to which different methods of research and systematization ought to apply.[21] *Friedmann,* after analyzing the "change" *in extenso,* concludes that modern international law moves on three different levels, the first concerning the classical system of international law regulating interstate relations with respect to "territorial jurisdiction", "sovereignty", etc. — essentially the same elements as in Morgenthau's first type of international law — ("the international law of co-existence"); the second concerning a universal preoccupation with co-operation in matters of international security, economics, communication, medi-care, etc. ("the international law of co-operation"); and the third, encompassing common rules concerning the regulation of regional affairs ("regional groupings").[22]

The subject of the present study is, as can be seen, very much tied to the first group of issues in both Morgenthau's ans Friedmann's systems: the

classical setting. While the separation of the issues in the Morgenthau system may seem somewhat severe — as it neglects the interrelationship between the issues and principles in the different groups — on cannot deny the pedagogical value of the systematization.

Notes, Chapter V

[1] This line of questions, in the given order, will form the basis here.

[2] Binding, K., Handbuch des Strafrechts (Leipzig, 1885), at 374. *Cf. infra* p. 321. Also see v. Rohland, Das internationale Strafrecht, Bd 1 p. 72 and v. Liszt, Lehrbuch des Völkerrechts (II ed. 1920), at 230 ff.

[3] See further *infra*, p. 318 ff.

[4] See e.g. Cook, W.W., The Logical and Legal Bases of the Conflict of Laws (Cambridge, Mass., 1949), the discussion at 77 ff.

[5] Kunz, J.L., The Changing Law of Nations (Toledo, Ohio, 1968), at 82. *Cf.* his statement *id.* at 83: "A *politics* of international law — as regards contents and as regards technique — is only possible on the basis of a *theory* of international law." (Footnote deleted.)

[6] In the words of Kunz, *id.* at 47: "[A] ny legal order, and hence international law, in order to be fully understood, must be studied from three approaches: analytical, sociological-historical, and axiological."

[7] See e.g. Falk, R., A New Paradigm for International Legal Studies: Prospects and Proposals, 84 Yale L.J. 969 (1975); Kunz, *supra* n. 5, at 6 and 158 ff.; Jennings, R.Y., The Progress of International Law, 34 B.Y.Int.L. 334 (1958), at 337 f.

[8] See e.g. Kunz, *id.* at 5 ff.

[9] See Friedmann, W., The Changing Structure of International Law (London, 1964); Falk, R., The New States and International Legal Order, 118 Recueil des Cours 1966:II, The Status of Law in International Society (Princeton, 1970); Jessup, A., A Modern Law of Nations (New York, 1948), Transnational Law (New Haven, 1956); Jenks, C.W., The Common Law of Mankind (London, 1958), Law in the World Community (London, 1967); Kunz, *supra* n. 5; Röling, B., International Law in an Expanded World (Amsterdam, 1960). Also see Bozeman, A., The Future of Law in a Multicultural World (1971); Anand, New States and International Law (Delhi, 1972); McDougal, M., International Law, Power and Policy: A Contemporary Conception, 82 Recueil des Cours 1953:I. Added hereto must be the Latin-American doctrin, with representatives such as Alvarez, A., Le Droit International Nouveau dans ses rapports avec la vie actuelle des peuples (Paris, 1959); Matesco, N., Le Droit International Nouveau (Paris, 1948); Americano, J., The New Foundation of International Law (New York, 1957); and Manotas Wilches, E., El Nuevo Drecho des Gentes (Bogotá, 1946).

[10] Friedmann, The Changing Structure of International Law, *supra* n. 9, at 368.

[11] Falk, A New Paradigm for International Legal Studies: Prospects and Proposals, 84 Yale L.J. 969 (1975), at 977 f.

[12] *Id.* at 976.

[13] *Id.* at 978.

[14] See *id.* at 971 and 1003 ff.

[15] Falk himself does not seem to be too sure: "I believe that a paradigm shift is both necessary and possible in the years ahead, and that such a shift would help to influence the transition process in the direction of preferred world order options. Nevertheless, the duration of the transition process cannot be anticipated with any confidence. It might be as short as a few decades or as long as several centuries" *Id.* at 998. While it must be recognized that Falk here refers to the transition process when stating the duration of time for change, it is also to be noticed that the duration of the paradigm shift has bearing on the duration of the transition process.

[16] See *id.* at 976. Falk quotes Thomas Kuhn's definition of paradigm (from The Structure of Scientific Revolutions viii, 2nd ed. 1970): "On the one hand, it stands for the entire constellation of beliefs, values, techniques, and so on, shared by the members of a given community. On the other, it denotes one sort of element in that constellation, the concrete puzzle-solutions which, employed as models or examples, can replace explicit rules as a basis for the solution of the remaining puzzles of normal science."

[17] See e.g. Schwarzenberger, G., The Inductive Approach to International Law, 60 Harv. L. Rev. 539 (1947); Kunz, *supra* n. 5, at 167.

[18] See Falk, *supra* n. 11, at 992, 994 and 998.

[19] *Id.* at 977. As to Thomas Kuhn, see *supra* n. 16.

[20] *Cf.* e.g. Friedmann, *supra* n. 10. at 35; Kunz, *supra* n. 5, at 163.

[21] In one of Morgenthau's articles before his "change" of scientific approach, Positivism, Functionalism, and International Law 34 Am. J. Int. L. 260, at 278 f. (1940).

[22] Friedmann, *supra* n. 10, at 60 ff and 367. Also see Friedmann, The Changing Dimensions of International Law, 62 Colum. L.Rev. 1147 (1962), and the same author in The Reality of International Law — A Reappraisal, 10 Colum. J Transnat.L 46 (1971).

Chapter VI
The Conflict of Laws aspect

1. Introduction

"Whenever a legal controversy is alleged or believed to hold foreign elements, a Conflict of Laws problem presents itself."[1] This statement may furnish the correct associations, but very little information. For what is an element, when is an element foreign, (what decides the foreignness of an element), and what significance will be assigned to a specific element for Conflict of Laws purposes?

Of these questions, the first is most accessible for an answer, provided all that is needed is examples: the situs of property, the nationality of persons or corporations, the place of contracting, the place of conduct, etc. Whether such elements are to be qualified as "foreign" is not a simple question of fact: it is one of law.[2] Even the ostensibly most obvious, that a piece of property alleged to be situated in France is qualified as a foreign element from an American viewpoint, is only so because of law; it is the law that fixes, for instance, the territorial borderlines. (As regards France, these are evident and hardly deserve to be disputed). Whether the piece of property really *is* situated in France, in the individual case, is, on the other hand, a purely factual matter, assuming that "situated" denotes the actual presence of a thing within French territory.

The nationality of persons, too, may seem to be a simple determination of fact (the man has a French passport, it is not falsified, he is accepted in France as a citizen thereof, etc.). But why should a U.S. court, for instance, acknowledge the French citizenship of that person? Only because there is a law that requires it to do so. (What if several nations regard the person as a citizen of their particular country? What if the United States is among these?)

Where is a person's domicile? Only law can determine that issue. Concerning nationality of corporations, the issue is no different.

The whole problem area becomes more tangible when viewing the two elements' place of contracting and place of conduct. When are these qualified as foreign? Is a contract made where it is negotiated, signed, or both,

where the contracting parties are staying (what if they are staying in different countries)? Is a tortious act committed where the tort-feasor was acting, or the injured or damaged person was suffering the consequences of the act, or where he subsequently died because of the act, or, in the case where the tortfeasor was acting through an agent, where the agent was eventually acting? These well-known issues, again, are issues of law. It is thus the law that qualifies certain elements as foreign or domestic.

The next consequential step is to determine the significance or relevance attached to the fact that an element is qualified as foreign.[3] That, too, is a matter of law. The *legal* significance of an element's foreignness thus varies with the field of law applicable in the particular case. (Some elements may have no legal significance at all — not all aspects of human life are legally regulated, one may assume — they are legally indifferent. Whether they are foreign or not is still ascertainable, but of no import). The nationality of the tort-feasor may be immaterial in the field of tort, for instance; the place of contracting immaterial in the antitrust field, etc.

The function of the Conflict of Laws is, *inter alia,* to lay down rules which determine the significance of a foreign element (or several in combination) in a particular field of law and which ascertain under what circumstances an element is foreign.[4] The effect of a foreign element, when attached legal significance according to a Conflict of Laws rule, is usually that *lex fori* is inapplicable (and when not, the *applicability* of *lex fori*)[5] Such Conflict of Laws rules, the *sole* function of which is to ascertain the applicability of *lex fori* in view of the foreign elements involved, will hereinafter be termed *unilateral* conflicts rules.[6] Phrased differently, these rules determine whether the forum court has *jurisdiction over the subject matter* or not (or whether a particular circumstance is *covered* or *within the substantive scope* of *lex fori*).[7]

Generally, however, Conflict of Laws rules not only govern applicability or non-applicability of *lex fori,* but also provide criteria as to the applicability or non-applicability of *foreign law* (or rules) in the forum court.[8] These are the so-called *choice of law rules,* sometimes referred to as *bilateral* conflicts rules.[9]

In summary, a Conflict of Laws rule, whether unilateral or bilaterial, governs the applicability or non-applicability of *lex fori* or foreign law in cases holding foreign elements, which, by the rule itself, are qualified as foreign and attached legal significance. For these purposes the Conflict of Laws rule is often defined as a *formal* rule, since it only governs applicability, as opposed to the *substantive* rules, the applicability of which is governed.

2. National or international law?

When *Joseph Story* 150 years ago in his great work "Commentaries on the Conflict of Laws", influenced by Huber and other representatives of the continental doctrine, formulated his widely known maxims (axioms), he viewed the world as one divided into sovereign nations each constituting distinct legal compartments based on territory.[10] The laws of one sovereign nation have no power, he claimed, to cross borders; they are confined to their particular legal system, which, consequently, as a whole, is limited by the territorial boundaries. Whether Story was here suggesting not only that a given nation lacks power to compel the courts of another to apply its laws, but further that the laws of one nation were unable to bind or affect *anything* in the territory of another, is not altogether clear, as we shall see *infra*.[11] Suffice it to state, for the moment, that in Story's mind laws were territorial. "It is plain", he wrote, "that the laws of one country can have no intrinsic force, proprio vigore, except within the territorial limits and jurisdiction of that country." Moreover, "no state or nation can by its laws directly affect or bind property out of its own territory, or bind persons not resident therein... (it cannot) *regulate* either persons or things not within its own territory."[12] These maxims, Story added, are a natural consequence of the proposition (Story's first axiom) that every nation possesses an exclusive sovereignty and jurisdiction within its own territory.[13]

The prime source of Story's maxims was no doubt international law, the essence of which was believed to be the principles of sovereignty, equality and the independence of nations.[14]

While Story's doctrinal basis thus was international law — the foundation of at least the first two maxims — Story regarded the Conflict of Laws as *national* law, in the sense that each nation has its own Conflict of Laws. Story's strongest impetus was what he tought to be the necessity for *general* rules in the Conflict of Laws field, since, "without some common principles adopted by all nations in this regard", confusion will rule the world.[15]

Let us assume for a moment — as *Lorenzen, Cook, Vogel* and others[16] have — that Story's conception of territoriality was *strict,* meaning that no state can make laws that affect persons residing, property situated, conduct that has taken place, etc., within the territory of another state, even if the intention merely is that the legislating state's own courts shall apply them. Observed closer, Story's maxims would then imply as follows: the legislator of each nation is bound by international law to lay down both *uni-*

lateral and *bilateral* conflicts rules that are in harmony with the principle of strict territoriality. On the other hand, the legislator is free to form only *unilateral* rules (or for that sake, no rules at all). If, and only if, *bilateral* rules are enacted, territoriality must be observed. Hence, for Story, international law would be decisive as to *when* (under what circumstances) an element is foreign, as to what elements are relevant and as to their legal significance in terms of the applicability or non-applicability of *lex fori* and foreign law. (In other words, international law would determine the *lex causae).*[17] The decision, however, whether to apply the law which, according to the axioms rule the specific event, lies entirely with the individual nation. If a nation chooses to apply foreign law, it does so out of "comity" only.[18]

The exact extent to which international law controls the substance of Conflict of Laws rules, according to Story, cannot be ascertained. It is entirely dependent upon the degree to which Story believed that international law defined territoriality, *i.e.,* when persons, property or phenomena are within a territory and when without. In this respect, the Commentaries of Story supply no clear and unequivocal guidelines.[19]

Story's conception of the territoriality of law was, as regards the American tradition, adopted and refined in Beale's "vested rights" version of the Conflict of Laws, which came to permeate the first Restatement of Conflict of Laws, published exactly one hundred years after Story's Commentaries. The power of a nation — its *legislative jurisdiction* — to affect and bind persons, property, etc., outside its territory was, according to the Restatement rules, consequently circumscribed.[20]

In commenting on the theories of Beale and other contemporaries, *Cook* puts the following rhetorical question: "Suppose England were to enact a law providing that all persons who anywhere in the world commit what would if done in England amount to unlawful homicide shall, if found in England... [be tried and convicted]... what ... would interfere to prevent the carrying out of the law?", practicality aside.[21]

Legislative jurisdiction, Cook concludes, depends *solely* upon a nation's own positive law, common or statutory, and not upon any inherent principles of jurisdiction. "Whether existing international law forbids such action by England", Cook continues however, "is... another question."[22] Yet, Cook ventures to propose, there is no general consensus as to international law limitations and, although he does not exclude the possibility of such limitations in the future, at the time of writing (1942), he believes, nations are free to act as they wish in this regard.[23] *Ehrenzweig,* twenty years later, seems to agree.[24] But even if we momentarily accept Cook's

understanding of Story's territoriality, Cook and Story would still, despite completely divergent results, stand on common ground. They would both define Conflict of Laws as national law, settled within the realm of international law principles, to the extent that pertinent international law principles exist. To Story, international law, from which at least two of his axioms were deduced, would control almost every step taken by the national legislator. To Cook, the legislator could safely proceed and practise caution only very rarely. Hence, the difference between Story and Cook affects international law *substance*. As to the *formal* foundation of the Conflict of Laws, they are in accord.

The view that the Conflict of Laws is wholly international law, the purpose of which is to solve conflicts between sovereign legal systems, to provide an international jurisdictional system (the internationalist view), is primarily ascribed to representatives of the French doctrine, such as *Pillet, Foelix, Laine, Despagnet* and *Weiss,* the German scholar *Zitelmann* and the Italian *Mancini.*[25] International law in the view of Foelix, Laine, Despagnet and Weiss, has two subsections: public international law and private international law (or Conflict of Laws). Conflict of Laws is international law; every aspect of Conflict of Laws is an aspect of international law, and as such it furnishes conflicts rules for every legal event with foreign elements (qualified as such by these rules). Moreover, for every such legal event, there is only one conflicts rule that is exclusively applicable. Jurisdiction over state territory and jurisdiction over state subjects are the controlling maxims.[26]

However "international" the internationalist view may seem, it cannot be distinguished, as a matter of principle, from the "national" view of *Story.* True, the terminology deviates, and true also that some internationalists offer a far more sophisticated and complete system than does Story.[27] And it may moreover be true that they attribute to international law a more conclusive role than Story. Yet it all seems a matter of degree, and not of kind.[28] For the internationalists do not maintain that national courts apply international law directly. International law (including its subsections) is directed to states and these are, by international law, obligated to model their laws on international law. The national courts, they seem to imply, apply national law and in the case of Conflict of Laws, *"national"* Conflict of Laws, in the ideal wholly corresponding to the *"international"* Conflict of Laws; two sets of rules which run along parallel lines.[29] This new terminology, however, may be dispensed with. Seen from a national court perspective, Conflict of Laws rules of a national character, are applied.

Consideration of international law is effected through transformation into national law of such principles or rules which may be relevant.

Whether international law principles, relevant in the field of Conflict of Laws, are directly applicable in national (municipal) courts or whether they have to be transformed (incorporated) into national law to be so applicable, may seem in the end to be a question of whether to choose to adhere to the dualist or to the monist school of international law. The dualist theory requires transformation; for dualists, as we shall see later, regard international law and national law (or laws) as separate legal systems, emanating from separate sources and regulating separate subject matters.[30] The monists, on the other hand, view the world as undivided — only one legal system can exist, wherein the international law and the national relate to each other hierarchically.[31] Assuming the supremacy (primacy) of international law, does the monist theory postulate the direct application of international law in national courts? And is accordingly the Conflict of Laws international law? If viewed from the national court perspective again: not necessarily. National courts are instruments of distinct national legal systems, and as such they perform the functions delegated by national law.[32] National law (constitutions) may prescribe that the national courts are free to apply international law, that in the case of a contradiction between international and national law, the former shall prevail and that national laws are always to be construed as being consistent with international law, etc.; yet the fact remains that *national* law provides the basis for the application of international law[33] and that national law provides the choice-of-law rule with respect to the choice between national and international law.

The method may be referred to as a general, *in blanco, transformation,* of international law, as opposed to the method according to which every single international law norm needs *specific* transformation. In both instances international law norms, to the extent that they exist, present themselves in a national disguise. Moreover, in the former case, the *courts* may be considered to *specifically* transform the international law norms into national law. The same phenomena may also be expressed in the terms "adoption", "incorporation", "reception" or simply "application". Only the terminology is confusing. The concept "directly applied", however, is herein, as noted above, reserved for the situation where international law directs the national courts to apply international law norms.[34] The idea that international law norms are directly applicable in national courts, seems, rather than monism, to be the foundation of *universalism.*[35]

A view different in principle from those alluded to so far would also be that national law knows no superior, expressed either in the form of the

national law supremacy over international law or in the form of a denial of the existence of an international law.[36] Hence, when *Binding* wrote that "Den Umfang seiner Strafrechte bestimmt jeder souveräne Staat souverän", and "Nur der Staat hat das Recht sich zu berechtigen; er allein besitzt Kompetenz-Kompetenz", his point of departure was the supremacy of national law.[37] Binding was convinced, it seems, that there does not and cannot exist an international law, in the sense binding on sovereign nations. But when *Otto Fischer* in 1915 firmly denied the existence of any international customary rule having a binding effect in the field of Conflict of Laws, he was probably not simultaneously rejecting international law altogether, merely stating the fact, as did *Cook,* that he was unable to find such controlling rules at that particular time.[38] The supremacy of national law theory has few, if any, advocates in the world today. The prevailing view is rather that Conflict of Laws is *formally national* law, and may exceptionally be subject in its outer perimeters (at least potentially) to general and abstract restrictions (or injunctions) that are very few and limited in scope and imposed by international law (treaties or customary rules). While some scholars deny that such exist, they do not deny the *possibility* of their existence. The emphasis of the debate today is on the scope and range of international law restrictions (or injunctions).[39] These are questions of substantive international law and will be dealt with *infra.* In the sections to follow, some aspects of the Conflict of Laws from a national viewpoint will briefly be touched upon.

3. The subject matter of Conflict of Laws

3.1 Terminologically

When *Story* considered it proper that the branch of national public law encompassing Conflict of Laws rules be denominated private international law, his *ratio* was that this field of law "is chiefly seen and felt in its application to the common business of private persons, and rarely rises to the dignity of national negotiations, or of national controversies."[40] Hence to Story, the Conflict of Laws or private international law governed legal controversies of an international character (*i.e.,* involving foreign elements) and concerned private persons in actions at a national court level as opposed to (public) international law, primarily pertaining to relations between nations. And since private persons are parties concerned, not only

in private law controversies, but in criminal or penal law actions as well, Story, quite consistently, systematized penal laws as one branch of the Conflict of Laws.[41] In doing so, Story pursued the tradition of the Dutch school and, further back in history, of the medieval scholars in what is now called Italy (Bartolus, Baldus, etc.).[42]

Story's systematization was later adopted by *Wharton* and *Beale,* seemingly on the same grounds.[43] Consequently, the Restatement (Ist) implied no changes.[44] *Cook,* it would seem, had no objections, but argued too on the same systematic bases.[45] The tradition has subsequently been kept alive by *Goodrich* and by *Leflar.*[46] When, on the other hand, *Rabel* and *Stumberg* delete "penal" laws from their respective treatises, they do so, one may assume, for practical reasons only.[47] *Ehrenzweig* confines — by description, if not by definition — Conflict of Laws to *civil* cases involving foreign contacts.[48] "The English conflict of laws is not directly concerned to any great extent with criminal law", says *Graveson,* and in accord, it seems, are *Cheshire* and *Dicey/Morris.*[49] And although *Neumeyer* may have conceived all public law (as distinguished from private) as falling within the province of private international law,[50] the modern Continental view is that private international law comprehends civil law only: international criminal law is, at the most, a neighbouring field of law.[51]

What, thus far, has been said of criminal or penal laws, can be extended to revenue laws, regulatory laws and other laws of a public character. These are occasionally referred to as the international administrative law, most of which was unknown to Story perhaps — and therefore not attended to — but which have gained terrain as a consequence of expanding government regulation and intervention in the lives of private persons.[52]

The foremost ground for not conceiving public law (including penal laws, revenue laws, etc.) as a component of the Conflict of Laws (or private international law) is that generally summarized in the maxim which states that the courts of one nation do not apply (execute) the penal or reveneu laws of another;[53] a national court determines only whether *lex fori* is applicable or not — *i.e.,* whether the court has subject matter jurisdiction; foreign law is not taken notice of, whereas in civil cases the choice of law process may render a foreign law applicable. In this particular sense, public laws are considered to be territorial. Rephrased in the terminology employed *supra,* the maxim implies that Conflict of Laws rules respecting public laws are *unilateral,* while those respecting private laws are normally *bilateral.*[54]

Seemingly unaffected by the many *de lege ferenda* attacks levelled against it in recent years, the vigour of the maxim, in the minds of scholars

and jurists of both civil law and Anglo-American law origin, has been and still is considerable.[55] Yet the maxim is by no way absolute: at least two doors are kept open. First, the distinction between public and private (civil) law is incapable of exact definition. The distinction may vary from one court to another (within one nation) and from one nation to another. Assuming that the characterization is *qua lex fori,* a law regarded in one nation as public may be characterized in another as civil, and *vice versa.* Secondly, foreign public laws are taken notice of at least indirectly for the sake of avoiding, for instance, double taxation or a breach of the principle *ne bis in idem* in criminal law. Furthermore, the act of state doctrine implies the taking into consideration of foreign public laws. And many more examples could be found which reveal that foreign public laws are not wholly disregarded; all however constitute mere exceptions to the general maxim.[56]

The underlying rationale for the non-application of foreign public laws is far from crystal clear: notions of tradition and history have played a certain role; the persuasive force of the maxim as such, regarded as an *a priori* principle, has no doubt had some significance; the respect for foreign sovereignties, the protection of national sovereignty and the general reluctance to give assistance to claims and commands of other sovereigns have also been referred to, as well as procedural and practical difficulties. More plausible is the rationale that lies in the inherent difference between private and public law within the realm of the Conflict of Laws.[57] Private law generally forms a legal unit which is distinct, existing somewhat apart from the state (seen in the sociological sense). One of the prime functions of private law is to give assistance to private persons in legal transactions and to furnish a workable basis for legal interrelations in the private sphere, but leave the parties free, on the whole, to transact their dealings in their own way.

The mere *existence* of private law is at least as important as its substance. For these reasons, and others, the state can confidently allow its own private law to be substituted for foreign private law: Only in exceptional cases will *ordre public* function as a corrective. Public law, on the other hand, is thought of as the state personified. Through public law, the state as such is acting, directly in its own interest, and in the courts the state — as such — is one of the parties, protecting and enforcing its own interests. The common interest which, in the private law sphere, states may have in the application of *any* private law rule (not necessarily its own) is not evident in the public law sphere. State public interests, if they do not always conflict, very seldom wholly coincide. And while they are prepared to assist private persons (whether their own nationals or foreigners) in conducting legal affairs,

states are unwilling (reluctance coupled with distrust) to give such assistance to other states. If *any* assistance is to be provided, then it is given only restrictively in individual cases (or groups of cases) and certainly not in accordance with a general rule. In contrast to private law, *ordre public* is the rule, not the exception, but at the same time this indicates that the private-public law dichotomy, while pedagogically a useful tool, cannot be strictly upheld — in the end it is all a matter of degree[58] — and it must not obscure the most essential fact that courts *do* not, but very exceptionally, apply foreign public law.

Since in the eyes of the civilians, accordingly, private international law includes no subsection that has a public law content, a new terminology has in some instances been developed for the purpose of covering all segments of law. Hence, parallel with private international law runs international administrative law, international criminal law, international procedural law, international constitutional law, international antitrust law, etc.[59] As a principal concept, encompassing all of these areas of law, *Heiz,* for one, has chosen "internationales Kollissionsrecht", the equivalent of which would be "international Conflict of Laws".[60]

Although the concepts of international administrative law, international criminal law, etc., have gained some footing amongst American scholars, the impression is that "Conflict of Laws" still functions as the superconcept, enveloping all law.[61] Story may have so intended,[62] but private international law is consequently not a synonym of Conflict of Laws today.[63] Conflict of Laws in the common law system has furthermore by tradition embraced not only the choice of law problems, but also jurisdictional problems (and problems relating to the effects of foreign judgments). And since all areas of law are coupled with jurisdictional issues, criminal law, law of taxation, etc., too have a self-evident position within the Conflict of Laws.[64] Terminologically, no objections can be raised against either this usage of the concept of Conflict of Laws or the Continental usage of the concept of private international law. Terminologically, further, "international antitrust law" is fully acceptable as a parallel concept.

3.2 Logically

However, those who claim that international criminal law and international administrative law run parallel to private international law, or that public law has a self-evident position in the field of Conflict of Laws, have something more in mind than considerations of terminology or of expediency; they base their claim on the requirements of logic. To every sub-

stantive rule, it is suggested, there is linked a formal Conflict of Laws rule, which marks the scope of the substantive rule. The Conflict of Laws rule may be explicit or implicit. In the latter case the "veiled" Conflict of Laws rule must be unveiled through a process of interpretation: a process which includes, *inter alia,* the establisment of the object of the substantive rule, the background of the rule and the intent of the legislator. In the field of public law, the Conflict of Laws rules are, as mentioned above, predominantly *unilateral,* in the private law field, *bilateral.* The latter supply criteria not only for the application of *lex fori,* but for the application of foreign law as well. However, both types of rules are, as a matter of principle, Conflict of Laws rules, it is further suggested, formal in character and autonomous in relation to the substantive rules the scope of which they determine. Thus *Stevenson* writes that "if a court finds that the criminal law of the forum cannot be applied — that is, that the State of the forum lacks legislative jurisdiction over the crime alleged — the court will not proceed with the case even though it has judicial (or personal) jurisdiction over the accused." In civil cases, Stevenson continues, the courts of the forum will apply the law of a foreign country in accordance with ordinary choice of law principles, at least so long as *ordre public* does not require otherwise. And then: "The difference, however, is one of degree and not of kind, for the decision to apply or not to apply the law of the forum in a criminal case is essentially a matter of choice of law."[65]

Klaus Vogel is contra. Logically, he concludes, the *unilateral* Conflict of Laws rules, as opposed to the *bilaterial* rules, cannot be separated from the substantive rules; logically, there are no autonomous *unilateral* Conflict of Laws rules, and there cannot be any — they are nothing but substantive rules.[66] The foundation of Vogel's deliberations is the science of logical semantics developed by Lesniewski, Tarski and Carnap and, in particular, the principle established therein for the purpose of avoiding inherent contradictions in language, that a sentence — whatever its language and contents — is logically unable to make statements as to its own verity — *i.e.,* logically it cannot, *per se,* express whether it is true or false.[67] Statements of verity, according to this principle, can be supplied only by other sentences, which, in relation to the former sentence — the so-called object-sentence — stand as "meta-sentences". There is a specific "meta-language", which gives statements of verity with respect to the "object-language".[68]

Transferred to the area of law, this principle implies — still in Vogel's view — that a norm is incapable of making statements as to its own *validity;* other norms — "meta-norms" — are called for, norms that state the validity or the non-validity of the "object-norms". The validity of the

"meta-norm" in a given case can further be stated only by a "meta-meta-norm", in other words, the "meta-nȍrm" is such only in relation to an "object-norm"; in relation to a "meta-meta-norm", the "meta-norm" is an "object-norm".[69]

Transferred further to the area of Conflict of Laws, the same principle would, according to Vogel, entail that a substantive norm is unable to make statements as to its own *applicability; "meta-norms"* are required, which determine whether *lex fori* or any other foreign law is applicable. In this sense, Conflict of Laws rules are "meta-norms" in relation to the substantive norms — the "object-norms" — of the various legal systems.[70]

The Conflict of Laws rules are thus logically distinct from the substantive rules. But this, Vogel submits, is true only of the *bilateral* rules, not the *unilateral.* And he explains: While it is true that a sentence is unable to make statements as to its own verity, it is logically perfectly possible for a sentence to restrict its pretentions of verity to specific areas. For instance the sentence "All apples are green, if found in Sweden" restricts itself to apples found in Sweden. Statements as to the verity of the whole sentence as such, however, require a "meta-sentence". In the same way, Vogel continues, substantive norms, within the realm of the Conflict of Laws, *can* restrict their own *applicability* to certain phenomena, without however giving indications, as to their applicability *vis-à-vis* the substantive norms of other legal systems. Thus, for example, a Swedish substantive norm declaring all resale-price agreements made with Swedish retailers illegal, restricts its applicability to specific agreements — resale agreements — where one of the parties is a Swedish retailer. The same norm, on the other hand, adds nothing to the question whether any other norm of another legal system is applicable, should the circumstances be different.[71]

There is no logical necessity, Vogel contends, to keep the "self-restrictions" separated from the substantive norm; to the contrary, they form a part of the substantive norms. *Unilateral* Conflict of Law rules, according to Vogel, are nothing more than the "self-restrictions" of the substantive norms. They are therefore not logically autonomous; they merely form a part of the substantive norm. Take again the aforementioned substantive norm "All resale-price agreements, made with Swedish retailers, are declared illegal". Assume that the Swedish courts do not apply the equivalent norms of other nations. A unilateral Conflict of Law rule could be extracted from this reading: "When one of the parties to an agreement is a Swedish retailer, then the norm is applicable". This may be required for practical reasons, not, however, by logical necessity, since logically the unilateral rule could just as well form a part of the substantive norm.[72]

Nevertheless, Vogel has to admit that the *unilateral* Conflict of Laws rules are hereby not wholly stripped of a "meta-norm" character. The idea, or the maxim, namely, that foreign public law is generally not applied in domestic courts, is a "meta-norm".[73] Hence, a substantive norm of a criminal law character cannot logically — without the risk of contradictions — make statements as to whether it is public law and whether it is the only norm to be applied and enforced in the domestic courts, exclusive of all foreign norms of a similar or an identical nature.

Despite the profoundity of Vogel's analysis, his reasoning is not completely convincing. Vogel's thesis that, within the realm of the Conflict of Laws, a substantive norm is, logically seen, unable to make statements as to its own applicability, on the one hand, but is capable, on the other, of restricting its applicability to certain phenomena, implies, as has been indicated, two different connotations of the term "applicability": In the former case "applicability" connotes the question: Is this norm, as such, applicable or can any other norm of foreign origin be applicable (is there a choice of law issue, or not)? — or, in other words, is the norm governed by the principle of unilaterality or by that of bilaterality (basis for applicability)? In the latter case the question is strictly: Is this substantive norm applicable (applicability in the simple sense). The former questions are, to invoke the terminology of the Conflict of Laws, formal in kind, the latter is substantive. Of this Vogel, of course, is fully aware, and he acknowledges too, as we have seen, that the principle of unilaterality of public law is a "meta-norm".[74] Yet he neglects to draw the full consequences from these premises. Since all substantive norms, whether private or public, are logically capable of defining, by way of "self-restrictions", their own limits, *i.e.*, their applicability in the simple sense, it would be logically possible to divest the bilateral Conflict of Laws rules of all ingredients, except the principle of bilaterality. All substantive norms would hereby be governed by either the principle of bilaterality or that of unilaterality, both being "meta-norms" and existing autonomously in relation to the substantive norms.[75] Logically there is no difference. It is all a matter of legislative technique. Instead of prescribing in a Swedish substantive norm, for instance, that "the right to inherit is possessed by the children, the wife, etc. of the deceased" and combining it with a bilateral Conflict of Laws rule of the type "the right to inheritance is governed by the law of the country of which the deceased was a citizen when he died", the substantive norm can read: "the right to inherit from a Swedish citizen, if he was such at the time of his death, is possessed by his children, wife, etc." and be combined with a Conflict of Laws rule, reading: "The norms regarding the right to in-

heritance are governed by the principle of bilaterality." Whether the connecting factor — citizenship — is built into the substantive norm or the "meta-norm" is logically indifferent. The former legislative method may be preferable, but it is not logically necessary.

Inversely, a substantive norm from the public law field, such as: "All resale-price agreements, made with Swedish retailers, are declared illegal", coupled with a Conflict of Laws rule prescribing that "the norms regarding illegality of resale-price agreements are governed by the principle of unilaterality", can, without logical bars, be rephrased as follows: "All resale-price agreements are hereby declared illegal", and "If, and only if, one of the parties to a resale-price agreement is a Swedish retailer, then the substantive norm declaring resale-price agreements illegal, is applicable", respectively.

The conclusion thus seems to be that there is no difference, imposed by logic, between bilateral and unilateral Conflict of Law rules. Whether international criminal law, international administrative law, etc. are fields of law parallel to private international law (in limited sense) cannot be decisively determined by this narrow question of logical semantics.[76] It seems that the whole matter can be solved, if necessary, only by a complex *appraisal* (as a matter of value judgment) of all the elements of one field of law in comparison with those of another. But then, of course, logic has surrendered. However, the purposes of the present study are, sufficiently fulfilled if the following is restated: unilateral Conflict of Laws rules can logically exist.

But that is not all. Vogel's transfer of the theory of logical semantics into the world of Conflict of Laws — placing the concepts of validity and applicability on an equal footing — is not entirely tenable. While a norm may be incapable of making statements as to its own validity, it is perfectly conceivable that a substantive norm *per se* conveys the basis for its applicability in the Conflict of Law sense — *i.e.,* whether it is governed by the principle of unilaterality or that of bilaterality. This may be accomplished by expanding the applicability of the substantive norm to all persons, things, acts, etc., whatever their nationality or *situs,* thereby excluding the possibility of bilaterality. The substantive norm, for instance, that "all resale-prince agreements, wherever made and in disregard of the nationality of the parties to such, are hereby declared illegal", cannot be governed by the principle of bilaterality; by its very wording it excludes bilaterality. (The reverse, however — that a substantive norm excludes unilaterality — is *not* logically possible). This is not to suggest that such all-inclusive substantive norms exist in reality, merely that, in terms of logic, they *can* exist.

In other words, an all-inclusive, universal, substantive norm does logically require a "meta-norm" if it is to be regarded as unilateral. On the other hand, all other substantive norms falling short of all-inclusiveness, do so require, although the *probability* of a substantive norm — which is next to all-inclusive — being governed by the principle of bilaterality, is small or minimal. Indeed, it seems that the further away one moves from the principle of non-discrimination in the Conflict of Laws — *i.e.*, the principle that the criteria for the applicability of *lex fori* and foreign law are equal — the greater the probability is that the principle of unilaterality is controlling, a probability that grows into certainty in instances of all-inclusiveness.

A caveat, however, must be added. Legal logic may, it is true, bring clarity into and widen the understanding of law, but the logical conclusions arrived at may not, as repeatedly emphasized by Vogel himself,[77] serve a postulates from which *practical* legal consequences are deducible. Thus the logical conclusion that unilateral Conflict of Laws rules can be autonomous in relation to the substantive norm that it governs, and the logical conclusion drawn by Vogel that the unilateral rule is nothing but a part of the substantive norm, cannot — logically, one might add — produce practical legal results other than to clear the minds of jurists. Even if the courts of one country were to consistently perceive the unilateral Conflict of Laws rules as autonomous and act accordingly, the logical conclusion that these rules are *not* autonomous could not provide a vehicle for the alternation of the courts' procedural (or decisional) practice, unless, of course, the autonomy of the unilateral rules is a specific prerequisite of procedural (or substantive) law. Or seen from another angle: Suppose country A has enacted an antitrust law comprising a number of substantive norms, all governed by one Conflict of Laws rule regarded as unilateral and autonomous, as a "true" Conflict of Laws rule. Suppose further that country B also has enacted an antitrust law consisting, however, merely of substantive norms since Conflict of Laws rules, it reasons, cannot logically exist in this field of law. Does the difference in approach give any information as to procedure, legal security, decisional practice, etc., in the respective countries? Clearly, it does not.

This "non-productive" facet of juristic logic is also symptomatic of Vogel's logical analysis as presented above and its bearing on the subsequent sections of his work, wherein he proposes a theory for the determination of the substantive scope of administrative law in West Germany; the so-called "Feldtheori". This theory — to be described next — is relevant, it would seem in the administrative law field, irrespective of the logical approach one chooses with regard to unilateral Conflict of Laws rules, apart

from some terminological singularities. In other words, Vogel's "Feldtheori" is — terminology aside — independent of the results of his prior logical analysis.[78]

Vogel's "Feldtheori" which, it should again be noted, is restricted to West Germany, is based on the cognizance of two different sets of reach-limiting norms within the ambit of administrative law: "external" norms and "internal" norms.[79]

External, or true "meta-norms", are norms of international or constitutional law.[80] Internal are the norms which logically — in Vogel's view — form a part of the substantive norm itself — the intrinsic self-restraining (limiting) norm of the substantive norm, which are sometimes, as a matter of legal technique, construed as a separate norm (an "assisting" norm).[81] However, as the reach-limiting norms of international or constitutional law, according to Vogel, are few if any, and since substantive norms only very seldom give definite indications as to their sphere of application on the international level, it is necessary that the substantive norm be further construed. The construction (or interpretation) of substantive norms, again, requires its own norms — some general principles — since a court is not — or, at least, should not be — free to construe substantive norms at its own discretion. Rules of construction, derived from, *inter alia,* the constitution or from the *"sensus communis",* or the totality of the legal system, must be observed.[82] As far as possible the wording of the substantive norm must be reasonably construed in light of the other norms of the specific statute. But when the words are equivocal, or when they fail to give sufficient information, additional "interpretative data" are needed.[83] At times the *legislative background* of the particular substantive norm may provide some guidance. In rare instances the *original "intent"* of the legislator may be revealed. As "interpretative data" Vogel also considers the *purpose* or *object* of a substantive norm and the so-called teleological method. However, Vogel infers, by detecting the purpose of a norm, one can only exceptionally determine the international applicability of the norm. From the mere fact, for instance, that the purpose of a norm is to protect consumers, or the small business, or to establish a certain standard of behaviour, one cannot draw conclusions as to which consumers, what small business and where, and whose behaviour is involved. The purpose itself has to be "localized", Vogel concludes somewhat tentatively.[84] And this is where Vogel introduces his specific "feldtheoretischer Topoi" or "interpretative data". The interpretation of every norm, with respect to its international applicability, Vogel suggests, necessarily leads to an arrival at a crossroads, where the choice lies between a "nationalist" or "isolationist" in-

terpretation, on the one hand, and an "internationalist" or "cosmopolitic" interpretation, on the other.[85]

As regards West Germany, Vogel concludes, this state has — on a constitutional basis — chosen the "cosmopolitic" attitude towards other states, an attitude of "openness" and "cooperativeness"; the "offene Staatlichkeit", as described by Vogel.[86] This constitutionally based "State openness", says Vogel, is a fact that the German courts have to take notice of — or even more: a rule which they are *bound* by. Thus in case of doubt, the German courts are constitutionally bound to interpret (construe) substantive norms — that are administrative in character — in accordance with the "cosmoplitic" idea; the courts are, consequently, bound by a constitutional norm, a "meta-norm".[87]

Vogel proceeds to examine different categories of administrative law in light of his theory — *inter alia,* the German antitrust law — and closes his analysis by somewhat doubting, but not at all rejecting, the view that the theory is pertinent outside West Germany.[88]

Inventive and thought-provoking as the theory of Vogel may be — although not at all unique[89] — its usefulness has obvious limitations, quite apart from the fact that the "interpretative data" it advances play a mere *subsidiary* role *vis-à-vis* the wording of a norm, its legislative background, the legislator's intent, etc.[90] This is plain from the examples provided by Vogel himself — for instance, from the antitrust field. A nationalist (or isolationist) approach would, according to Vogel, *in dubio* lead to a construction of the antitrust law *in extenso* — *i.e.,* the utmost possible extension of the law. In contrast, an internationalist (or cosmopolitic) approach — shared, *e.g.,* by West Germany — would lead to a restrictive construction of the law involving due respect for the laws of other nations. Section 98 II of the German Antitrust Act (GWB), which roughly provides that all restraints of trade, wherever carried out and having an effect within the nation, are covered by the Act, would in consequence of the aforesaid German approach have to be restrictively construed. Accordingly, Vogel concludes, only the German market is protected and only such restraints as have a direct or immediate effect on that market are covered; restraints that affect other markets directly and the German market only indirectly are outside the scope of the Act.[91]

The product of Vogel's theory here, it seems, is the conclusion that only restraints having a *direct* effect on the German market are covered. But does the theory really allow such straight conclusions? Is the idea of "offene Staatlichkeit" a sufficient basis for so concrete an answer? Why not, for instance, settle for *direct and substantial* effects, or *direct and severe* ef-

fects, or for *"indirect"* effects — after all "indirect" many be more "cosmopolitic" than *"any"* effects? Vogel pretends that there is only one choice — that between direct and indirect effects — but the matter is not so uncomplicated. The problem is rather to fix a level on a wide scale of effects, from "any" effects to "most severe" effects, and to this end Vogel's theory is of little value.

Some points of doubt may also be raised against the basic structure of Vogel's theory. Does the fact that a nation (here West Germany) strives for "openness" and cooperation in some areas, with some other nations, for some periods of time — or even most areas and most nations — give sufficient ground for Vogel's thesis of "offene Staatlichkeit" as interpretative data? Should not the fact that a nation has avoided, consciously or not, seeking cooperation in some areas, with some nations, or, in other words, that the nation reveals a "nationalistic" attitude in these respects, be an equally valid guide for the courts of that nation and warrant the contrary interpretative data of "closed" Staatlichkeit? And does not the fact that a nation in some areas has laws which are predominantly national in character, which in their very wording take little, if any, notice of other nations, rather proceed to the conclusion that in these areas the nation has chosen to be "nationalistic" and that this the courts are bound to respect? Is there not an intrinsic contradiction in the thesis that a public statute, which is "nationalistic" in character, is to be construed in line with the idea of "openness"? This, of course, touches the very core of Vogel's theory.

Moreover, how can a court be certain that the route chosen in a specific case is one which furthers cooperation among nations and which pays due respect to other nations, in contrast to alternative routes? What are the decisive criteria? Is international law of any interest, is it guiding? If international law has a guiding role, is not the theory advocated by Vogel just another way of expressing the maxim that national law is to be construed in conformity with international law, in the absence of express wording to the contrary? Vogel himself denies this: in discussing the maxim, he finds the applicability of it too exceptional (Vogel's own theory, on the other hand, is of general applicability).[92]

These questions may represent the doubt one entertains when examining Vogel's theory. In the present context they will suffice. The examination will continue in the following sections of the now proceeding analysis, in sections which are more immediate and relevant to such an examination.

Notes, Chapter VI

[1] *Cf.* Goodrich, Conflict of Laws (St. Paul, Minn., 1949), at 1 f. Also see the Restatement (1st), Conflict of Laws (1934), § 1; Ehrenzweig, Conflict of Laws (St. Paul, Minn. 1962), at 1; Westlake, Private International Law (7th ed., Bentwich, 1925), at 4; Leflar, American Conflicts Law (1959), at 9; Dicey and Morris, The Conflict of Laws (London, 1973), at 3 f.; Cheshire, Private International Law (London, 1974), at 3 f. As to the subject matter of Conflict of Laws, see further, *infra* p. 321 ff.

[2] Whether national (domestic, *lex fori*) or international, will be discussed *infra* p. 317 ff.

[3] This is all said with reference to the statement made in the beginning of the introduction, *supra*. From the standpoint of a national court, the whole process of reasoning may be, and it is generally taught to be, the reverse, and is moreover holding other aspects. Having in sight, for instance, a legal controversy brought to a court, wherein one of the parties (or both) alleges that the case involves foreign elements which should render *lex fori* inapplicable and maybe even further: a foreign law applicable. Logically the decision-process of the court must begin with what is generally referred to as *characterization,* or sometimes as *classification, i.e.,* the *demarcation* of the particular field of law at issue, followed by the ascertainment of the Conflict of Laws rule governing in that field. The Conflict of Laws rule, again, determines what elements are to be qualified as foreign, and consequently, whether the alleged element in the case can be qualified as foreign at all, with respect to the particular field of law involved. The question becomes, in other words, whether the element, alleged to be present, is relevant (or material). Relevant elements are oftentimes designated *connecting factors* (points of contact). Subsequently, the court must decide whether the alleged element *in fact* is foreign, a part of the decision-process usually referred to as *localization*. Should it so be, the remaining issue becomes, what legal significance does the Conflict of Laws rule attach to the fact that the case comprehends a foreign element: Does it render *lex fori* inapplicable, does it render foreign law applicable?

See further, Ehrenzweig, Conflict of Laws (St. Paul, Minn. 1962), at 326 ff. (including the comprehensive references; Leflar, at 209 ff., 215; Robertson, A., Characterization in the Conflict of Laws (1940); Ehrenzweig, Private International Law (A.W. Sijthoff — Leyden, 1972), at 113 ff.; Rabel, The Conflict of Laws: A Comparative Study (Chicago, 1945), at 42 ff.; Goodrich, Conflict of Laws (St. Paul, Minn. 1949), at 15 ff.; Dicey and Morris, The Conflict of Laws (London, 1973) at 19 ff; Cheshire, Private International Law, at 42 ff.

[4] "Function" will herein denote merely the (direct) formal function of the Conflict of Laws rule (see Cheshire, at 3) and not the underlying policies, reasons, motives, rationale, etc. upon which the Conflict of Laws are generally founded. See e.g. Leflar, at 113; Goodrich, Conflict of Laws (St. Paul, Minn. 1949), at 7.

[5] *Lex fori* is the commonly accepted term for the law of the forum court in the particular field of law as characterized. See e.g. Dicey and Morris, at 11.

[6] The equivalent to "unilateral" in the German doctrine is "einseitig", see e.g. Neumeyer, Internationales Verwaltungsrecht, part IV, at 115 ff., but see further *infra,* p. 324 ff. Also see Morris, The choice of Law Clause in Statutes, 62 L.Q. Rev. 170 (1946), who prefers the term — "one-sided" as opposed to "all-sided" conflict rules. These terms are adopted by Mann, F.A., Studies, at 43 ff, but used, it seems, in a different sense.

[7] Subject matter jurisdiction does *not,* accordingly, correspond to jurisdiction *in rem.* As to the ambiguity of the concept, see e.g. Ehrenzweig, Conflict of Laws (St. Paul, Minn. 1962), at 72 f. In those days the use of the concept subject matter jurisdiction in the sense noted in the text, had been practised widely. Another equivalent, "competency", has not been

favoured. As an equivalent to substantive scope (covered, under the aegis) in the German doctrine is "Anwendungsbereich". Conflict of Laws rules that determine the substantive scope of a particular field of law are therefore frequently termed "Anwendungsbereichnormen" or sometimes "Grenznormen" or simply "Kollissionsnormen". See further, *infra,* p. 321 ff.

[8] Ehrenzweig, in Private International Law (A.W. Sijthoff-Leyden, 1972), at 75 f., discusses whether foreign *law* or a foreign *rule* is applied and reaches the conclusion that foreign *rule* is preferable. *Cf.* Ehrenzweig, Conflict of Laws (St. Paul, Minn. 1962) at 352 ff. (foreign *law).* Also see Cavers, The Choice of Law Process (1965), at 9 and 40 f. Still it seems that "foreign law" is a concept settled enough among both American and European scholars, and regarded as a counterpart to the *lex fori,* see *supra* n. 5.

[9] Here the German equivalent ist "zweiseitige Kollissionsnormen". See e.g. Heiz, 48 f. Niederer, 120 ff. See further, *infra,* p. 322 ff.

[10] Story, Commentaries on the Conflict of Laws, Foreign and Domestic (8th ed., by Bigelow, M.M., Boston 1883. The first edition was published in 1834). The influence of Huber is well documented. As to this and Story in general see e.g. Vogel:, Der räumliche Anwendungsbereich der Verwaltungsrechtsnorm (Frankfurt am Main, Berlin, 1965), at 28 ff. and 40; Lorenzen, Huber's De Conflictu Legum, Selected Articles on the Conflict of Laws (New Haven, 1947), at 136 and 155; also see Lorenzen in the same work, Story's Commentaries on the Conflict of Laws — One Hundred Years After, id., at 181; Ehrenzweig, Conflict of Laws, at 6 (including n. 22); Müller, Horst, Der Grundsatz des wohlerworbenen Rechts im internationalen Privatrecht (Hamburg, 1935), at 157 ff., with further references at 158; Gihl, Den internationella privaträttens historia och allmänna principer (Stockholm, 1951), at 167 ff. *Cf.* Story's own references to Huberts work, *id.,* at 29 ff. The influence of Paul and John Voet is likewise demonstrated, *id.* Cook, in The Logical Bases of Story's Treatise, The Logical and Legal Bases of the Conflict of Laws (Cambridge, Mass. 1942), 48, at 51, has summarized Story's axioms as follows:
1) Every nation possesses an exclusive sovereignty and jurisdiction within its own territory.
2) The laws of every state affect and bind directly all property, whether real or personal, within its territory, and all persons who are resident within it, whether national born subjects or aliens, and also all contracts made and acts done within it.
3) No state or nation can by its laws directly affect or bind property out of its territory, or bind persons not resident therein. See Story, at 8 ff. See further, *infra* chapter XV.

[11] Chapter XV.

[12] Story, at 8 and 22. The distinction between the power of a nation to bind or affect persons or property in other nations, and the power to bind or affect courts and other authorities of other nations is vital and has been recognized especially in the continental doctrine, see e.g. Gutzwiller, M., Geltungsgebiet und Anwendungsgebiet der Gesetze, Festgabe Ulrich Lampert (Freiburg, Switzerland, 1925), at 162. In the same sense Vogel, at 13 ff. (in particular n. 7), who distinguishes between "transitive" and "intransitive" territoriality. The terminology and its implications will be analysed further, *infra* chapter XV.

[13] Story, at 22.

[14] See Story, at 9. *Cf.* Ehrenzweig, Conflict of Laws, at 7 (including n. 4); Ehrenzweig, Private International Law, at 54; Gihl, at 171;

[15] Story, at 6 f. and 32 f. *Cf.* Gihl, at 171.

[16] See further *infra* chapter XV.

[17] *Lex causae,* as understood elsewhere, *i.e.,* the law (or rule) that governs the particular issue in a case, according to a Conflict of Laws rule. *Cf.* Dicey & Morris, Conflict of Laws, at II.

[18] See Story, at 6 f., 25 ff., 32 ff and 35 ff.; the doctrine of *comitas gentium,* originally introduced, it seems, by the Dutch school of Conflict of Laws. See further, references made *supra,* in n. 10

[19] See the criticims by Cook, in The Logical Bases of Story's Treatise, The Logical and Legal Bases of the Conflict of Laws, at 48 ff. and Lorenzen, Territoriality, Public Policy and the Conflict of Laws, 33 Yale L.J. 736 (1923—24).

[20] See the Restatement (Ist) of the Conflict of Laws (1934), §§ 42 ff. and 59 ff. *Cf.* Beale, A Treatise on the Conflict of Laws (New York, 1935), at 1968 f. See further Ehrenzweig, Private International Law, at 54 f. The author adds: "To be sure..... Beale's teaching has long since been generally rejected....." As to the influence of Story in the American teaching of Conflict of Laws, see e.g. Harrison, F., Jurisprudence and the Conflict of Laws (1919, written in 1876), especially at 119: "[F] rom the date of its [Story's work] appearance hardly a single case on this subject in America or in England, and perhaps few on the Continent, have ever been decided without some reference to this learned book. A new era in the History of Private International Law may be traced from it." Also see Lorenzen, Story's Commentaries on the Conflict of Laws — One Hundred Years After, Selected Articles on the Conflict of Laws, 181 (or in 48 Harv. L. Rev. 17, 1934); Nadelmann, Josep Story's Sketch of American Law, 3 Am. J. Comp. L. 3 (1954), Joseph Story's Contribution to American Conflicts Law: A Comment, 5 Am. J. Leg. Hist. 230 (1961), and Some Historical Notes on the Doctrical Sources of American Conflicts Law, Conflict of Laws: International and Interstate, Selected Essays (The Hague, 1972). However, the past three decades, or more, have witnessed a shift of Conflict of Laws theory. The shift is partly materialized in the Restatement (2nd) of the Conflict of Laws (1962, revised 1964, 1965) and in the writings of later day scholars, such as Cavers, The Choice-of-Law Process (1965), Ehrenzweig, Private International Law and Leflar, American Conflicts Law and *id.* The Law of Conflict of Laws (1959).

[21] Cook, the Logical Bases of the Conflict of Laws, The Logical and Legal Bases of the Conflict of Laws, at 14 f.

[22] Cook, *id.,* at 15. Also see The Legal Bases of the Conflict of Laws in the same work, at 71, especially at 77. *Cf.* F.A. Mann, The Doctrine of Jurisdiction. Studies in Internaional Law, (Oxford 1973), at 4 ff. and 13 ff, where Mann applying an equivalent example reaches the opposite result.

[23] Cook, *id.,* at 26 and 75.

[24] See Ehrenzweig, Conflict of Laws, at 22 ff., 26 f. and 75 f.

[25] Pillet, Traité pratique de droit international privé I (Paris, 1923); *id.* Théorie continentale des conflicts de lois. Recueil 2 (Paris, 1925); Foelix, Traité du droit international privé ou du conflit des lois de différentes nations (3d ed., Paris, 1856); Laine, Introduction au droit international privé contenant une étude historique et critique de la théorie des statuts et des rapports de cette théorie avec le Code civil I (Paris, 1888); Despagnet, Précis de droit international privé (5th ed., edited by De Boeck, Paris, 1909); Weiss, Manuel de droit international privé (6th ed., Paris, 1909); Zitelmann, Internationales Privatrecht (Leipzig, 1897); Mancini, De l'utilité de rendre obligatoires pour tous les Etats, sous la forme d'un ou de plusieurs traités internationaux un cetain nombre de régles générales du Droit international privé, pour assurer la décision uniforme des conflits entre les différentes législations civiles et criminelles (Clunet, 1874). Also see Anzilotti, Studi critici di diritto internazionale privato I (Rocca S. Casciano, 1898).

[26] Foelix, *id.*, at I; Laine, *id.*, at 10 ff.; Despagnet, *id.*, at 17 ff.; Weiss, *id.*, at 25 f.
See further the discussion by Makarov, Völkerrecht und internationales Privatrecht, Mélanges Streit 1939, 535 ff., at 545 ff.; *id.* Internationales Privatrecht und Völkerrecht: Strupp-Schlochauer, Wörterbuch des Völkerrechts, Vol. II, 1961, at 129 ff.; Niederer, Internationales Privatrecht und Völkerrecht, Schw.Jb.Int.R. 1948, 63, at 68 ff.; Kahn, F., Völkerrecht und internationales Privatrecht, Abhandlungen zum internationalen Privatrecht (München, Leipzig, 1928) 268, at 269 ff. and 275 ff.; Gihl, at 279 ff.; Gutzwiller, Zitelmanns völkerrechtliche Theorie des Internationalprivatrechts, Festgabe für Ernst Zitelmann, 468, at 474 ff.; Guggenheim, Völkerrecht I, at 334; Bühler, O., Der völkerrechliche Gehalt des internationalen Privatrechts, Festschrift für Martin Wolff, 177, at 180 (J.C.B. Mohr, Paul Siebeck, Tübingen); Drost, Grundlagen des Völkerrechts (München, Leipzig, 1936), at II (criticism of Wolff, M., Internationales Privatrecht (Berlin, 1933), at 4 ff. Starke, J.G., The Relation Between Private and Public International Law, CCVII L.Q.Rev. 395 (1936).

[27] So e.g. Zitelmann, *supra* n. 25, and Niederer,*supra* n. 26, at 69.

[28] See e.g. Kahn-Freund, General Problems of Private International Law (Sijthoff-Leyden, 1976) at 21; Gihl, however, (at 301) seems to understand the difference as one of kind and Story, in Gihl's eyes, is in reality an internationalist, *id.*, at 171. See Niederer, Einführung ..., at 136. But see Vogel, at 247, n. 34, and 270.

[29] See e.g. Kahn, *supra* n. 26, at 277 ff., and 280; Niederer, *supra* n. 26, at 69 f.; Makarov, *supra* n. 26, at 543 ff.; Gihl, at 279 ff.; Drost, *supra* n. 26, at 11 ff.

[30] The founders of the dualist theory were Triepel (Völkerrecht und Landesrecht, Leipzig, 1899) and Anzilotti (Corso di diritto internazionale, Cours de droit international, Paris, 1929). See further, *infra* chapter VII.

[31] The monist school is primarily represented by Kelsen, Verdross, Kunz, Scelle, Wright, see further, *infra* chapter VII.

[32] *Cf.* Verdross, Völkerrecht (5th ed., Wien, 1964), at 112. Kahn-Freund, *supra* n. 160, at 21.

[33] See e.g. the systems in United States, Great Britain and West Germany. See further, *infra* chapter VII.

[34] Verdross (Völkerrecht, at, 117 f.) is obviously *not* thinking of that meaning of the concept, when he speaks of "unmittelbare Anwendung", but rather of a general transformation of international law.

[35] A theory encompassed by the writings of Frankenstein, Internationales Privatrecht (Grenzrecht) I (Berlin, 1926), Von Bar, Theori und Praxis des internationalen Privatrechts I (Hannover, 1889), and, at least, the early writings of Wolff, M., Internationales Privatrecht (Berlin, 1933). Also see, Levy-Ullman, La doctrine universaliste en matiére de conflit des lois, Avant-Propos. To Barbey, Le Conflit de Lois en matiére de contrats (1938). These writers regard the Conflict of Laws as neither international law nor national law, but as something comparable to *jus gentium,* a supranational law binding directly on national courts and individuals. See further, Gihl; at 300 f. To Niederer, *supra* n. 25, at 75 ff., Frankenstein is not an universalist, but an internationalist.

[36] See further Kelsen, Das Problem der Souveränitet und die Theorie des Völkerrechts (originally published 1920, newly printed Scientia Aalen, 1960), at 154 ff. and Walz, Wesen des Völkerrechts und Kritik der Völkerrechrsleugner, Handbuch des Völkerrechts, Grundbegriffe und Geschichte des Völkerrechts (Stuttgart, 1930).

[37] Binding, Handbuch des Strafrechts, Vol. 1 (Leipzig, 1885), at 374 f.

[38] Fischer, O., Die Methode der Rechtsfindung im internationalen Recht (1915) at 10. See further Makarov, *supra* n. 26, at 537, although Makarov seems to understand these lines as an rejection of international law. In the same sense he interprets statements made by Rundstein, Ago and Niemeyer. *id.*, at 537, n. 2. Also see Makarov, Grundriss des internationalen Privatrechts (Frankfurt am Main, 1970), at 32 f.

[39] See e.g. Cheshire, at 9 and 13; Makarov, *supra* n. 38; Gihl, *supra* n. 26, at 301 ff., 304; Dicey & Morris, at 7 f.; Ehrenzweig, Conflict of Laws, at 22 ff.; Graveson, The Conflict of Laws (London, 1969), at 3 (including references); Eek, The Swedish Conflict of Laws (The Hague, 1965), at 3 f.; Bogdan, Svensk internationell privat- och processrätt (Lund, 1980), at 17 f.; Heiz, Das fremde öffentliche Recht im internationalen Kollissionsrecht (Zürich, 1959), at 26 ff.; Bühler, *supra* n. 26, at 188 ff., 200 f.; Kahn, *supra* n. 26, at 284 ff.; Niederer, *supra* n. 26, at 82; Stevenson, J.R., The Relationship of Private International Law to Public International Law, 52 Colum. L. Rev. 561 (1952), at 574 ff.; Cheatham, Sources of Rules for Conflict of Laws, 89 U. Pa. L. Rev. 430 (1941), at 432 ff.; Starke, *supra* n. 15, at 398 ff.; Hambro, The Relations Between International Law and Conflict Law, 105 Recueil des Cours I (1962), at 12, 13 ff., 65 f.; Wortley, B.A., The Interaction of Public and Private International Law Today, 85 Recueil des Cours 245 (1954), at 257, 260 ff., 294 f.; Schnitzer, A., Handbuch des internationalen Privatrechts (Basel, 1957), at 37 f. ("gewisse grundsätze"); Niboyet, Traité de droit international privé Français (Paris, 1938), at 25, 29 ff., 49 ff.; Raape/Sturm, Internationales Privatrecht (München, 1977), at 44 f.; Niederer, Einführung in die allgemeinen Lehren des internationalen Privatrechts (Zürich, 1954), at 78 f. 102 ff. 134 ff.; Kahn-Freund, *supra* n. 28, at 1 and 30 f.; Neuhaus, Die Grundbegriffe des internationalen Privatrechts (Berlin-Tübingen, 1962), at 31 ff. Ross, A., Laerebog i folkeret (Copenhagen, 1976), at 85 f.; Wolff, M., Das internationale Privatrecht Deutschlands (Berlin-Göttingen-Heidelberg, 1954), at 7 ff.

[40] Story, Commentaries on the Conflict of Laws, at 10 (footnote deleted). The concept "private international law" was no doubt invented by Story. *Cf.* Cheshire, at 13; Niederer, at 79 and Raape/Sturm, Internationales Privatrecht, Vol. 1 (München, 1977), at 6.

[41] See Story, *id.*, at 840 ff.

[42] Story himself referred to the Dutch scholar P. Voet.

[43] Wharton, (3d ed. Rochester, 1905) Conflict of Laws, at preface XV (Conflict of Laws and private international law are regarded as synonyms), and Beale, A Treatise on the Conflict of Laws, Vol. I, at 7 f. (New York, 1935).

[44] The Restatement (Ist) on the Conflict of Laws, §§ 425 ff.

[45] Cook, The Logical and Legal Bases of the Conflict of Laws, at 14 ff. and 71 ff.

[46] Goodrich, at 24 ff. and as to taxation, at 97 ff.; Leflar, at 267 ff. and taxation, at 620 ff. Also see Trautman in Brewster, at 339 ff.

[47] Rabel, The Conflict of Laws: A Comparative Study (Chicago, 1945) and Stumberg, Principles of Conflict of Laws (Chicago, 1937). Rabel, at 3, writes: "[W]e shall observe the limitations of private law more strictly than is usual and only to the extent necessary explore the implications of constitutional, administrative, procedural, criminal, and public law generally."

[48] Ehrenzweig, Conflict of Laws, at I (including n. I). Also see his Private International Law, at 23: "More in accord with general usage, international *administrative* law [including the law of taxation] and international *criminal* law and procedure will not be covered." (Notes omitted). When speaking of "general usage", Ehrenzweig probably primarily alludes to the Continental authorities.

[49] Graveson, The Conflict of Laws (London, 1969), at 5; Dicey/Morris, The Conflict of Laws (London, 1973) and Cheshire, Private International Law (London, 1974, edited by North, P.M.), who treat penal laws from one aspect only — the non-applicability of foreign penal law. *Cf.* Beckett, What is Private International Law, 7 Brit. Y.B. Int. L. 73 (1926), at 94: "[The] whole set of principles and considerations by which jurisdiction or choice of law in criminal matters is said to be governed is entirely different from those postulated in the realm of private law".

[50] This is not altogether certain. Neumeyer, it seems, used two meanings of private international law, one in the narrow sense and one in the broad sense, Neumeyer, Internationales Verwaltungsrecht, Vol. IV (Zürich-Leipzig, 1936), at III in the preface and at 481 ff., particularly at 487.

[51] See e.g. Kegel, Internationales Privatrecht (2d ed., 1954) at 6; Raape/Sturm, at 7; Makarov, Grundriss des internationalen Privatrechts, at 27; Nussbaum, Grundzüge des internationalen privatrechts (Berlin-München, 1952) at 4; Niederer, at 83 ff. and 86; Heiz, at 49 f.; Neuhaus, at 1 ff.; Arminjon, Précis de droit international privé, Vol. I (Paris, 1947), at 204 ff.; Batiffol, Traité élémentaire de droit international privé (2d ed. Paris, 1955), at 3 ff. and 7; Walker, G., Internationales Privatracht (5th ed., Vienna, 1934), at 14; Wolff, M., Das internationale Privatrecht Deutschlands (Berlin-Göttingen-Heidelberg, 1954), at 3 ff.; Ross, A., Laerebog i folkeret (Copenhagen, 1976) speaks of private International Law in a limited sense ("snaevrere forstand") not encompassing public law, at 85 f. But see Niboyet (Paris, 1938) at 15 f. As to the Swedish view, see e.g. Karlgren, Internationell privat- och processrätt (5th ed., Stockholm, 1974); at 13 f.; Eek, The Swedish Conflict of Laws (the Hague, 1965), at 5; Bogdan, at 19 and 70 f.; Michaeli, Internationales Privatrecht (Stockholm, 1948), at 28; Reuterskiöld, C.A., Handbok i svensk privat internationell rätt (Stockholm, 1907), at 1 ff. and 5; who all agree that private international law deals solely with private law. But see Sundberg, H., Folkrätt (Stockholm, 1950), at 16.

[52] See the authorities referred to, *supra* in n. 46—51.

[53] See the English and Continental authorities cited in *supra* n. 49 and 51. As to the maxim, suffice it to refer to the broad analysis carried out by Vogel, at 194 ff.; Heiz, at 47 ff.; Hjerner, at 233 ff.; Leflar, Extrastate Enforcement of Penal and Governmental Claims, 46 Harv.L.Rev. 193 (1932); Dicey/Morris, at 75 ff.; Madsen-Mygdal, Ordre public og territorialitet (Copenhagen, 1946); Gihl, Lois politiques et droit international privé, 83 Rec. de Cours 163 (1953, II); Trautman in Brewster, at 340 ff. including the exhaustive references in the works now referred to.

[54] See *supra* p. 316.

[55] See e.g. Zweigert, Internationales Privatrecht und öffentliches Recht, Fünfzig Jahre Institut für internationales Recht an der Universität Kiel, (Hamburg, 1965); Bär, Kartellrecht und internationales Privatrecht (Bern, 1965).

[56] See especially Heiz and Hjerner, *supra* n. 53; Bullinger, *infra* n. 19, at 104 ff.

[57] In particular, see Hjerner, at 253 f. and Vogel, at 205 ff. and 237 ff.

[58] See further e.g. Bullinger, M., Öffentliches Recht und Privatrecht, (Stuttgart-Berlin-Köln-Mainz, 1968), at 75 ff. and 104 ff. *Cf.* Holliger, Das Kriterium des Gegensatzes zwischen dem öffentliches Recht und dem Privatrecht (Diss. Zürich, Affoltern, 1904).

[59] See e.g. Niederer, at 86; Neuhaus, at 3 f.; Raape/Sturm, at 21 ff.; Makarov, at 27 ff.; Heiz, at 50 f.

[60] Heiz, at 51. Also see Neuhaus, at 2 f. *Cf.* Stevenson, at 563 f.

[61] See e.g. Carlston, International Administrative Law: A Venture in Legal Theory, 8 J.Pub.L. 329 (1959). Also see Ehrenzweig, Private International Law, at 23.

[62] See *supra* p. 321 f.

[63] See e.g. Zweigert, Internationales Privatrecht und Öffentliches Recht, Fünfzig Jahre Institut für Internationales Recht an der Universität Kiel, (Hamburg, 1965), at 137. Also see Stevenson, at 563 f.

[64] The opinions differ, however. See Dicey/Morris, at 7 f.; Cheshire, at 13 f.; Neuhaus, at 1 ff.; Raape/Sturm, at 6 f.; Niederer, at 79 ff. in particular at 83.

[65] Stevenson, at 563. *Cf.* Heiz, at 47 ff.; Niederer, at 120 ff.; Neumeyer, at 104 f., 120 ff., 136 ff. and 481 ff., in particular at 484; Haymann, at 37 ff. and 62 ff.;

[66] Vogel, at 298 ff.

[67] Vogel, at 253 ff.

[68] Vogel, at 256 ff. and 262.

[69] Vogel, at 258 ff.

[70] Vogel, at 275 f.

[71] Vogel, at 262 f., 277 f. and 298 ff. Observe that the examples given here are not Vogel's, but inserted by the present writer for the sake of a better understanding.

[72] Vogel, at 298 ff.

[73] Vogel, at 310 f. As "meta-norms" Vogel also regards any *constitutional* rule or any rule of *international law* — the extent to which such exists, is not discussed by Vogel — that determine the applicability of a substantive norm, see Vogel, at 301 ff.

[74] Applicability in the first sense is by Vógel "Anwendungsbegründung" and the latter "Begrenzung der Anwendungsbereich", *i.e.,* Conflict of Law rules are "anwendungsbegründenden normen" while the substantive norms are themselves "anwendungsbegrenzenden normen", Vogel, at 276 ff.

[75] In other words: Bilaterality or not bilaterality — that is the question. *But* see Haymann, at 8 ff.

[76] *Cf.* Haymann, at 66 f. and Neuhaus, Besprechung von Vogel, Klaus, Der räumliche Anwendungsbereich der Verwaltungsrechtsnorm, 1966 Fam RZ 327, at 328.

[77] Vogel, at 269 and 279.

[78] See Haymann, at 66 f.

[79] Vogel, at 341 ff.

[80] These are discussed briefly by Vogel, at 341 ff.

[81] Vogel, at 341 ff. and 357 ff.

[82] Vogel, at 364 f.

[83] Vogel, at 357 f., 376 ff.

[84] Vogel, at 396 f.

[85] Vogel, at 402 ff., 407 f. and 410.

[86] Vogel, at 411 ff. and 414.

[87] Vogel, at 405, 414 ff. and 417. Also see Haymann, at 65.

[88] Vogel, at 417 ff.

[89] See e.g. Rehbinder, at 47 and 103 ff. Rehbinder, whose work was published the same year as Vogel's, also forwards a subsidiary theory of interpretation based on the principle of "Verhältnissmässigkeit" (proportionality), the principle — as transformed by Rehbinder to the international law area — that the methods or means invoked to achieve certain goals, must stand in reasonable ("angemessen") proportion to the goals wished to be achieved.

[90] This is clearly pointed out by Vogel, e.g. at 357 f. and 416 ff.

[91] Vogel, at 408 f. and 421 ff.

[92] Vogel, at 398 ff. and 401.

Chapter VII
International law and national law — the relation

1. Introduction

Every statement as to the binding character of international law on state conduct holds an assumption of the relationship between international law and national law. Thus the statement that international law set limits on state jurisdiction, includes the assumption that international law contains rules that are binding on states. The question of the relationship between international law and national (or municipal) law — the binding character of international law — has always troubled the minds of jurists. It is one of the favourite playgrounds of legal thinkers. Almost every treatise on international law has a chapter or two reserved for this problem. The seemingly endless discussion as to whether the dualist or the monist school provide the correct description of relation between the international and national law may, in a sense, as *Berber* puts it,[1] be a struggle of words and concepts: There is a general consensus among international lawyers as to the supremacy (primacy) of international law over national law.[2] The only subject of dispute, it seems, is the nature of that supremacy. An international court judge would not hesitate to apply the international law rule even though it conflicted — at least as far as the subject matter concerns — with a municipal rule of law. And no one, it seems, would deny him that right.

Nevertheless, for an accurate understanding of international law — its subject matter, its subjects, its functions, etc. — a discussion on the subject is indispensable. What particularly concerns us here is the following query: Are the jurisdictional principles and their substance in international law — if such exist — in any way conditional upon the nature of the international — national law relationship, *i.e.*, whether you choose to give support to the dualist school, the monist school, or any other school, intermediate or independent of these.

2. Dualism versus monism

The dualist (pluralist) and monist controversy revolves primarily around three questions: The *source,* the *subjects* and the *subject-matters* of international law and national law, respectively. When an inqury is made as to the source of law, the decisive question is, *whence* does the law spring?, a question not necessarily identical to that of the validity, or the binding force, of law.[3] When the subjects of law are to be identified, the query is: *to whom* (to which persons) does the law apply? The subject-matter, finally, has to do with the contents of law, the *what* of law. Sketched very schematically, the dualist school regards international law and national law as two entirely separated legal orders, having separate sources, separate subjects and separate subject-matters. The monist school, on the other hand, discerns only one legal order: in the eyes of the monist school, law is universal.

3. Dualism (pluralism)

According to *Triepel* all legal norms are an expression of will.[4] The will from which a legal norm emanates, Triepel regards as its source of law. The source of national law is the will of the sovereign state.[5] The source of international law, Triepel reasons, is the collective will of several states merging in a common will, in a "Vereinbarung".[6] A "Vereinbarung" of state wills is to be distinguished from a treaty. While the treaty, according to Triepel, is a compromise of conflicting wills, the "Vereinbarung" is a fusion of wills striving towards the same end.[7]

To be distinguished thus is the will of the single state from the common will, as manifested in the "Vereinbarung", in Triepel's view, two separate sources of law.

According to Triepel, moreover, international law and national law has separate subjects; whereas the subjets of international law are the states, national law is addressed to the persons living in those states.[8]

And, finally, in Triepel's view international law regulates solely interstatial relations, national law on the other hand the intercourse between a single sovereign state and its subjects and between the subjects within the state. The consequence of the separation of international law and national law as legal orders, Triepel continues, is that international law cannot be

valid and binding for the subjects of a state, whereas, on the other hand, national law has no binding force in the realm of international law. For a rule of international law to be valid within a single state, it has to be transformed into rule of a national law and *vice versa*. Furthermore, the two legal orders can never stand in mutual conflict. The state is sovereign over its subjects; international law is sovereign over the states, and thus there is no area of conflict.

The theories of Triepel have been adopted, refined and developed by, *inter alia, Anzilotti, Walz* and *Heilborn*.[9] A conflict between international law and national law, says Anzilotti for instance, is not conceivable.[10] True, the state — as a subject of international law — is under an obligation to harmonize the national law with international law. Where such a harmonization is omitted, or where the state creates rules in violation of international law, it is this act or omission by the state as such, which violates international law, and not the product of its behaviour, *i.e.,* the national law. The conflict is only significant from the viewpoint of international law.[11] Or in the words of *Oppenheim:* "[International law cannot] per se create or invalidate Municipal Law, nor can Municipal Law per se create or invalidate International Law. International Law and Municipal Law are in fact two totally and essentially different bodies of law which have nothing in common except that they are both branches — but separate branches — of the tree of law."[12]

4. Monism

Monism has many forms. One monist theory proceeds from the idea of the state as the supreme entity (state primacy); another from the notion of the international law as the highest authority (international law primacy) from which state rights and national law derive their validity (the so called radical monism); and a third, also to be true from the notion of international law supremacy, but assuming at least a temporary "validity" of national law rules that conflict with international law (the "moderated" monism). And although the basic structure of the theories of those who champion the international law supremacy is shared, the variations are numerous.

Common to all monists is the perception of the law as a single entity — the law as universal — and sovereignty as absolute. There is, the monists assume, only one source of law, the origin of all law, under which there

cannot exist separate subjects or separate subject-matters.

Those monists who regard the state as supreme, as the absolute sovereign, above which no authority exists, perceive international law — if such law there is at all in the "true" meaning of the word (the difference between those who deny international law all together and the state primacy monists stands and falls, of course, with the definition of international law) — either as an external state law — rules incorporated in the national law for external affairs — or a law otherwise created by states for common purposes but of a non-binding character, or "self-binding" as the theory of "autolimitation" suggests.[13] Monism in this sense flourished particularly in the past century in the furrow once turned by *Hegel,* but has today few, if any, followers.[14] Moreover, this "inverted monism", to speak with *O'Connell,* "has never found favour in international tribunals".[15]

"*Radical" monism* arose with *Kelsen.*[16] In his brilliant and epochmaking works the "pure theory of law" was founded.[17] Law, in his view, and in the spirit of Kant, is an independent science domiciled in the world of "Sollen" ("oughtness"), strictly separated from the world of "Sein" ("isness"); "purified" from elements of nature. Elements from the world of "Sein" (facts, circumstances, etc.) are relevant in the world of "Sollen" if given a significance by the elements (norms) of the latter. For Kelsen there is only one legal order, whose elements — the legal norms — are all linked together in chains the anchor of which is the basic norm ("Grundnorm"), the ultimate norm.[18] A legal norm is valid and is an element of the legal order if it can be traced back to another legal norm, the validity of which must be traced back further to another legal norm, and so on, which ultimately leads to the basic norm, the foundation of all legal norms, the "unifier" of all legal norms. Every basic norm is the foundation of a norm system. Ethics and law constitute different norm systems because they have different basic norms. On the other hand, the substance of a norm alone conveys nothing about its validity as a legal norm, nor does the fact that it is logically deducible from the basic norm.[19] To be valid as a legal norm, the norm must have been created by an act of volition and according to a predetermined specific method, the validity of which, again, must be traceable back to the basic norm. In this sense, all legal norms are positive. The only norm that is not positive and therefore not created in the legal order, is the basic norm itself. The basic norm is nothing more than a hypothesis. The hypothesis chosen must, however, be capable of providing a plausible explanation and elucidation of the world we know.

Unlike other representatives of the Vienna school, such as *Verdross* and *Kunz,* Kelsen is unable to found international law primacy on logical cri-

teria. Theoretically, he claims, both international law primacy and national law primacy are possible.[20] The choice, he says, is merely subjective, a choice of values.[21] The national law primacy implies the sovereignty of the state (any state) as a legal order, the state legal order as the top of the pyramid in which other states and the international law are merely the constituent elements, (the "subjective" theory of international law), the international law primacy, that the states as legal entities form a part of the international law, that states thus are not sovereign but co-ordinated parts encompassed by international law.

Verdross and *Kunz* go further and argue that national law primacy is logically impossible and that, therefore, only the primacy of international law can be asserted. Absolute sovereignty, accordingly, can only pertain to international law. State sovereignty, if such there should be, is merely relative in the sense that no state is subordinated to another state, but to international law alone.[22] All states are thus directly and immediately subordinated to international law, and all their activities, in consequence, are regulated by that law. The "competence" of the states is conferred on them by international law; the "Kompetenz-Kompetenz" is vested in international law. Moreover, the rules of international law are principally rules of competence, the essential and necessary function of which is to settle the territorial, personal and temporal sphere of validity of the co-ordinated states (legal orders).[23] Yet there are no limits to the substance of international law.[24]

The *moderated monism,* which originated with *Verdross,* differs from radical monism in the sense that it admits the possibility of conflicts between international and national law.[25] A national law rule in contravention of international law is not a mere nullity, but leads a life of its own — at least temporarily — and it is applied by the national courts until the waves of international law dissolve the disharmony.[26]

The *basic norm,* the foundation of all norms, through which we are to understand the world we know and the world of "Sollen", was first assumed to be *pacta sunt servanda.* But criticized, *inter alia,* for not explaining the existence of customary rules in international law, this postulate was abandoned. For Kelsen the substitute reads: "The states ought to behave as they have customarily behaved",[27] and for Verdross, who cannot see that mere customary behaviour may create rights and obligations:[28] the subjects of international law shall behave as prescribed by the fundamental (general) principles based in the social nature of human integration, and the norms of treaty law and customary law generated on the basis of these fundamental principles.[29]

5. Criticism of dualism

The foremost critic of dualism is *Kelsen*. In his work entitled "Das Problem der Souveränitet und Theorie des Völkerrechts" published in 1928, and in later works, Kelsen spares no pains in dissecting the dualist doctrine. The following is a tentative appraisal of Kelsen's analysis.

When seeking to appraise Kelsen's analysis of dualism, one must never lose sight of the fact that Kelsen argues basically as a monist, that he primarily examines dualism from the viewpoint of his "reine Rechtslehre" — that he thus applies the "Deutungs-schema" of his own preconceptions and perceptions as developed in the "reine Rechtslehre" — that his reasoning is principally "Systemimmanent" — *i.e.*, it lies intrinsically within his own system.

The object of Kelsen's analysis is the logical — or correctly, "normlogische" — relationship between international and national law and he perceives, as a starting point, three possibilities: Either the two systems are wholly separated from, and independent of, each other; or they stand in a relationship of sub- and superordination; or finally, they are coordinated under a third legal system. The third possibility is immediately rejected without further inquiries. The analysis of the relationship, says Kelsen to begin with, is not a matter of inquiry into positive law, but merely a question of putting hypotheses to the test and: "Die möglichen Hypothesen systematisch zu entwickeln und in allen ihren Konsequenzen zu durchdenken."[30]

For this purpose, Kelsen selects three parameters for legal systems: The *source* of law ("Norm-Quelle"), the *object* of law ("Norm-Objekt") and the *subject* of law ("Adressat" or "Norm-Subjekt").[31] The source of law, in Kelsen's view, is the foundation of the legal order, the foundation of the *validity* of the order as such and the validity of all the norms in the order — their validity as norms in the legal order — *i.e.*, the basic norm. And since only a norm can grant validity to another norm, the basic norm also is a norm, as its denotation suggests, and therefore not a fact. This source, the basic norm, thus is the last outpost of all norms in a legal order, beyond which there is nothing in the world of "Sollen". It is moreover, according to Kelsen as we have seen, only a hypothetical norm: The validity of the legal order is consequently dependent upon the validity of the hypothesis. As the *object* of law, Kelsen understands the contents or substance of law, which is human behaviour — the conduct of men — in fact: "Das Recht regelt menschliches Verhalten, statuiert Pflichten und Berechtigungen, die menschlisches Verhalten beeinhalten."[32] The *subject* of law, on the other

hand, is not to be identified with the physical person — a person, in fact — but is the creation of law, an element of the world of "Sollen". All persons are therefore legal persons, which, says Kelsen, — in the world of "Sollen" — are nothing more than personifications of a complex of norms as a system, invoked for pedagogical purposes.[33] Physical persons become legal persons when qualified as such and endowed with rights and obligations according to a legal norm which constitutes part of a legal order. In consequence, separate legal orders have separate legal persons: "Der Verschiedenheit des Adressaten entspricht in voller Parallelität die Verschiedenheit des Adressanten; so dass als Grundsatz zu gelten hat: Verschiedene Ordnungen entspringen ebenso verschiedenen Quellen oder *Autoritäten,* wie sie sich stets und begriffsnotwendig an verschiedene *Personen* oder Adressaten richten."[34] ("Person" here means a legal person.) It follows too, that since a person is qualified as such — *i.e.,* as a legal person — only on account of a norm in a legal order, such a person is the subject of only one legal order. Other legal orders, if such exist, have their own legal persons. A *human being — i.e.,* a physical person, as distinguished from a legal person — may find his behaviour regulated by two separate orders — in Kelsen's view, at least two separate normative orders such as a legal order and a ethical order — and may *psychologically* be in conflict, but that is quite another matter.[35]

The critical criterion for the individuality — the independence — of a legal order, in Kelsen's view, is whether it has an independent source.[36] Two separate and independent legal orders can exist only when they are founded upon two entirely separate and independent sources (basic norms). Differences as to the object of law, constitute merely a secondary element and become significant as a distinguishing factor only when there exists a difference in sources. Separate legal orders may have different objects. On the other hand, it is also possible that two separate orders have — partly or fully — the same object, precisely as the object of a legal order and ethics may partly or fully coincide. Finally, since the subject of law wholly parallels the source of law, it cannot be a distinguishing factor.[37]

Such are the interpretative data, Kelsen's own paradigm — his "Deutungsschema" — that is applied to Triepel's dualism. Consequently, when the dualists maintain that international law and national law have different subjects — international law the states, and national law the subjects of the state — Kelsen's main objection is that there is no such thing as a state in the world of "Sollen": The state is nothing but a personification — a "Hypostasierung" — of a system of legal norms, a legal order. A differentiation between the state, as a legal order in the international sphere, and

the state also as a legal order in the national sphere is, according to Kelsen, not feasible, not at least if the separation of the two spheres is to be upheld.[38] Nor is the dualist conclusion that international law and national law have different subject-matters — or, in the terminology of Kelsen, different objects — acceptable. Both systems, Kelsen claims, have human behaviour as objects: What the dualists regard as state conduct is nothing but the conduct of men. And since one of the axioms of the "reine Rechtslehre" is that a legal order knows no limits with respect to contents, a separation of international law and national law on account of their objects is out of the question.

However, non-separability of international law and national law subjects and objects does not determine the issue. According to Kelsen's own premises, the dualism of legal orders is not contingent upon the possibility of such separations. Whether Triepel so suggested or whether he was merely describing the international — national law relation, without defining the exact criteria for dualism, is not entirely clear. Moreover, when Triepel saw states as subjects under international law — and state subjects as subjects under national law — he probably had in mind what in the Kelsen terminology would be referred to as the *object* of law; and the use of the word "state" might, after all, have been a mere metaphor. Thus Kelsen's analysis so far is primarily a clearing up and a disposal of what in Kelsen's mind are misunderstandings and misconceptions in the dualist construction.

What it all comes down to, if dualism is to be maintained, is whether international law and national law have independent sources. This is the crucial criterion, as Kelsen assumes. It is here that the emphasis of Kelsen's analysis and critique must lie. Yet it is here that Kelsen is least convincing.

Kelsen criticizes the concepts of "Staatswille" and "Willensvereinbarung" — the sources of national law and international law in Triepel's view — as being inappropriate as basic norms: they are expressions of facts and therefore not genuine norms and, secondly, they are diffuse.[39] Kelsen's criticism, however, does not yet reach the heart of the matter. It is true, the "will" does not constitute an expression of "Sollen" ("oughtness") — although it may easily be rephrased as such — and it is also true that the "Willensvereinbarung" is somewhat of an *unio mystica*.[40] But, again, dualism does not necessarily perish with Triepel's choice of sources;[41] nor does monism with Kelsen's choice of the basic norm, as we have seen.[42] Later representatives of the dualist school have selected other sources without undermining the dualist doctrine.[43]

What then is the *crux,* the crucial criterion, upon which dualism must

stand or fall? According to Kelsen's basic thesis,[44] the crux is whether the relationship between international law and national law can *logically* be one of dualism (and "relationship" cannot possibly here denote a normative relationship as between two norms in Kelsen's world of "Sollen", since that would be equal to asking whether dualism is identical with monism) or, in other words, whether the dualist construction, in spite of all its imperfections, is logically possible: Is it "norm-logically" tenable? The logical posture of the dualist doctrine, apart from these imperfections, is never really put to the test. When Kelsen argues that the international lawyer must disregard ("absehen") national law and the national lawyer international law; or that "eine gleichzeitige Geltung beider Ordnungen.... von demselben einheitlichen Standpunkte aus unmöglich ist"; or that "der auf der Basis einzelstaatlicher Rechtsordnung Stehende und in diesem Sinne als 'Jurist' Bezeichnete die Geltung völkerrechtlicher Normen in seinem Betrachtungsbereich nicht erfassen [kann]"; or that: "Ein Völkerrecht, das auf einen von der Quelle staatlichen Rechts gänzlich verschiedenen Ursprung zurückgeführt wird, ist für den 'Juristen' ebenso überhaupt nicht vorhanden"; or that, if international law and national law are two separate legal orders, "dann wäre sie vor die Möglichkeit eines Widerspruches zwischen beiden Ordnungen gestellt, den sie zu lösen ausserstande bliebe",[45] he is merely restating and rephrasing one of his fundamental premises for the analysis, namely, that norms in a legal order derive their validity from the source of the order — the basic norm — or that separate legal orders must derive their validity from separate sources, in other words, that two legal orders cannot be one.

In the end also Kelsen is forced to admit that dualism is logically possible: "Eine dualistische Konstruktion des Verhältnisses zwischen Völkerrecht und staatlichem Recht ist zwar logisch nicht unmöglich".[46] Narrowed down to its very essence, the question of relationship between international law and national law is a question whether the connecting link between these two spheres of law is a legal norm or whether it is the process of transformation. And, indeed, *this* question cannot be logically solved: it is a question of beliefs. Kelsen's analysis of the dualist construction may prove that the monist view is more reasonable from the viewpoint of the "reine Rechtslehre"; it does not show that monism is the only possible logical construction. As has been demonstrated, Kelsen's own premises allow that one and the same *human being* is given legal significance in separate legal orders.[47] (That *human beings* in government positions in the individual states may have been given legal significance in both international law and national law, is therefore not an entirely untenable proposition, which

would, at least partly, explain the "binding" character of international law).[48]

If the dualism — monism controversy cannot be settled by the application of strict logic, the question becomes: Do empirical studies offer conclusive evidence in favour of either theory? Seen from the standpoint of international and national courts, for instance, the answer again must be in the negative. The fact often called attention to by the monists,[49] as evidence for their view, that national courts apply international law, that the national courts, as *Verdross* suggests, independently (independently of the state, that must be) and directly apply international law rules, is merely a monist interpretation of facts. The dualist interpretation of the same facts would be as follows: National courts are regulated by national law, they are a part of the national law system and they apply international law rules on the sole ground that national law either explicitly or implicitly directs them to do so, by way of transformation of the international law rule into national law, by way of a specific incorporation of the rule, or by way of a general incorporation of the rule into the national law system.[50] *Blackstone's* proposition that "The law of nations ... is ... adopted, in its full extent by the common law, and is held to be a part of the law of the land",[51] would thus in the mind of a dualist be interpreted as a general — en bloc — incorporation of international law into national law. The additional fact, adduced in favour of monism[52] namely, that international treaties may be self-executory in some countries, may be regarded by the dualists as nothing else than a national law competence vested in the national government organs to create national law in this particular manner.[53] When Verdross claims to have found evidence of the fact that "innerstaatliche Verfahren *einer völkerrechtliche Kontrolle* unterworfen werden kann", in the possibility that, in certain instances, one state may require another state to bring its national law rules into harmony with international law,[54] he seems merely to be stating what the dualists do not deny, that the decisions of international courts may, in specific cases, require a state to take necessary action towards harmonization. As *Ross* observes,[55] only if the international court decision *eo ipso* should invalidate the particular national law rule in question, could Verdross' point be seriously maintained.

Nor is, on the other hand, the argument put forward by the dualists that monism is incompatible with the fact that national courts apply national law rules which contradict international law, exclusively in favour of dualism. To this the monist may reply first, that international law may tolerate temporary inconsistencies as matters of law, and secondly, that contradictions in law between international and national law are logically not poss-

ible in the dualist system.

What these few examples show is that the same facts can be taken as evidence for both dualism and monism. The controversy between these two schools, is in the end not so much a controversy on facts (whether they exist), but rather whether the facts and their interpretation offer evidence for one or the other theory.[56] Assuming thus that the dualist-monist dichotomy cannot be resolved by logical reasoning or empirical studies, that both logic and factual experience leave the controversy unsettled, what else is there to resolve the issue? What is it that makes an international lawyer prefer one before the other? It seems that the answer is, as Kelsen once held with respect to the choice between international law primacy and national law primacy,[57] that the choice is essentially a reflection of fundamental subjective conceptions of life in general and a result of an individual appraisal of the extent to which one or the other theory corresponds to these conceptions.[58]

6. Other theories

There is a strong tendency among international jurists to abandon the dualist-monist dichotomy on the ground that the theories are unsound, illogical or on the ground that they are divorced from realities.[59] The critique against both theories has emanated principally from advocates of the opposing school, but also from writers independent of both schools.[60] The criticism has resulted in the presentation of new theories, most of which, however, are more or less variations of dualism or monism. Some theories have grown out of criticisms of Kelsen that rest on a fundamental misunderstanding of Kelsen's perceptions and concepts. *Gerhard von Glahn,* for instance, submits that: "A reasonable interpretation of the entire issue would appear to be that international law is derived from domestic law through the openly or tacitly expressed will of the states recognizing the obligatory character of a rule of international law",[61] having concluded that: "States are, in practice, quite opposed to an acceptance of the idea that their authority was conceded to them by some outside agency or legal order. It would be very difficult to prove that any such concession or delegation had been effected in actuality when the states of the world themselves are the creators of the rules of international law."[62] What concerned Kelsen was not so much the historical basis of international law — a ques-

tion of facts — as Glahn seems to infer. Kelsen was rather devoted to the analysis of the *legal* basis of international law in its normative posture. The problem with Glahn, as with many others,[63] is that he attaches too many subjective value judgments to the concepts of Kelsen, especially to that of "delegation". He forgets that "delegation", as well as "sovereignty", strictly denote norm-logical relations. Historically, to take an example from the microcosmos, two persons who conclude a contract may have delegated or conceded some of their powers (competences) for the purposes of reaching an agreement concerning their mutual competences in some respects. From Kelsen's norm-logical point of view, the conduct of these persons (as human beings) is the object ("Norm-Object") of certain norms, the validity of which can be traced back to the contract, the validity of which may be traced back to the sentence *pacta sunt servanda,* etc.[64] further back to the basic norm. Or to take another example: Let us envisage for a moment the Indian tribes as nomads on the American continent before the white man set his foot there. Although some of these tribes may have lived in peaceful coexistence, let us assume that in the beginning the relations between the tribes took the form of a continuous struggle (for hunting-grounds, food, etc.). Assuming further that for the settlement of this endless struggle an agreement was reached at some point between the chiefs of the tribes (or at least of some tribes) as to the allotment of hunting-grounds. If these assumptions be correct: What is the norm-logical image of these supposed historical facts? Norm-logically the conduct of the chiefs of the tribes, and perhaps the tribes as such, is the object of norms whose validity may be traced back to the agreement and further back to the norm *pacta sunt servanda* until eventually we reach the basic norm — a mere hypothetical creation. "Delegation" here merely denotes this norm-logical relation between norms in a hierarchical system. In this sense, the concept does not debar the supposed *historical* fact that inter-tribial law was created by the tribes themselves. Thus, in a historical (or sociological) perspective, Glahn's theory may be accurate, but it does not, despite his suggestions in that direction, move Kelsen's theory one inch. The object of Kelsen's analysis is *the law as it is.*

An allegedly independent theory in this field is the theory of "harmonisation", introduced by *O'Connell.*[65] In the eyes of O'Connell both monism and dualism must be regarded as unsound; monism for treating the national system as a derivation of international law, thereby "ignoring the physical, metaphysical and social realities which in fact detach them"; and dualism for disregarding the "allprevailing reality of the *universum* of human experience".[66a] From the standpoint of the "harmonisation" theo-

ry, the correct understanding of the international-national law relationship is, O'Connell suggests, that international law and national law are "concordant bodies of doctrine, each autonomous in the sense that it is directed to a specific, and, to some extent, an exclusive area of human conduct, but harmonious in that in their totality the several rules aim at a basic human good."[66b] And this is what seems to be the core of the "harmonisation" theory: the perception of the fundamental and intrinsic unity of international law and national law in the idea of the law as an instrument for the solution of human conflicts and the benefit of humanity. For this purpose, O'Connell seems to suggest, law should be harmonious and free from contradictory rules of behaviour. Thus far the theory of "harmonisation", ostensibly at least, resembles Kelsen's postulate of "Einheit der Rechtsordnung". But, O'Connell proceeds, "[i]f contradictory rules in fact exist it does not follow that one of them must be void", thereby implying that both rules can be valid. Also Verdross' moderated monism allows some temporary conflicts to be eventually dissolved in the unity of law.[67] Is O'Connell thus a moderated monist? No, as we have seen in, *inter alia,* the quoted lines *supra,* O'Connell regards the two systems of law as autonomous, as two forces which do not meet or "like two wheels revolving upon the same axis"; "one system is not more elevated than the other ... both are on the same plane".[68] O'Connell's unity is accordingly not a unity of all law, as in the mind of Kelsen, but rather a unity of values anchored in the idea of human good.

Although O'Connell thus recognizes that two "conflicting" rules from international law and national law, respectively, may co-exist as valid rules, that they are mutually compatible, he denies that he is a dualist: "It will be readily apparent that while this permits of a jurisdictional dualism, it is far removed from traditional legal dualism which denied even the basic unity of the two systems, and hence rejected the possibility of a municipal judge ever resorting to international law for his rules of decision unless expressly authorised by his constitution to do so."[69] Hence, in O'Connell's view, national courts do directly apply international law without being authorized to do this by national law — but authorized by international law or some other law, the conclusion then must be — hereby emphasizing the incorrectness, as he sees it, of the dualist conclusion that rules of international law are applied in national courts on the basis of national law. Again, however, the national courts are not exclusively applying international law, but national law as well. For the national court judge then, if O'Connell's explications are correctly understood here, both international law and national law are valid, side by side. One of the principal functions

of the judge, as of all jurists, is, O'Connell points out, to eliminate contradictions between these two systems of law by harmonizing the points of conflict. Yet in the "rare instance of conflict" between the two systems, O'Connell's interjection is, the national judge is "obliged by his jurisdictional rules"; "he must take that course which his jurisdictional rule enjoins"[70] And later he repeats: "Rather he [the judge] must give effect to both [systems], within the limits of the competence conferred upon him, presuming that when he applies international law he encounters no obstacle from municipal law, and vice versa."[71]

In essence, the theory of "harmonisation" thus seems to imply — if viewed from the standpoint of the national court judge — the existence of two systems of laws, side by side, both valid and of "distinct formal origin"; both applied by the judge, international law by virtue of a non-national authority and national law by virtue of national law. Occasional conflicts are resolved by the invocation of a jurisdictional rule (of national law origin, it may be presumed). Compared with dualism, this theory bears one distinguishing mark: the fact that international law is not applied by virtue of national law. The independence of the theory thus seems to stand and fall with this distinguishing element. What then is the authority of the judge in this respect? Is it international law? Does the national court thus have two authorities, one of which is non-national and one of which much yield in the case of conflict? Is thus the national court in some respects independent of national law only to retreat to the national law domain in cases of conflicts? Is the court independent and dependent at the same time? One cannot escape the impression that O'Connell's principal source of influence is *Niboyet* in Mèlanges dédiées á Carré de Malberg,[72] on the issue of statutes and treaties: The French judge, according to Niboyet, must give effect to both the treaties and the statutes. Treaties and statutes are parallel systems of legal rules emanating from separate sources, primarily from separate government entities, the government and the parliament. They have different spheres of applicability; the first in the sphere of international relations, the second in the domestic domain. For the judge, both are applicable until they are repealed or annulled in the mode that treaties and statutes are to be annulled. In Niboyet's system, the national court would certainly seem to have two authorities: the treaty and the constitution. But on closer examination, does the court's authority to directly give effect to a treaty come from the treaty itself (international law) or does it come from the constitution? Niboyet and the contemporary French doctrine[73] did not, of course, regard the courts in France as international courts — which the acceptance of the first proposition would imply (direct

application of international law) — but as national courts giving effect to national law and treaties as an integral part of national law. Niboyet and his contemporaries were primarily discussing constitutional issues and the role of the courts in that respect.

Hence, if O'Connell is suggesting that the national court has two authorities — international law and national law — the courts in giving effect to both would be acting both as an international court and a national court. The court's "limits of competence" and obligations under the "jurisdictional rules" which O'Connell recognizes, must consequently emanate from either international law or national law. In case of conflicts, either system could — theoretically — hold a rule giving preference to either system; a rule which would direct the court to choose side. Excluding the possibility that international law is equipped with such a rule — it does not correspond to the realities — the rule would therefore have to be a national rule. If the competence of the court rests on national rules of jurisdiction, then the court must be a national court and not a court with double status.

There is no way in which a court can only *partly* be obliged by national jurisdictional rules. The same reasoning would apply whatever authority — other than international law and national law — O'Connell selects for the co-ordination of international and national law in the national court, and in support of his theory of "harmonisation"; and so also if the notion of "basic human good" is chosen as a legal authority — for a *legal* authority it must be. Should this notion on the other hand, be regarded as of a *meta-legal* character in the theory of "harmonisation", the theory cannot possibly add or take away anything from dualism or monism: The dualists or monists have never maintained anything other than that the object of law is human behavior, that the (sociological) basis of law is the solution of human conflicts for human good. What remains to be argued then is merely the scientific approach — *i.e.,* whether the legal scientist should pay attention to meta-legal elements and, if so, to what extent. Or to paraphrase the metaphor borrowed by O'Connell: Whether the two wheels are revolving upon the same axis or on two axes, is, from a dualistic point of view, of no consequence, if the substance of the axis is meta-legal.

It seems that O'Connell's "harmonisation" theory is nothing but a disguised dualism. When O'Connell points out that "[t]he theory of harmonisation assumes that international law, as a rule of human behaviour, *forms part of municipal law* and hence *is available* to a municipal judge",[74] this is really a dualist opinion.

7. Conclusion

At the outset of this chapter the question was put: Does the dualist-monist dichotomy have any bearing on the jurisdictional principles of international law — to the extent that such exist — and particularly on the *substance* of these? Having analyzed the specifics of the dualist-monist controversy, the answer must be: No, none at all. Representatives of both theories (leaving aside, as the premise was, the state primacy of monism) regard international law as binding law, and this is what really matters. The theories must be viewed in the right context. They are theoretical constructions — hypotheses — and systematizations of the legal material, developed for the better understanding of law, and for these purposes they have a function to serve. As to the substance of international law, they reveal nothing.[75] To be put in the center is the binding character of international law upon states, binding at least in the sense — to speak with *Ross*[76] — that international law holds rules with provisions as to national law substance, but not *vice versa*. And, in practice, states and national courts take notice of international law, although the way in which this is done varies from state to state (and to some extent probably, from court to court). To complete the picture some fragments of the practice will therefore be provided for in the following. Most representatives of the international law doctrine[77] agree that

1 national courts apply national law and international courts international law, and that national law is applied, as facts, in international courts, and *vice versa;*[78]
2 a state cannot justify its violation of international law by invoking national law (not even the constitution) in contradicion of international law, whether in international courts or as against another state;[79] in international litigation, the international law is supreme;
3 the conclusion in international litigation that a national law rule is contrary to international law, does not nullify the rule for national law purposes;[80]
4 national courts apply international law rules to the extent that these have been transformed to, adopted by, or in any other way incorporated into national law;[81]
5 national courts interpret general and ambiguous national law rules in a way consistent with international law;[82]
6 in case of conflict between national law and international law, the national courts will generally give preference to the national law rule; as

to the relation between treaties and statutes, the national courts in most states seem to apply the principle *lex posterior derogat legi priori,* while in some states, treaties take precedence over subsequent statutes.[83]

These are some aspects of the relationship between international law and national law as developed in practice and interpreted in the doctrine. To these the practice in the *United States* and the views of American international lawyers form no exception.[84]

Notes, chapter VII

[1] Berber, at 95. *Cf.* Ross, at 71.

[2] See e.g. Berber, at 95; O'Connell, at 38 ff., 42.

[3] See e.g. Gihl, Internationell lagstiftning, at 5 ff.

[4] Triepel, Völkerrecht und Landesrecht (1899).

[5] *Id.*, at 25 f.

[6] *Id.*, at 53 f.

[7] *Id.*, at 70.

[8] *Id.*, at 20.

[9] See Anzilotti, Il diritto internazionale nei Giudizi Interni (1905); Walz, Völkerrecht und staatliches Recht (1933); Heilborn, Grundbegriffe des Völkerrechts (1912), at 88 ff.

[10] Anzilotti, *supra* n. 9, at 202 ff.

[11] In later writings, Anzilotti considers the maxim *pacta sunt servanda* as the source of international law, *see e.g.* Anzilotti, Cours de droit international, I. Trad. par G. Gidel. (Paris, 1929). *Cf.* Heller, Die Souveränität, at 155 ff.

[12] See Oppenheim's introduction to Picciotto, The relation of International Law to the Law of England and of the United States of America (1915).

[13] See further, e.g. Walz, Wesen des Völkerrechts und Kritik der Völkerrechtsleugner (Stuttgart, 1930); Kelsen, Das Problem der Souveränität, at 151 ff. The the theory of "autolimitation" is usually ascribed Jellinek; *see* Jellinek, Die rechtliche Natur der Staatenverträge (Wien, 1880).

[14] See e.g. Wengler, at 96 and O'Connell, at 42 f.

[15] O'Connell, at 42.

[16] The concept "radical" monism, however, does not originate from Kelsen.

[17] See Kelsen, Das Problem der Souveränität; Allgemeine Staatslehre (1925); Reine Rechtslehre (1934).

[18] The pioneer here is in many respects Bierling, see Zur Kritik der Juristischen Grundbegriffe, I, (Gotha, 1877) and Juristischen Prinzipienlehre (Vol. 1 and 2, 1894 and 1898). See further, Vogel, at 241 ff.

[19] From the basic norm, for instance, that "you shall endeavour to avoid trouble", one can draw no conclusions as to the content of the legal norms derived from the basic norm. Any content is possible. Nor can a legal norm such as "you shall not steel your neighbour's apples" exist — or be valid — by virtue only of the fact that it can be logically deduced from the basic norm.

[20] Kelsen, Allgemeine Staatslehre, at 134 ff.

[21] Kelsen, Das Problem der Souveränität, at 317 and 320.

[22] See Verdross, Völkerrecht, at 111 ff.; Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung (1923); Die Verfassung der Völkerrechtsgemeinschaft (1926); Kunz, Die Staatenverbindungen (1929). Also see Kunz, The Changing Law of Nations, 59 ff., at 85 ff.

[23] Kunz, The Changing Law of Nations, 59 ff., at 94;

[24] *Id.*, at 92.

[25] See Verdross, Völkerrecht, at 112 ff. *Cf.* Kelsen, Das Problem der Souveränität, at 113 and 146. But see Kelsen, Principles of International Law (1952), at 419 f.

[26] See Verdross, Völkerrecht, at 113. *Cf.* Kelsen, Principles of International Law (1952), at 419 ff.

[27] Kelsen, Principles of International Law, at 417 f. *Id.* (2d ed.), at 564. Also see Kelsen, General Theory of Law and State (1946), at 369. *Cf.* Guggenheim, at 6 ff.

[28] Verdross, Völkerrecht, at 22 f.

[29] *Id.*, at 24 f. It is, in Verdross' view, more correct to speak of a *system* of legal principles, rather than of one single basic norm, *id.*, at 25.

[30] Kelsen, Das Problem der Souveränität, at 103 f.

[31] *Id.*, at 103 ff.

[32] *Id.*, at 125.

[33] *Id.*, at 109.

[34] *Id.*, at 109 f.

[35] *Id.*, at 110.

[36] *Id.*, at 107.

[37] *Id.*, at 107 ff.

[38] *Id.*, at 132.

[39] *Id.*, at 134 ff.

[40] *Cf.* Gihl, Studier, at 14; Internationell lagstiftning, at 10.

[41] *Cf.* Jägerskiöld, Folkrätt och inomstatlig rätt, at 89.

[42] See *supra* p. 345.

[43] See e.g. Cavaglieri, Lezioni di diritto internazionale (1923), at 44 ff.; Anzilotti, *supra* n. 8; Strupp, Grundzüge des positiven Völkerrechts (5th ed., 1932). *(Pacta sunt servanda).*

[44] See *supra* p. 346.

[45] Kelsen, Das Problem der Souveränität, at 121 f.

[46] *Id.*, at 150.

[47] See *supra* p. 347.

[48] *Cf.* Ross, at 73.

[49] Verdross, Völkerrecht, at 117; Guggenheim, at 32 ff.

[50] See Ross, at 71 f.; Brownlie, at 44 and 59. See further *supra* p. 320 f.

[51] Blackstone, Commentaries on the law of England, IV, Ch. V.

[52] See e.g. Verdross, Völkerrecht, at 112. *Cf.* the theory that international law applies directly to individuals, see e.g. Brierly, The Basis of Obligation in International Law; Starke, International Law (1946).

[53] *Cf.* Brownlie, at 53.

[54] Verdross, Völkerrecht, at 113.

[55] Ross, at 72.

[56] *Cf.* Ross, at 70 f.

[57] See *supra* n. 17—18.

[58] *Cf.* Ross, at 72 f.

[59] See e.g. O'Connell, at 43; Brownlie, at 36; Ross, at 73 (in some sense).

[60] See e.g. Vogel, at 241 ff.; Heller, Die Souveränität; Ago, Scienza giuridica e diritto internazionale (Milano, 1950); Berber, 94 ff.; Fitzmaurice, 92 Recueil des Cours 68 (1957, II); Rosseau, Droit international public, at 10 ff.; Bruns, Völkerrecht als Rechtsordnung, I ZaöRV I (1929); Glahn, Law Among Nations, at 5 ff.; O'Connell at 39 ff. See further Brownlie, at 36.

[61] Glahn, Law Among Nations, at 7.

[62] *Id.*, at 6.

[63] See e.g. Fitzmaurice, *supra* n. 60.

[64] See e.g. Kelsen, Das Problem der Souveränität, at III ff.

[65] O'Connell, at 43 ff.

[66a] *Id.*, at 43.

[66b] *Id.*, at 44.

[67] Verdross, Völkerrecht, at 112 f.

[68] O'Connell, at 45 f.

[69] *Id.*, at 45.

[70] *Id.*

[71] *Id.*

[72] Published in 1933.

[73] See e.g. Rousseau, Principes généraux de droit international public I (1944), at 265 ff.; Plaisant, R., Les règles de conflit des lois dans les traités (1946); Scelle, Précis de droit des gens 2 (1934), at 362 f.

[74] O'Connell, at 45 (emphasis added).

[75] *Cf.* Drost, Völkerrechtliche Grenzen, at 130:"[E]s geht nicht an, aus Konstruktionsbegriffen, die zur Erfassung eines Rechtsinhaltes erst gebildet sind, nun etwa wieder Folgerungen für den Inhalt eben dieses Rechts ziehen zu wollen. 'Non ex regulaxius sumatur, sed ex jure quod est regula fiat'"

[76] Ross, at 72 f.

[77] See e.g. Ross, at 73 ff.; Brownlie at 39 ff.; Berber, at 105 ff.; Verdross, Völkerrecht, at 117 ff.; Guggenheim, at 26 ff.; O'Conell, at 46 ff.; Schwarzenberger, A Manual of International Law, at 40 f.; Jägerskiöld, 151 ff.

[78] See the Case Concerning German Interests in Polish Upper Silesia, P.C.I.J., Ser. A, No. 7, p. 19 (1926).

[79] See e.g. Berber, at 106; O'Connell, at 47 f.; Restatement (2d) of Foreign Relations Law, § 3, Comment i.

[80] See e.g. O'Connell, at 48.

[81] See e.g. Ross, at 73 ff.; Berber, at 107; Wengler, at 84 ff.

Outside the scope of the discussion here has been the question of whether the individual state considers treaties (bilateral or multilateral agreements, other international agreements) to have *direct immediate effect* (self-executing) within the individual state, *i.e.*, whether the nationals of the state can claim that the treaties be directly applied by the municipal courts and authorities of that state, or whether some form of implementation (transformation, incorporation) of the treaty is required in order for the treaty to be placed on a par with national law and applied as such by municipal courts and other authorities. This is, of course, a question of national law. International law does not require the use of one or the other method. According to international law, states as such are bound by the international agreements to which they are parties. If a treaty provides that the nationals of each agreeing state shall have the right to invoke the provisions of the treaty before municipal courts and authorities, the agreeing states are obliged by international law to confer that right on their nationals. The method applied in doing so, however, is for the states themselves to choose. It is only in the rare instance where the treaty itself provides that it shall have direct effect, that the agreeing states are bound by a certain method, bound by international law that is, to allow the treaty to have direct effect.

The law of the United States in this matter, as interpreted in Section 141 of the Restatement (2d) of Foreign Relations Law, is that a treaty has direct effect — is self-executing — if an intention to that effect is manifested (in the specific case) and if the treaty is constitutionally valid. In the absence of a manifested intention, a treaty has to be transformed into United States law.

In Sweden, the legal situation in this respect is unclear. The Norwegian Castberg concludes that Sweden has adopted the dualist system and with it the dogma that treaty provisions must

be transformed into internal law or "incorporated by legislation" to become effective in Swedish law (see Castberg, F., The European Convention on Human Rights, Oslo 1974, at I). Danelius agrees. In his view the "traditional" position in Sweden is, and has been, that a treaty must be transformed or incorporated in order to become effective within Sweden in the sense that rights are conferred and duties imposed upon Swedish nationals. (See Hans Danelius, Mänskliga rättigheter, Lund 1975, at 43. Also see H.-H. Lidgard, Sverige — EEC och konkurrsen (Lund, 1977), at 32 ff. and 83 ff. Gustav Petrén, Europarådet och de mänskliga rättigheterna (contribution to discussion), SvJT 1979, p. 39; Departementspromemoria, Justitiedepartementets departementsserie (Ds Ju) 1980:13, at 35; Statens offentliga utredningar (SOU) 1974:100, at 44. The position of Jägerskiöld in Folkrätt och inomstatlig rätt, at 65 ff. and 206 ff. is somewhat ambiguous and cannot be discussed further here). The "traditional" position — the transformation theory — has according to Danelius been upheld in recent case law (Danelius here refers to Arbetsdomstolens Domar (AD) 1972, No. 5 (Lokmannamålet), Nytt Juridiskt Arkiv (NJA) 1973, p. 423 (Sandströmmålet) and Regeringsrättens Årsbok (RÅ) 1974, p. 121 (Råneåmålet).

The view that the transformation theory is the law of Sweden is actively — and apparently on good grounds — challenged by J. Sundberg (Europakonventionen och Sverige, Svensk Rättsforum, No. 14 and Svensk rätt under Europakonventionen, Svensk Rättsforum, No. 20/21. Also see Eek, Folkrätten, at 265 f.; Eek in Juridikens källmaterial, 9th ed., Stockholm 1979, at 61 f.; H. Sundberg, Lag och traktat, Uppsala 1934, at 42 ff. and 49 ff.; Undén, Studier i internationell äktenskapsrätt I. Lund 1913, at 3 f.; Malmlöf/Mellqvist, Om statens skadeståndsansvar vid myndighetsutövning, Studier kring Europakonventionen, Institutet för offentlig och internationell rätt, No. 47, Stockholm 1982, p. 25, at 43 ff.). Sundberg denies that there is, or ever has been, a principle in Swedish law according to which treaties must be transformed in order to become effective within Sweden. The support that can be extracted from the case law for the transformation theory (see the cases referred to *supra*), Sundberg argues, is weak. (*Cf.*, Malmlöf/Mellqvist, *supra*, at 46 ff.). Moreover, the practice of Swedish authorities is inconsistent.

So much seems certain that even if there would exist a principle according to which treaties must be transformed in order to become effective, the principle is in no way absolute. There are treaties which do not reguire transformation. Danelius (*supra*, at 44), for instance, seems to suggest that treaties imposing obligations upon Sweden which are met by already *existing* principles and rules in the Swedish legal system, need not be transformed. (*Cf.* the Swedish Supreme Court case NJA 1973, p. 423, *supra*, at 438). Hence, whether or not transformation is required is essentialy a question of interpreting the law in Sweden at the time of the making of the treaty in light of the treaty obligations and, further, establishing the view of the treaty-making organs with regard to the question whether Swedish law conformed to the treaty obligations at that particular time. However, it is also conceivable that treaties not "codifying" existing principle and rules (but imposing obligations not corresponding to Swedish law) have direct effect within Sweden. Thus, for instance, it seems that treaties containing provisions clear and concrete enough to form the basis of individual complaints, do not have to pass the transformation process in order to become effective within Sweden. It is admitted, the support for this view is not strong; on the other hand, the support against is neither.

[82] See e.g. Restatement (2d) of Foreign relations Law, § 3, Comment j.; Ross, at 77.

[83] See e.g. Berber, at 107,

[84] See the Restatement (2d) on Foreign Relations Law, §§ 3 and 141 ff.; Berber, at 98 f; Jägerskiöld, at 179 ff.

Chapter VIII
National jurisdiction under international law

1. Introduction

There exists, as we have seen, a general consensus among international lawyers that international law is binding on states. This binding character of international law — its "Kompetenz-Kompetenz" — is accepted, whether the doctrinal basis with respect to the international-national relationship is dualism, monism or any other theory. Few, if any, deny the obligation of the states to adhere to international law.

In light of this fact one might, at first blush, find the conclusion reached by *Brewster*[1] — in examining the reach of American antitrust law — somewhat surprising: "Since there is no binding external authority to which the United States has submitted these questions, any limitation [of the reach of the antitrust law], in the last analysis, is self-imposed. In that sense, the decision to restrict jurisdiction is a matter of national policy, not sovereign power."[2] This, however, is not what it seems to be: a relapse into Hegelian state supremacy or Jellinek's "autolimitation" theory. The conclusion is based rather on the findings, *lex lata*, by Brewster, that "international legal tribunals have not set a positive limitation upon the *power* of a state to regulate conduct abroad",[3] treaties apart. The suggestion thus seems to be that this area of national jurisdiction is unregulated by international law, or, in other words, that the states are free to exercise their powers and regulate in this area without limitations of international law. "Unregulated" here may have at least three connotations: either that

1) the area alluded to falls exclusively within the national law sphere and is thus excepted from international law regulation, *i.e.*, that international law *cannot* possibly regulate this area;
2) the area has not yet been regulated by international law and that it, therefore, constitutes a *lacuna* in international law, an area for which international law prescribes nothing: no prohibition, no obligation, no permission, no sanction; or that

3) the area of antitrust law is, at present, unregulated by international law and that, therefore, either the states are free *by virtue* of international law to regulate at their own discretion (such regulation is *permitted*); or else the states are not free to regulate at their own discretion, but are obliged to await positive international law regulation, and until such has developed, there is under international law a prohibition against taking independent action. The choice in this third alternative is often characterized as the presumption for or against the freedom of the states.

While it seems clear that Brewster in his analysis was referring to the third alternative and presumed the freedom of the states, other legal writers, as we shall see, have anchored their arguments in one or more of the other alternatives. A general survey is therefore warranted.

2. The so-called exclusive jurisdiction of states

To be inquired swiftly henceforth is whether there is any subject-matter which falls exclusively within the domestic sphere of the state, *i.e.*, that, as a matter of principle — or by its very nature — falls outside the scope of international law. That this is so may seem to be the opinion of, for instance, *Beckett,* who categorically declares that the jurisdiction exercised by a state over its own nationals in relation to acts performed at home or abroad, "can *never* be the concern of any other state and is therefore *quite outside* the sphere of international law."[4] Is there thus an exclusive competence — a domaine réservé — of states which is wholly beyond the control of international law?

The answer does not depend on whether one is a monist or dualist. *Triepel* (in "Völkerrecht und Landesrecht") views a considerable part of national law as irrelevant — or indifferent — from the perspective of international law. This, he claims, is particularly true of the Conflict of Laws (including private-, criminal-, procedural- and administrative law), and he continues: "Das *wirkliche* Völkerrecht jedem Staate die volle Freiheit lässt, seine Normen auch an Personen zu richten, die sich im Auslande befinden, gleichviel, ob sie seinem Staatsverbande angehören oder nicht, dass ihm aber auch unverwehrt ist, die Uebertretung dieser Normen, soweit er es mit seinem Berufe vereinbar ... mit Strafe zu bedrohen ... so werden zahlreiche, wohlerwogene Verschriften staatlicher Gesetze ... sich in den Bereich völkerrechtlich irrelevanten Landesrechts zurückziehen können."[5]

On its face the views of Beckett and Triepel would seem to coincide, at least insofar as the regulation of state nationals concerns. Triepel, however, is merely making a statement *lex lata*. In the future, he recognizes, the situation may very well change, hereby indicating that this particular area is not excluded *in principle* from the international law domain. In light of the continuing change of international law, Triepel apparently implies, all subject-matter can sooner or later be covered by international law: "Ja selbst für jedes einzelne Landesrecht müsste sich die Untersuchung auf einen genau fixierten Zeitpunkt beschränken, um sicher zu gehen. Denn da sich das Völkerrecht nicht ewig gleich bleibt, so kann die vökerrechtliche Relevanz des staatlichen Rechtssatzes von heute auf morgen wechseln."[6] Triepel's analysis of jurisdictional rules thus has relevance only for his particular period of time.

Kelsen argues in a similar sense, when he maintains that there is no subject-matter which, by its very nature, falls within a state's domestic domain.[7] International law has the competence (capacity) to regulate *any* subject-matter, a consequence of the international law primacy over national law. For Kelsen there is only two possibilities: either the particular subject matter is regulated by general international treaties, general custom or otherwise by international law, or else it is not (at least not yet) encompassed by international law. In the former case, national jurisdiction is subject to international law, in the latter, the states are free *by virtue* of international law to design their own law as they wish. In order to determine whether a specific subject matter falls within one or the other category, an analysis of the international law must be made at each relevant moment; the international law is an ever changing materia. The omnipotent and omnivorous character of international law, in the sense now indicated, is widely accepted today. Thus Brownlie, for instance, concludes that "[t]he general position is that the 'reserved domain' is the domain of state activities where the jurisdiction of the state is not bound by international law: the extent of this domain *depends on* international law and *varies* according to its development. It is widely accepted that no subject is irrevocably fixed within the reserved domain ...".[8] And Dahm is in accord: "[D]er vorbehaltene Hoheitsbereich [ist] offenbar *variabel*. Sein Inhalt und Umfang hängt von dem jeweiligen Stande des VR ab."[9]

Those who do not unreservedly accept the prevailing view, claim that the states must retain a minimum of reserved jurisdiction in order to remain independent: an "irreducible sphere of rights which are somehow inherent, natural, or fundamental" for the states; a minimum of sovereignty.[10] This is presumably how *Verdross* must be understood when he argues that the

international law may limit the sphere of domestic jurisdiction but not abolish it in its entirety, as international law presupposes the existense of sovereign states.[11] Following Verdross is *Schaumann* when he infers that if there are no particular fundamental rights which always and by necessity must be excluded from international law regulation, then at least a certain *degree* of independence must remain with the states.[12]

There is thus, according to these scholars, a borderline, the crossing of which jeopardizes the very existence of international law. This occurs when the domestic domain is so much circumscribed by international law as to imply the extinction of he sovereign state, without which there is no international law. The question is, however, at what point does circumscription grow into extinction? If it is accepted that international law is binding upon the states, the answer must, of course, lie in international law. In other words, it is international law that determines the borderline. Theoretically, international law may fix a borderline tomorrow far beyond the line we have today, in infinity, and yet remain an international law. Consequently, this borderline is as much a variable as any other in the area between the international and the national spheres.

The problem of domestic — exclusive — jurisdiction is otherwise commonly associated with the former Article 15, Paragraph 8 of the Covenant of the League of Nations and its substitute, Article 11, Paragraph 7 of the United Nations Charter and the scope of United Nations jurisdiction. The latter clause — a modification of the former — reads:

"Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

Intervention in matters of an essentially domestic nature is thus not permitted. A matter of slight controversy has been the interpretation of the locution "essentially" (formerly "solely"), especially whether it is a quantitative or qualitative standard, with a view to defining objective criteria for the application of the Article. The qualitative standard, invented by *Verdross*,[13] seems to suffer from the same deficiencies as his theory of "minimum sovereignty", discussed immediately above. The quantitative standard as advanced *inter alia* by *Dahm*[14] is both grammatically and logically more agreeable. However, the real stumbling-block here seems to be how to seclude a certain subject-matter from a broader area, *i.e.*, to determine when a matter is a "matter".[15] How arduous this task may be, the

following will demonstrate: Assuming, *arguendo,* that legislation directed to a state's own citizens and domiciled persons within the state is an area which normally falls within the domestic domain. Shall a statute regulating the conduct of citizens of the state living abroad be regarded as an independent area ("matter") or shall it coalesce with the indicated broader "matter"? What if the statute contains a broad definition of citizenship, would it still be regarded as a fraction of legislation concerning a state's own citizens? Is a statute regulating the conduct of foreign citizens within the state an independent matter, or does it "essentially" fall within the realm of the broader area? Is a statute regulating the conduct of foreign citizens abroad a "matter" of its own? What if a statute has such a wide definition of conduct at home as to cover also what others would regard conduct abroad (in other words, a difference in views on how to localize the conduct)?

At some point the essentially domestic matter turns into a matter of international law, loses its domestic character, separates itself from the domestic bounds and becomes an international affair. The only question is when?

The interpretation of the "domestic jurisdiction" clauses in the Covenant and the Charter has another dimension. There is a dividing line between those scholars who claim that all "matters" not regulated by international law are *ipso facto* of exclusively domestic concern within the meaning of these clauses, and those who advocate the view that the domestic jurisdiction exemption must be much more narrowly interpreted to include only such matters as are specifically assigned to the states by international law. In the view of the former group of scholars, "matters" can be characterized as either *international,* because they are *not* regulated by international law, although there is nothing to prevent them from being so at any time.[16] In the view of the latter, "matters" can be characterized as *international* because regulated by international law, *domestic,* because specifically defined and distributed to the states as such by international law, and finally as neither international nor domestic, but rather "*intermediate*", because, although not regulated by international law, they fall outside the domestic domain.

Thus, *Rolin,* a representative of the latter view, makes a distinction between the "domaine réservé" and the "matters" not (yet) regulated by international law and reaches the conclusion that "entre le domaine réservé et le domaine réglé ou lié, il y a une zone intermédiaire, transitoire, un domaine qui n'est plus réservé et qui n'est pas encore réglé, en sorte qu'il demeure discrétionnaire."[17] Article 2, Paragraph 7 in the Charter, in

Rolin's view, restricts itself to the "domaine réservé".[18] And *Verdross,* in the same spirit, perceives three categories of "matters": 1) matters regulated by general or specific (regional) international law; 2) matters that are exclusively domestic by virtue of international law, *i.e.,* matters to which the clause in the Charter refers and as to which intervention is not permitted. (Under which category a "matter" is to be subsumed may, on the other hand, be a subject of discussion); and 3) all other matters that are not *in concreto* regulated by international law, but which belong to a category of law ("Rechtsgruppe") that as a matter of principle would be encompassed by international law, such as (Verdross exemplifies) human rights, matters concerning the outer space and forms for indemnification.)[19]

This three-partitioning has recently also convinced *Rosswog:* "Nicht jede Angelegenheit, die weder durch partikuläres noch durch allgemeinen Völkerrecht eine nähere Ausgestaltung erfahren hat, fällt allein schon wegen dieser fehlenden völkerrechtlichen Regelung automatisch in den nationalen Zuständigkeitsbereich der Staaten."[20]

The basis for the findings of these writers is the wording, character and purpose of Article 11, Paragraph 7 itself. Verdross expounds: *First,* assuming that the competent organ of the United Nations should be forced, *in casu,* in order to establish the exact extent of the exclusive jurisdiction, to inquire into the exact reach of international law regulation. This implies, that the organ would have to categorize all "matters" in accordance with international law ("Sie hätten also alle angelegenheiten ... *nach Völkerrecht* zu beurteilen")[21] — a pure court function. But this would be incompatible with the Charter, according to which the Security Council has a political function — not a court function. *Secondly,* should "matters" in the domestic domain correspond to those not regulated by international law, any state before the competent organ of the United Nations would, *in casu,* be entitled to request the organ to determine whether the "matter" in controversy is or is not regulated by international law. Such a decision, however, would end the controversy, for then we would know whether there was a violation of international law, or not. In this way the Security Council's function as a peace mediator would be wholly paralyzed. Thus, in the interest of maintaining peace, as Rosswog would understand it,[22] there must be an intermediate zone.

To support this interpretation of Article 11, Paragraph 7, Rosswog invokes the case of *Nationality Decrees in Tunis and Morocco,*[23] which concerned the construction of Article 15, Paragraph 8 of the League Covenant. In its advisory opinion the Permanent Court defined domestic

matters as "certain matters which though they may very closely concern the interests of more than one State, are not, in principle, regulated by international law. As regards such matters each State is sole judge."[24] It is agreed, and as *Gihl* already has demonstrated,[25] the case may give support to the theory of an intermediate zone from the perspective of these clauses. On the other hand, as Rosswog himself recognizes,[26] the case may also support the "opposite" theory.[27]

Which of these theories is to be preferred will not be discussed further herein; the relevance of this issue is much too slight for the purpose of the present thesis.[28]

Of far greater interest is the question whether the theory of the intermediate zone is restricted in application to the two clauses in the Charter and the Covenant, or whether it is valid for the entirety of general international law and, if this is so, if it is of any significance for the subject of this thesis. We have seen, that for the functioning of the United Nations' organs, it might be argued that an intermediate zone is essential. Would it be so for an international court? At least Rosswog seems to think so when he concludes: "Aber nicht nur eine Analyse der Aufgaben der Weltorganisation, sondern auch eine allgemeine Überlegung, die das Verhältnis von Staat zu Staat berücksichtigt und sich am wesen des Vorbehaltsbereiches sowie an der Grundstruktur des Völkerrechts orientiert, rechtfertigt es, den nationalen Zuständigkeitsbereich der Staaten nur als einen Ausschnitt aus der 'competénce discrétionnaire' anzusehen."[29] The arguments presented by Verdross, discussed above, on the interpretation of Article 11, Paragraph 7 of the Charter for the functioning of the Security Council could not possibly be invoked in this context, since we are no longer dealing with political functions. Instead Rosswog reasons that there exists no intrinsic ground ("innere Grund") for an identification of the exclusive domestic domain with matters unregulated by international law.[30] Such an identification would rather lead to a "Aufweichung des Ordnungsgefüges des Völkerrechts" and to a "Gefährdung des internationalen Friedens".[31] In contradistinction to *Politis*,[32] who, some thirty years earlier, also saw an intermediate zone in the international law structure ("le domaine réservé par abandon") an area wholly unregulated by international law and within which, therefore, the states had complete freedom, Rosswog is prepared to allow such freedom only when there is no rule of international treaty or customary law, or recognized general principle of law[33] that is applicable.[34] While Politis' "domaine Réservé par abandon" is *out of the control,* Rosswog's 'compétence discrétionnaire" is *under* the control, of international law.[35] One can only ask: Why work with an intermediate zone if, in fact, it

is controlled and regulated by international law? Why not simply speak of temporarily regulated and temporarily unregulated matters?

Rosswog's real problem starts, namely, when he attempts to establish criteria for defining the area in which the states have exclusive competence ("compétence exclusive"). Having advocated an intermediate zone, Rosswog recognizes that on such a basis one cannot select as criterion the fact that a matter is unregulated by international law: that would be denial of the existence of an intermediate zone. The criteria shall rather be based on the contents and nature of the exclusive area. (How can one base criteria for the determination of the contents of the exclusive area on the contents of that area?) Since international law is in a state of constant change, Rosswog proceeds, no general (abstract) and fixed borderline can be established.[36] The determination must be made indenpendently in each specific case.[37] From this Rosswog draws up his first formula: Qualified as exclusive matters are those which "nach allgemeiner Rechtsüberzeugung ihrem Wesen nach nur jeden Staat allein betreffen und an denen dritte Staaten kein legitimes Interesse haben können"[38]. However, by "legitimes Interesse" Rosswog does not understand political or economic interests; these have a much too subjective character. There is basically, he explains, in these times of growing interdependence between states, hardly any matter which does not in any way — politically or economically — damage or at least affect the spheres of interests of third states or of international organisations[39]. "Legitimes Interesse" thus equals the *legal* interest.[40] Rosswog is likewise correct in concluding that the question of the borderline between international and domestic matters is a question of law, the establishing of which must be founded on international law. But the problem is, what is a "matter" of legal interest? What else could it be than a matter regulated by international law. And simultaneously: What else could an exclusive matter be than a matter *not* regulated by international law? In the end, Rosswog must return to the criterion which he rejected at the outset: exclusive matters are those which are not regulated by international law. This is clearly evidenced by Rosswog's own words: "Ein rechtliches Interesse an gewissen Angelegenheiten haben dritte Staaten nur sicherlich dann, wenn diese Angelegenheiten Gegenstand internationaler Rechtsnormen sind ... Ein rechtliches und damit beachtliches Interesse dritter Staaten wird ferner für den Fall zu bejahen sein, dass die Existenz dieses Interesses die Anerkennung des Völkerrechts gefunden hat."[41] A legal interest is finally, according to Rosswog, one that could be founded on the United Nations' Charter.

By selecting as an objective criterion legal interests based on inter-

national law for the demarcation of the "competence exclusive", Rosswog in effect is denying the existence, or at least the "innere Grund", of an intermediate zone in the structure of international law.[42]

By so concluding we have not yet, however, ruled out the possibility proposed by *Politis* and presented above,[43] that there is an intermediate zone uncontrolled and unregulated by international law, beyond the area regulated by international law and the exclusive competence of the states, assigned to these by international law, an intermediate zone in which states are entirely free to act at their own discretion, a no-man's-land, an absence of law, a *lacuna* in international law ("rechtsfreier Raum").

Notes, chapter VIII

[1] Brewster, at 287.

[2] Also see Mann, ("Studies"), The Doctrine of Jurisdiction, at 14 (*critical*).

[3] Brewster, at 288.

[4] Beckett, The Exercise of Criminal Jurisdiction Over Foreigners, 6 B.Y. Int. L. 44, at 45 (1925).

[5] Triepel, Völkerrecht und Landesrecht, at 275 f.

[6] *Id.*, at 284.

[7] Kelsen, The Law of the United Nations, at 770 f.; Principles of International Law, at 198.

[8] Brownlie, at 284 f. (emphasis added, footnote omitted).

[9] Dahm, at 212 f. Also see, Brownlie, at 284 f.; Kaiser, Internationale und nationale Zuständigkeit im Völkerrecht der Gegenwart, 7 Berichte I, at 13 (1967) 1. Münch, *id.*, at 50; Ross, at 52; Constitution of the United Nations, at 120; Gihl, Huvuddrag, at 140; Internationell lagstiftning, at 84; O'Connell, at 310 f.

[10] See Preuss, Art. 2, paragr. 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction, 74 Recueil des Cours 547, at 567 f. (1949, 1). *Cf.* Eek, Folkrätten, at 378 f.

[11] Verdross, Völkerrecht, at 514. *Cf.* Preuss, *supra* n. 10, at 556; Wehlberg, Der nationale Zuständigkeitsbereich der Staaten nach der Satzung der Vereinten Nationen, 2 Arch.d. VR 259, at 260 (1950); Politis, Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux, 6 Receueil des Cours 1, at 46 (1925); Heller, Die Souveränität, at 167; Morgenthau, The Problem of Sovereignty Reconsidered, 48 Colum. L. Rev. 341, at 347 (1948); Aufricht, On Relative Sovereignty, 30 Cornell L. Rev. 137, at 147 f. (1944); Mosler-Bräutigam, Wörterbuch des Völkerrechts, Vol. III, at 320.

[12] Schaumann, at 140. *Cf.* I. Münch, *supra* n. 9, at 50 f. (hesitating).

[13] See Verdross, Völkerrecht, at 511 ff.

[14] Dahm, at 217.

[15] See the example mentioned by I. Münch, *supra* n. 9, at 49 f. See further Kelsen, The Law of the United Nations, at 776 ff.

[16] See e.g. Kelsen, The Law of the United Nations, at 776 ff.

[17] Rolin, Les principes de droit international public, 77 Recueil des Cours 305, at 391 (1950, II). *Cf.* Bourquin, Règles générales du droit de la paix, 35 Recueil des Cours I, at 147 ff. (1931, I); LeFur in Annuaire de l'Institut de droit international (1932), at 164 ff. ("domaine intermediaire").

[18] Rolin, *supra* n. 17, at 383 f.

[19] Verdross, Völkerrecht, at 515.

[20] Rosswog, at 126.

[21] Verdross, Völkerrecht, at 513.

[22] Rosswog, at 126 f.

[23] P.C.I.J., Ser. B, No. 4 (1923).

[24] *Id.*, at 23 f.

[25] Gihl, Internationell lagstiftning, at 80 ff., 84 f.

[26] Rosswog, at 126.

[27] See further Kelsen, The Law of the United Nations, at 776 ff.; Brownlie, at 287 ff.

[28] Only a brief comment to Verdross' argument (*supra* p. 365 f.): By determining that a "matter" is regulated by international law, we do not yet necessarily know the content of that law, that is, whether international law prohibits, prescribes, permits, etc. a certain state conduct. These are two separate issues; the former has a formal character, the latter, a substantive character. The Security Council would then only be concerned with the formal side. The substantive issue — the "controversy" — would still have to be decided.

[29] Rosswog, at 127.

[30] *Id.*, at 128.

[31] *Id.*

[32] Politis in Annuaire de i'Institut de droit international (1931, II), at 217 ff.; *supra* n. 11, at 46 ff.

[33] *Cf.* Article 38(I)(c) of the Statute of the International Court of Justice.

[34] Rosswog, at 129.

[35] Rosswog, at 129; Politis, *supra* n. 32.

[36] *Cf. supra* p. 368.

[37] Rosswog, at 130.

[38] *Id.*, at 130 f. (here quoting Verdross).

[39] *Id.*, at 131.

[40] *Id.*, at 132.

[41] *Id.* (footnotes omitted).

[42] *Cf. supra* p. 368. *Cf.* further LeFur, *supra* n. 17.

[43] *Supra* chapter VII n. 34.

Chapter IX
Lacunae in international law and the problem of non liquet

1. The views of some publicists

The problem of lacunae in international law and the other side of the coin, the *non liquet,* is classical in the international law doctrine and often disputed. (An international court reaching the conclusion that there is a genuine lacuna in international law, would, *par definition,* have to proclaim a *non liquet*; that it is not possibile to decide the case under law — although a decision of some kind there would be — or, in other words, that the case is non-justiciable). Rephrased, the question is whether international law is a logically closed or a logically open system of law. That this question is not merely academic is partly evidenced by the discussions of the Committee for the Preparation of the Statute of the Permanent Court of International Justice[1] in 1920. Some members of the Committee, endeavouring to forestall declarations of *non liquet,* advocated the insertion of — what now is — Article 38 (1) (c) in the Statute, making "general principles of law recognized by civilized nations" available as a source of law for the Court.[2] At the outset, it may be established that, in principle three different views are represented on this issue: There are those — although very few today — who see the (logical) possibility of lacunae in international law and believe that such exist; there are those who deny the (logical) possibility of lacunae altogether; and, finally, there are those who recognize the (logical) possibility of lacunae in law, but deny the existence of such in international law.

As one of the first in our age among those who believe in the possibility and existence of lacunaue, *Bergbohm* has been found to be.[3] His prime thesis has been said to be that law is unable to regulate the totality of human conduct, to foresee all its variations, all its manifestations, and that this is neither necessary nor practicable, nor appropriate. Moreover, by regulating certain areas of life, the legislator implicitly indicates that the yet non-regulated areas are left open. The non-regulated aspects of life are devoid of law; they remain within the "rechtsleeren Raum", and "[h]ier

herrscht Willkür, das reine Belieben im juristischen Sinne". Here every man is completely free from law — some outer limits aside — and a court confronted with an extra-legal controversy, can do nothing but declare a *non liquet.*[4] However, in the above-mentioned Committee for the Preparation of the Statute for the Permanent International Court, *Descamps, Root, Lapradelle* and *Hagerup,*[5] among others, were concerned that the possibility of a *non liquet* would tend to weaken the functions of the Court and therefore suggested the introduction of an additional source of principles — the general principles of law recognized by civilized nations. In this way, they believed the lacunae in international law could be filled. For the same purposes, others[6] have proposed the method of analogy. *Rolin* also has acknowledged the possibility of lacunae, and so, it may seem, has *Politis,*[7] although in his view, the court must not declare a *non liquet,* but rather dismiss the plaintiff's claim.

The view of the logical impossibility of lacunae in international law is supported by, *inter alia, Kelsen, Radbruch, Bruns, Guggenheim, Donati* and *Gihl.*

Radbruch's conclusions are illustrative: "Der Richter kann die rechtsuchenden Parteien nicht dahin bescheiden, dass die zwischen ihnen streitige Rechtsfrage unbeantwortbar sei, da das Gesetz in Hinblick auf sie lückenhaft, widerspruchsvoll oder unklar sei: nur Verurteilung und in Zivilsachen Klagabweisung, in Strafsachen Freisprechung, nur die Bejahung und die Verneinung von Rechtsvolgen, nur assertorische Urteile kann der Richter aussprechen, nicht problematische Urteile, nicht ein 'non liquet'" ... "Dieses Dogma ist aber nicht nur [eine] positivrechtliche Eigentümlichkeit ... aller jener Rechtsordnungen ... es ist vielmehr eine *apriorische Notwendigkeit* jedes rechtlichen Ordnens."[8] By way of legal construction, Radbruch indicates, the deficiencies and imperfections of law and the intertia of law may be remedied. And, as extrapolated by *Kelsen,* a legal norm may either prescribe a duty, or it may not so prescribe; there is no third possibility. A decision is always possible. Whether the plaintiff's case is dismissed or not, the decision always implies the application of law. When prescribing a duty, the law simultaneously guarantees a freedom beyond that duty. A legal order contains not only the norm that prescribes a certain form of human behaviour, but also the norm which prescribes that where there is no duty there is freedom. This is the so-called residual negative principle. What is not legally prohibited (or regulated, one should add) is *legally* permitted (ce qui n'est pas défendu est permis).[9]

The foundation of *Bruns'* legal thinking in this context is somewhat different. It rests on the idea that every legal order, by its very nature, is an

order for peace and one of delegation: "Das Wesen einer Ordnung besteht nicht bloss in einem Negativen, in der Anordnung des Nichtdürfens. Ordnung ist Zuweisung einer Eigensphäre des Handelns und Herrschens an den Genossen, ist Gewährung eines Dürfens und ist Schutz dieses Dürfens durch Anordnung des Nichtdürfens der übrigen Genossen. So ist eine Rechtsordnung ihrem Wesen nach Verteilungs- und Friedensordnung."[10] The omnipresent, all-pervading, guiding rule is the "peace decree" ("Friedensgebote"). And this is the nature of the legal order. By virtue of the "peace decree" a court is under the obligation to settle any controversy and must not (*i.e.*, is prohibited) declare a *non liquet*. So also within the international sphere. A *non liquet* contradicts the basic structure of the legal order as an order for peace,[11] and here Bruns reveals the "apriorische Notwendigkeit" of the closed order.

In this *Lauterpacht,* at least in his earlier writings,[12] seems to concur: the court has a duty to settle the case. The completeness of the legal order is an *a priori* assumption in every legal system. Since law shall be conceived as a means of ordering human life, a declaration of a *non liquet* must not be.[13]

In a later article, however, it appears that Lauterpacht has changed position.[14] Lacunae are logically possible, he claims. But they do not exist in international law, as there is a positive principle of international law which ensures its completeness, which prohibits a declaration of a *non liquet*. This principle, Lauterpacht continues, lies embedded in customary international law. It is furthermore incorporated in international law as one of the principles of general law recognized by civilized nations within the ambit of Article 38(1) (c) of the Statute of the International Court of Justice.[15] This general principle of completeness, he reasons, "has asserted itself through judicial and arbitral effort more active and more fertile than reliance upon the principle that, in the absence of a restraining rule of law, recourse must be had to the maxim that what is not expressly prohibited is permitted."[16] For that maxim, he concludes, is of "controversial doctrinal value and of limited practical utility".[17]

This, which we have categorized as the third,[18] perception of the possibility and existence of lacunae, was already advocated by *Drost,*[19] but with one crucial modification which puts him somewhere between the standpoint of Kelsen and others, on the one hand, and Lauterpacht, on the other. Experience proves, says Drost, that there are lacunae in international law ("zwischenstaatliches Sein ohne vökerrechtliches Sollen"). These lacunae may, by virtue of Article 38(1)(c), be abridged. But this source of principles does not suffice to cover every aspect of international life. What about the remaining matters — what Drost calls genuine ("ech-

te") lacunae — is the court obliged to create law to cover these too? (That *creation* there must be, can logically not be doubted, Drost holds, since *if* no rules exist, the court must create new rules in order to be able to render a decision). But an analysis, *lex lata,* of the international law (1936) reveals, Drost concludes, that the international court is not authorized, much less under a duty, to create law.[20] On the other hand, he propounds, there is a general principle of international law which prohibits the court to declare a *non liquet.*[21] From this dilemma where the court is allowed neither to create law nor to declare a *non liquet* — there is only one route of escape: if the plaintiff's case cannot be founded on a rule of international law, it must be dismissed. Implicit in this solution lies the residual negative principle "ce qui n'est pas défendu est permis".[22]

Other writers, such as *Greig* and *Mann,* who also recognize the possibility of lacunae and claim that the *non liquet* is prohibited (or at least is wholly unsatisfactory), suggest that the court shall create law in order to resolve the dilemma.[23] This power to create, Mann concludes, lies "inherent in the judicial process in general" and therefore — as a proposal *de lege ferenda* — "it should be affirmed".[24] And in the prosaic eyes of Greig, the international judge will "resort to general notions of justice and equity in deducing the new rule or in refining an existing rule. In either case, the new rule or the modified rule will often be referred to as a general rule of international law, or as a customary rule, and the traditional fiction will be preserved that the judge is in no way creating law, but simply applying existing international law."[25]

Slightly blended is the view of *Verdross.* To his mind the lacunae, although they may exist, have no practical significance, as the parties before an international tribunal regularly require a decision under all circumstances. For this purpose the parties grant to the court the powers necessary ("nötigen Vollmachten") for decision-making. Such a grant, Verdross suggests, may lie implicit in the fact that the sources, on which the decision is to rest, are not restricted.[26]

Tammelo,[27] again, who by applying the formulae of legal logic reaches the result that lacunae are logically possible — that there is no *a priori* reason why a legal system should be complete — does not see (in line with Drost) that the international court can create law. The established principles of international law must be strictly construed. Outside the extension of these, the law is absent. This follows from the concept of the sovereignty of states.[28] However, if the *compromis* (or any other act) determining the jurisdiction of an international court is silent on the point of *non liquet, i.e.*, neither prohibits nor authorizes a declaration to this effect, "the court

is obviously under no obligation to pronounce it". But then again, Tammelo maintains "[t]he consistent practice of international courts of avoiding a *non liquet* seems to have established the customary rule that international courts have the right to reject claims in all cases where these are not founded on applicable norms of international law."[29] Judging by the latter statement, Tammelo seems to agree with the view of Drost: by rejecting claims not founded upon international law, the court avoids a *non liquet.*[30] (The difference between these scholars seems to be that, whereas Drost considers *non liquet* to be *prohibited,* Tammelo suggests that it is merely *not mandatory* and is therefore avoided by the courts). On this point, however, Tammelo is somewhat confusing. The profound analysis of *Stone,*[31] has demonstrated that by merely rejecting the applicant's claim, a court is not necessarily avoiding a *non liquet.* The decision to reject could imply that the respondent's conduct was legally permitted, but it could equally imply that the conduct was legally neutral in relation to existing law. In order for a decision to reject a case on the ground that there is no rule of law supporting the applicant's claim — the so-called adversary principle — to go beyond a mere declaration of *non liquet,* the decision must rest on an additional principle. And this principle, Stone contends, is the residual negative principle. But Tammelo denies its existence in international law. Thus, the courts would not, Tammelo believes — and if Stone is to be followed — avoid a *non liquet* by rejecting a claim.[32]

2. An appraisal

In the end — and here *Stone* has cleared the sky — there remain, it seems, the following alternative theories:

1) Lacunae are logically possible, they exist, and a declaration of *non liquet* is obligatory.
2) Lacunae are logically possible, they exist, and a declaration of *non liquet* is not obligatory, but licensory (authorized).
3) Lacunae are logically possible, they exist, but a declaration of *non liquet* is prohibited. To avoid a *non liquet* the court must generally either invoke the residual negative principle or create new law, or combine creation with the residual negative principle.
4) Lacunae are logically possible, but they do not exist, since the principles

of international law constitute an "inexhaustible storehouse" covering all conceivable disputes.

5) Lacunae are logically *im*possible, they do not exist. The legal system is complete by virtue of the residual negative principle or by virtue of the duty incumbent on the court always to decide a case by creating new law, or of a combination of these two reasons.

As we have seen in the preceding analysis, all of these theories are, in one way or the other, represented in the doctrine. Of these alternatives, the second cannot be entirely absorbed by either of the remaining theories: if *non liquet* is licensory, the court, in order to be consistent, must choose either to avoid a *non liquet* as a matter of principle — which brings it to alternative 3) — or not to avoid, *i.e.,* declare a *non liquet,* as a matter of principle — which brings it to alternative 1). The third route to avoid or not to avoid depending upon the circumstances in each particular case — would be conceivable only if it were possible to establish general criteria for what choice to make in the individual case. Seen from the other side, the third route implies that the court has taken the position that it shall create law to some extent. To what extent, however, is a question left open by the court, apart from the fact that it will not *always* create new law. The criteria will then determine when the court will create law and when it will not. They will convey that certain circumstances in the particular case make the creation of law necessary.[33] If such circumstances are not present, the court may declare a *non liquet* (assuming that the parties before the court do not require a decision under all circumstances). Or the court may, one would tend to think — since *non liquet* is licensory — apply the residual negative principle. But, here again, there must be criteria for the choice between *non liquet* and the residual negative principle, for why should a declaration of *non liquet* be preferable to the residual negative principle — and *vice versa* — in the particular case. Thirdly, there is the possibility of a combination of law creation and the residual negative principle.

An appraisal of the five alternative theories would, it seems, have to rest on mere logic, arguments *de lege lata,* or arguments *de lege ferenda.* Seen from the point of view of mere logic, it can no longer be seriously doubted that lacunae are logically possible, that the impossibility of such cannot be *a priori* assumed. Mere logic does not lead to the conclusion that the courts in any legal system can complete the system by applying the residual negative principle. Such a principle does not lie inherent in a legal system. It is not there by the very nature of the legal system. If the residual negative

principle is present in a legal syste, it is so by virtue of a legal rule, since the principle itself — if it exists — is a *legal* principle. As an alternative, a legal system might just as well hold the legal principle that the courts are obliged to decide all cases, in the end to create new law, or to alternate between the residual negative principle and creation, depending on the circumstances of each individual case. But there may, logically, equally well exist legal systems that lack such a legal principle for the completion of the system. In the words of *Tammelo*: "[T]he absence of law' is *prima facie* not unthinkable and, based thereon, the possibility of a *non liquet* under [a] certain order not precluded."[34] Consequently, the fifth theory may be excluded. By doing so we have exhausted the possibilities of arguing further on the basis of mere logic. Mere logic does not guide us in the choice between the remaining four theories. Thus, let us begin by adding arguments *de lege lata*.

An undeniable fact seems to be that, so far, no international tribunal has declared a *non liquet*. "[I]n the thousands of cases", Stone observes, "considered during more than one hundred and fifty years of modern international arbitration, a *non liquet* has not been squarely pronounced in a single case".[35] The results of various studies of international case law show that the tribunals have consistently avoided a *non liquet*. On this point there is general agreement. When it comes to the significance of this fact, to the conclusions that can be drawn from it, however, the opinions diverge, with one exception: Very few writers seem to seriously contend that, in light of this consistent practice, the international courts are *obliged* to declare a *non liquet* when confronted with a lacuna.[36] On the contrary, case law might evidence that international courts are not — legally — under an obligation to declare a *non liquet*. For when viewing the rapid technological, economic and political change during the past ten or fifteen decades, against the background of the imperfections of international law and its inability to cope entirely with the change, it would certainly seem to be "miracle" if all the cases have been decided upon *existing* principles of international law.[37] (The sparse evidence offered by *Siorat* for the opposite view, is not convincing).[38] Understood in this sense, one would not be too bold in excluding theory one from the debate. On the other hand, if the same theory is given a more limited interpretation, if it were to allow the courts some power to create new law — subject to certain criteria — if *non liquet* were to be understood as obligatory only for the purpose of ruling out the residual negative principle, then at least the case law would not suffice as evidence against it. Thus, in this limited sense, theory number one would still stand.

The proposition advanced by *Lauterpacht,* that the absence of *non liquet* in case law proves that international law *prohibits non liquet* declarations, cannot — as demonstated by Stone[39] — be accepted. From the mere absence of a certain behaviour it cannot be concluded that the behaviour is prohibited. That the courts have avoided a *non liquet* may have other explanations. But then, of course, the total absence of *non liquet* may serve as an indicator and may support the proposition of such a prohibition on *other grounds.* And another ground Lauterpacht provides:[40] The prohibition of *non liquet,* he claims — *i.e.,* the completeness of the international law system — is founded on one of the general principles of law, recognized in civilized nations, referred to in Article 38(1)(c) of the Statute of the International Court of Justice and is therefore incorporated into international law. This proposition rests on premises that may, and have been, subject to great controversy. Disputed are the questions, *inter alia,* what is a general principle of law?; how is a such principle established?; what is a civilized nation?; what other cirteria are there for a such principle to constitute a source of law for the International Court of Justice?; is a general principle of law, as accepted under Article 38(1)(c) also a part of international law in general?; is it so *ipso jure* or *ipso facto*?, etc.[41] These questions will not be discussed further in this context. Suffice it to say that, in light of the fact that these questions *are* controversial, one could at least entertain doubts as to the solidity of the proposition. On the other hand, one cannot be blind to the fact that probably no national law system allows its courts to declare a *non liquet.* If national law is the basis for Article 38 (1)(c), then that fact must have some argumental force. Thus, while the arguments and propositions of Lauterpacht do not seem to be conclusive, at least it is fully *possible* that international law prohibits the declaration of a *non liquet.*

Quite another matter is that Lauterpacht's reasoning with respect to the consequences of this prohibition is somewhat puzzling. On the one hand, Lauterpacht seems to acknowledge that there are lacunae in international law.[42] Whether international courts have the competence to create new law without the express permission of the contending parties, Lauterpacht does not explicitly say. It may be that he is implicitly so suggesting when maintaining that the general principles of law, referred to in Article 38(1)(c), vouch for the completeness of the international law system — since, if there are lacunae, and the residual negative principle is rejected, creation there must be.[43] Or is Lauterpacht perchance merely recognizing the logical possibility of lacunae in international law, but denying the existence of such, on the ground that there is always a general principle of law em-

bodied in Article 38(1)(c), available for every dispute (theory no. 4)?

Stone, on the other hand, seems to derive support from court practice for the theory that *non liquet* is *licensory*: the court may declare a *non liquet*, but they are not compelled to do this, nor are they prohibited from doing it. "Licensory", thus, implies a choice. Two or several routes are available for the courts. The choice, in Stone's view, lies between a declaration of a *non liquet* and the creation of law.[44] The residual negative principle, according to Stone, is unsound. In concord with Lauterpacht, he thinks it of controversial doctrinal value and of limited practical utility.[45]

Leaving aside for a moment the issue whether an international court may create new law and the wisdom *de lege ferenda* in the "licensory" theory — *inter alia*, the problem of finding criteria for a workable choice — it may be questioned whether the theory can be properly founded, *lex lata,* on the practice of the courts. Stone's chain of persuasive and acute arguments has at least one weak link: from the fact that in the thousands of cases, Stone argues, a *non liquet* never has been declared, it cannot be concluded that *non liquet* is prohibited, much less that it is obligatory.[46] On the contrary, says Stone, "[t]his practice reveals clear support for a rule that international law does not prohibit a court from deciding a case even if it finds absence or obscurity of pre-existing law."[47] And then comes the weak link: "It also [*i.e.,* the practice], by way of corollary, supports a rule conferring law-creative authority on the court in such circumstances".[48] Thus, in the absence of law (in the presence of a lacuna) — or when the law is obscure — the court may either declare a *non liquet* or create new law. Such is the conclusion which Stone draws, a conclusion, he claims, supported by court practice. The problem with Stone's analysis is that he rejects the residual negative principle as unsound from the very start. The thought does not even occur to him — at least he does not so say — that the absence of *non liquet* in court practice may just as well imply that the courts have applied the residual negative principle. There is no sign in Stone's chain of reasoning of an analysis of the court practice for the purpose of ascertaining whether the residual negative principle has been applied. Instead he directly concludes that since *non liquet* is not prohibited and since lacunae do exist, the court practice, "*by way of corollary*", supports the view that the courts are authorized to create new law.

The problem with Stone's analysis thus is that he does not inquire whether the residual negative principle is a principle of international law; whether it is part of the *lex lata.* It is only symptomatic then that Stone's attack on the residual negative principle is based mainly on arguments *de lege ferenda.* That the principle is of "controversial doctrinal value and of

limited practical utility" — here quoting Lauterpacht with approval — is, no doubt, an argument of this category.[49] That it may prove "unacceptable", since it "assumes as an overriding principle of positive international law that any State conduct not infringing a positive existing prohibitory rule is always lawful",[50] is clearly no different. Other arguments against the principle, earlier advanced by Stone, apart from the fact that they may be interpreted as arguments *de lege ferenda,* wholly lack force since they rest on a failure to distinguish the adversary principle from the residual negative principle — a distinction later invoked and emphasized by Stone himself.[51] With this distinction, these arguments cannot be pursued.

What has been said thus far concerning the "licensory" theory may not, however, prejudice the fact that the theory is *possible* as such, but it is so, and this is the point, side by side with several other theories.

Thus, we have seen that it cannot be conclusively ascertained, *ex lege lata,* whether a declaration of *non liquet* is obligatory, licensory or prohibited. Any one of the theories underlying these variations is possible, although that pertaining to an obligation only in a limited sense. The possible variations may very roughly be summarized as follows:

	Non liquet	Alternative consequences		
		1	2	3
A	Obligatory	Non liquet (No law creation)	Non liquet (No residual negative principle)	*Comb.* Law creation and non liquet
B	Licensory	*Comb.* Law creation and non-liquet	*Comb.* Law creation and residual negative principle	*Comb.* Non liquet and residual negative principle
C	Prohibited	Law creation	Residual negative principle	*Comb.* Law creation and residual negative principle

(The alternative consequences A2, B1 and B2 can be merged with A1, A3 and C3; respectively). The selection of a theory may thus lead to 6 alternative consequences, A1, A3, B3, C1, C2 and C3, provided we accept, in spite of the inference made from the international case law given above, that *non liquet* can be obligatory.

Still not tested *de lege lata* is the theory, according to which lacunae are logically possible, but non-existent on the ground that international law constitutes an "inexhaustible storehouse". It may be argued, for instance, that the insertion of Article 38(1)(c) in the Statute of the World Court, with reference to general principles of law, has made international law complete, and that, consequently, the situtaion need not arise in which the Court would be standing without a pertinent rule. This was, no doubt, partly the intention of some of the authors of the preceding Statute of the Permanent International Court of Justice.[52] But surely the proposition that international law is complete cannot rest on these facts alone. We have already seen how very much in dispute Article 38(1)(c) is, as regards its substance and its status.[53] Furthermore, if it is suggested that completeness does not necessitate the creation of new law, this is either an overestimation of the capacity of Article 38(1)(c), or an underestimation of the complexity of international life. Even if it could be proved that there is a bundle of general principles of law on which the Court's decision could be founded, it must seriously be doubted whether these or additional principles supply the answers to every problem. For how long can the Court keep composing rules upon alleged general principles of law and still maintain that it is merely applying existing law? The "completeness" theory must at the very least be open to doubt.[54] It seems, rather, that this theory has a certain flavour of logical *impossibility* of lacunae attached to it, or that it presupposes a prohibition of *non liquet, de lege lata,* theories already commented upon.

Now, it can readily be seen, that four of the six alternative consequences as listed in the scheme above are contingent upon whether international courts are competent to create law. Whether, again, a such competence exists, depends on how "creation" is defined. If by "creation" we understand — as we have here — the creation of *new* law, the competence does, at least formally,[55] *not* lie. The problem, however, as we know, is to distinguish "creation" from the mere application of law. One would be naive to think that all courts in all cases have merely applied existing rules of international law, that never is law newly created.[56] And assuming that, in addition to treaty and customary rules, there exist the general principles of law, referred to in Article 38(1)(c) of the Statute of the International Court of Justice, as a source of international law, the distinction between "creation" and application becomes even more blurred.

But this is not the issue. The issue is whether, according to international law, international courts may create new law — act as legislators — without the consent of the litigating parties. Here the answer must be: they may

not. As far as the International Court of Justice is concerned, this is not only clear from the introductory words of Article 38(1)(c) — the function of the Court is "to decide in accordance with international law": Again and again the Court has emphasized that it is not a legislator but a court of law, that its decisions are within the rules that have been staked out. As was said in the *Fisheries Jurisdiction Case:* "In the circumstances, the Court, as a court of law, cannot render judgment sub specie legis ferendae, or anticipate the law before the legislator has laid it down."[57]

It is also true that, however the Court may have "developed" the law, it has always been anxious to point out that the "development" is anchored in the law as it is. Thus, for instance, when in the *North Sea Continental Shelf Cases* the Court applied a rule of equity, it was careful to notice: "[W]hen mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles."[58] One of the main points in Vice-president Koretsky's dissenting opinion in the very same case was precisely that the majority had gone beyond existing law: "The International Court is a court of law. Its function is to decide disputes submitted to it 'in accordance with international law' ... and no other grounds. It is true that the Court may be given 'power ... to decide a case *ex aequo et bono'*, but only 'if the parties agree thereto' ... The Court itself states in its Judgment that 'There is ... no question in this case of any decision *ex aequo et bono'* ... nevertheless it may be thought to have tended somewhat in that direction."[59] And can it be more clearly stated that in the judgment in the *Fisheries Jurisdiction Case:* "The Court is of the view that there is no incompatibility with its judicial function in making a pronouncement on the rights and duties of the Parties under existing international law which would clearly be capable of having a forward reach; this does not mean that the Court should declare the law between the Parties as it might be at the date of expiration of the interim agreement, a task beyond the powers of any tribunal. The possibility of the law changing is ever present: but that cannot relieve the Court from its obligation to render a judgment on the basis of the law as it exists at the time of its decision."[60]

Thus acknowledging, that the difference between mere application and "creation" is a difference of degree, but that the line has to be drawn somewhere (otherwise lacunae would not exist) — a matter for the court itself, it is believed — so that beyond that line recourse cannot be had to a rule of international law, it seems settled enough that courts cannot create

("creation" in the strict sense) new law and therefore have to seek another way out. The remaining possible alternatives, apart from the theory of "completeness", are the obligatory *non liquet,* the prohibited *non liquet, i.e.,* obligatory application of the residual negative principle, and finally a combination of *non liquet* and the residual negative principle (where *non liquet* is licensory). A choice of one of the theories to the exclusion of the others cannot be made upon the basis of *lex lata.* Yet as a matter of *de lege lata,* we have seen, the theory of obligatory *non liquet* is the least probable. Still to be added are arguments *de lege ferenda.*

One of the main functions of international law is to secure peace by providing rules aimed at preventing, suppressing or minimizing the damage caused by conflicts, through facilitating constructive co-operation and friendly intercourse, for the benefit of all people. This is true particularly of the law on which the United Nations and the International Court of Justice is based. If the problem of lacunae in international law is considered in this perspective, the ultimate alternative theory, at least, must not counteract, but rather, if possible, promote this function of international law. It is this peace function that *Bruns* has in mind when he claims that there cannot be lacunae and that the court is obliged to render a decision based on law.[61] For, if there were lacunae, Bruns argues, states would be entirely free with respect to an unregulated matter, and there would be nothing to prevent or suppress conflicts — of whatever kind they may be — regarding that matter. A lacuna, says Bruns, would imply a form of natural state for international relations: "Der einzelne könnte mit jeder Art Gewalt durchsetzen, wozu er die Macht hat."[62] The consequence of a lacuna would be that a state affected by the conduct of another state not yet regulated by international law, would also be entirely free to react *by every available means.* An obligation to tolerate the conduct would not exist, since the conduct is beyond law.[63] To avoid conflicts and war the court must therefore always be able to state what the law is. This obligation upon the court, Bruns concludes, lies within the basic structure of everey legal order.[64]

Stone, however, though sharing the common values regarding the functions of international law,[65] is somewhat sceptical as to the type of reasoning lead by Bruns. "Will the progress of international law", Stone asks rhetorically, "in the new fields thrown up by our present dynamically changing world be safer in the hands of tribunals enjoying wider compulsory jurisdiction and prohibited from refusing to decide for lack of law, than it will be if left to be worked out in the play of practice, including of course the possibilities of conflict, negotiation and compromise?"[66] The answer, Stone suggests, cannot be a "clean", "confident" and "general"

"yes". To impose upon the courts an obligation to settle a case and to prohibit the courts to declare a *non liquet* would, at least in some instances, he seems to imply, evoke premature legal principles based on insufficient knowledge and experience. In these instances, the law would prove to be a poor provisional arrangement and an unworkable adjustment. "The chaotic play of selfish interests of the disputants", Stone explains, "has at least this basic advantage as a channel of approach, that the more chronic the conflict arising from the play of interests, the more knowledge and experience are likely to be available for basing a compromise. And it may well be an ill service both to the long-term abatement of international conflict, and to the chances of growth of a body of law that will subserve this abatement, prematurely to give one disputant an armour of vested legal right to repel demands for compromise whose merits may only be properly assessable as later knowledge and experience accumulate."[67] Badly adjusted law, Stone submits, may, in itself, give rise to conflict and war.

Again, it must be remembered that Stone is here primarily arguing against the *categorical* prohibition of *non liquet;* the unexceptional character of such a prohibition (and the consequent duty to settle the law). In *some,* perhaps exceptional, cases, Stone is, as we have seen,[68] prepared to give the courts a right to declare a *non liquet.* On the face of it, Stone's *de lege ferenda* reasoning seems sound — it has a pragmatic and realistic touch, essential for such reasoning — although it might be arguable: Called in question is a fundamental function of international courts, and of the International Court of Justice in particular — the function of preventing or mitigating conflict and war — by one to whom war is not desirable, but inevitable.[69] Delicate and crucial as the question may be, it need not further detain us here. Much more immediate is another arguable point — a lacuna, indeed — in Stone's analysis. Rejecting, as he does, *a priori* the residual negative principle, he never inquires whether this principle would tend to neutralize the alleged deficiencies of the duty imposed upon the courts to settle the case. A such inquiry would show, namely, that the deficiencies would be neutralized.

A decision, wherein the residual negative principle is applied, implies, as we have seen, that there is no rule of international law — at the time of decision — which either prohibits or otherwise regulates a certain matter and, since no such rule is available, the matter is covered by a permissive rule. In other words, what is not prohibited or regulated by law, is permitted by law. Consequently, the application of the residual negative principle does not imply the creation of unworkable law, not the setting of badly adjusted law. It simply connotes that, in the absence of law, a certain

conduct is permitted. And since there is no settled law, there is no law that "sticks" — no premature law, no law that hampers the chances of a growth of law, no law that obstructs compromises or agreements, no law that would not allow the play of future knowledge and experience, and certainly no law from which conflict and war might arise. Moreover, the "legal immunity" or "vested legal right" given hereby to one of the disputants would not make it the least more possible to "repel demands for compromise" or to commit instrusion, than it is under a declaration of a *non liquet*.[70] The advantages, if such there are, of the "chaotic play of selfish interests" would remain. And, finally, the hazards, perceived by Stone, of imposing upon courts a power and a duty to decide a case in "one way or another, *ruat coelum,* however sceptical the court may be as to the value of the rule which it has to improvise for the occasion",[71] namely, a reluctance on the part of the states to submit a dispute to third-party judgment,[72] would not present themselves under the residual negative principle, at least no more than under the *non liquet.*

At the same time the residual negative principle seems to remedy the hazards of *non liquet* envisaged by *Bruns*:[73] the existence of a no-man's land where states are free to use every measure and every counter-measure, including war, to achieve their ends. Under the residual negative principle states would not be free to start a war, since the unregulated area is occupied by permissive rules; permissive under international law; a right, an intrusion upon which is a breach of international law.

In sum, Stone has not succeeded in showing that *non liquet* has any value independent of those of the residual negative principle. On the contrary, the last observation seems to point to the fact that the residual negative principle has at least one advantage before a mere declaration af a *non liquet.*

The risks involved in a declaration of a *non liquet* are sufficiently great, it is believed, to warrant the conclusion that *non liquet* should not be *obligatory.* Whether the residual negative principle should be obligatory or a mere alternative to a licensory *non liquet,* cannot be determined without an exhaustive analysis of the pros and cons, a task far beyond the scope of the present study. While the residual negative principle has at least one advantage, it cannot, in the absence of such an extensive analysis, be regarded as exclusively desirable. Yet, tipping the balance in favour of the residual negative principle would be the *fact* that, so far as can be ascertained, the international courts have never explicitly held a *non liquet* to be desirable. The conclusion, therefore, is that the residual negative principle is not only the *most* probable (if not the *only* probable) answer to the problem of

lacunae, but also the *most* desirable (if not the *only* desirable). Hence, the *end-result* coincides with that of many distinguished writers on this subject, such as *Brierly, Verdross, Kelsen, Ross, Drost, Wengler, Dahm, Berber, Gihl, Phillimore, Ricci-Busatti, Guggenheim, Rosswog, Radbruch, Bär, Hermanns, Schlochauer, Rehbinder,* and others.[74] The principle also stands in accord with the practice in most or all municipal law systems and *may* be considered as incorporated into international law on the ground of that fact alone, or in combination with the generally accepted and well-esteemed dogma "nulla poena sine lege".

Notes, chapter IX

[1] Procés- verbaux of the Proceedings of the Committee, at 307 ff.

[2] See further e.g. Spiropoulus, Die allgemeinen Rechtsgrundsätze im Vökerrecht (Kiel, 1928); Gihl, Internationell lagstiftning, at 81 ff.; Studier, at 73 ff.

[3] This is Bergbohm interpreted by Bruns, Völkerrecht als Rechtsordnung, I ZaöRV I, at 25 f. (1929), see Bergbohm, Jurisprudenz und Rechtsphilosophie, Vol. I (Leipzig, 1892). But this seems to be a misunderstanding of Bergbohm, who in fact did *not* perceive the possibility of lacunae, see Verdross, Völkerrecht, at 155; Kaufmann, Das Wesen des Völkerrechts und die clausula rebus sic stantibus, at 50 f., (Leipzig, 1914). *Cf.* Tammelo, On Logical Openness of Legal Orders, 8 Am. J. Com. L. 187, at 192, n. 20 (1959).

[4] See *supra* n. 1—2

[5] See e.g. Lammasch, Die Lehre von der Schiedsgerichtsbarkeit in ihrem ganzen Umfange, 62, 179 f. *Cf.* K. Engisch, Der rechtsleere Raum, 108 Zeitschrift für die gesamte Staatswissenschaft 385 (1952).

[6] Rolin, Annuaire de l'Institut de droit international (1932), at 375 f.; Politis, Annuaire de l'Institut de droit international (1931 II), at 218; La justice internationale (Paris, 1924), at 84 f. See further L. Siorat, Le problème des lacunes en droit international (Paris, 1959).

[7] See Kelsen, Principles of International Law, at 304 ff.; Radbruch, *supra* n. 3, at 187 ff.; Bruns, *supra* n. 3, at 25 ff.; Guggenheim, 129 ff.; Donati, Il Problema delle Lacune dell'Ordinamento giuridico, Archiv für öffentliches Recht, at 125 ff. (1910); Gihl, Internationell lagstiftning, at 80 ff.

[8] Radbruch, *supra* n. 3, at 187 ff. (emphasis added). See the translation made by K. Wilk of Radbruch's writings in Radbruch, Legal Philosophy, 20th Centrury Legal Philosophy Series, Vol IV, at 212; "It is essentially inherent in legal order to be universal. The law cannot lay down a partial regulation without, by the very selection of the part of human relations to be regulated, also taking a stand on the unregulated part — precisely by precluding legal effects there. Consequently, a 'legal vacuum' is always devoid of law only by virtue of the legal order's own will; in the strict sense, it is not a field of facts legally unregulated, but one regulated in a negative sense, by denying any legal effect. In the alleged vacuum the legal order has willed nothing — not, by any means willed not to will, which would indeed be a contradiction in terms." Also see Tammelo, *supra* n. 3, at 191 ff.

[9] See Kelsen, Reine Rechtslehre, at 100 ff.; Dahm, at 48; Gihl, Internationell lagstiftning, at 81 f.; Lacunes du droit international, Acta Scandinavica Juris Gentium (1932), at 37, 60 ff.; Guggenheim, at 129 ff.; Heydte, Vökerrecht I, at 88. Also see the opinions of M. Ricci-Busatti and Phillimore in the preparation of the Statute for the Permanent International Court, *supra* n. 1, at 314 ff. Verdross, however, denies that lacunae are logically impossible, see Völkerrecht, at 155. Also see Brierly, The Basis of Obligation in International Law (Oxford, 1958), at 82 f. and 170 f.; Wengler, 367 ff.; Rosswog, at 86; Lauterpacht, The Function of Law in the International Community, at 60 ff.

[10] Bruns, *supra* n. 3, at 9.

[11] *Id.*, at 9 and 25 ff.

[12] Lauterpacht, *supra* n. 9, at 63 ff., 76 ff., 86 ff. and 134 ff.

[13] *Id.*, at 64.

[14] See Lauterpacht, Some Observations on the Prohibition of *Non Liquet* and the Completeness of the 'Legal Order', Symbolae Verzijl (1958), at 196 ff. Also see J. Stone, *Non Liquet* and the Function of Law in the International Community, 35 B.Y. Int. L. 124 (1959), where Lauterpacht's article is discussed in detail.

[15] Lauterpacht, *supra* n. 14, at 205.

[16] *Id.*, at 207 ff.

[17] *Id.*, at 208.

[18] See *supra* p. 373.

[19] Drost, Grundlagen des Völkerrechts (München-Leipzig, 1936), at 66 ff., in particular at 69 and 71.

[20] *Id.*, at 70 f.

[21] *Id.*, at 71.

[22] See Drost, Vökerrechtliche Grenzen für den Geltungsbereich staatlicher Strafrechtsnormen, 43 Niemeyers Zeitschrift für Internationales Recht 111, at 131 (1930-31). *Cf.* Glatzel, 108 ff.

[23] Greig, International Law (2d ed., 1976), at 31; Mann, Studies, at 165.

[24] *Id.*

[25] Greig, *supra* n. 23, at 131.

[26] Verdross, Völkerrecht, at 155.

[27] Tammelo, On the Logical Openness of Legal Orders, 8 Am. J. Com. L. 187 (1959).

[28] *Id.*, at 201. As to the concept of sovereignty, see *infra* chapter XI.

[29] *Id.*, at 202 (footnote omitted). *Cf.* Drost, *supra* n. 19.

[30] See Drost, *supra* n. 19.

[31] Stone, *supra* n. 14, at 136 f., in particular at 137. *Cf.* Glatzel, at 99.

[32] The confusion is all the more surprising knowing that Tammelo and Stone have cooperated in this field. See Tammelo, *id.*, at 200 and Stone, *supra* n. 14, at 135.

[33] See Tammelo, *supra* n. 27, at 188. Also see Wengler, at 367 f.; Verdross, Völkerrecht, at 155; M. Bogdan, General Principles of Law and the Problem of Lacunae in the Law of Nations, Nord. Tidskr. I.R. (1977) p. 37, at 38 ff., 52 f.

[34] Tammelo, *supra* n. 27, at 193. Also see *id.*, at 202.

[35] J. Stone, Legal Controls of International Conflict (Sidney, 1954), at 162 (footnote omitted). Also see Lauterpacht, *supra* n. 14, at 201 ff. (*Cf. id.*, at 199); Tammelo, *supra* n. 27, at 202.; Bogdan, *supra* n. 33, at 38 f. with further references.

[36] But see e.g. Siorat, Le Problème des lacunes en droit international (1959), at 189, analyzed in Stone, *supra* n. 14, at 140 ff.

[37] *Cf.* Stone, *supra* n. 35, at 162 f.; *supra* n. 14, at 130, 139 f., 159; Bogdan, *supra* n. 33, at 39 f.

[38] Siorat, *supra* n. 36, at 186 ff. See the analysis in Stone, *supra* n. 14, at 140 ff., especially at 142 f.

[39] Stone, *supra* n. 14, at 138 ff.

[40] See Lauterpacht, *supra* n. 14, at 205 ff.

[41] See e.g. Dahm, at 35; Berber, at 65 ff. with further references; Gihl, Lacunes du droit international, *supra* n. 9; Brownlie, at 15 ff. (with further references); Wengler, at 361 ff.; O'Connell, at 9 f.; Tunkin, Co-existence and International Law, 95 Recueil des Cours 25 (1958); M. Bos, The Recognized Manifestations of International Law, 20 German Yearbook of Int. L. 9 (1977).

[42] Lauterpacht, *supra* n. 14, at 199 and 204 f.

[43] *Id.*, at 208.

[44] Stone, *supra* n. 14, at 128 ff., 139 ff., 159.

[45] *Id.*, at 129.

[46] *Id.*, at 159.

[47] *Id.*

[48] *Id.*

[49] *Id.*, at 129.

[50] Stone, Legal Controls, etc., *supra* n. 35, at 160.

[51] In "Legal Controls", at 160 f. (see *supra* n. 35) Stone has, it seems, only the adversary principle in mind. (As to the distinction adversary-residual negative principle, see *supra* p. 376 f. and n. 32). Arguing against this principle he states: "Third, and most serious, the cogency of the adversary argument against *non liquet* is by definition limited to adversary proceedings. Such are, for example, requests of international bodies for advisory opinions as to the legality of particular acts; *joint* requests of States for a declaration of their rights, as in an *actio finium regundorum* for the definition of frontiers, where neither asserts any particular line. Where no Party (or both Parties) are thus in the processual position of Claimant, neither can be held to fail merely because no rule is found supporting its claim. On the adversary theory, both sides would have to win or both would have to lose — which is either absurd or a non liquet."

If instead of the adversary principle, the residual negative principle, which implies that what is not prohibited by law, is permitted *by law,* were to be applied, the same reasoning would no longer have absurd consequences. International bodies would be able to render advisory opinions on the legality of particular acts and the existence or non-existence of certain rights. In the case of the definition of frontiers where neither party asserts any particular line, and, in addition, no rule is available to support either side, it would be surprising if the parties would not require a decision under all circumstances, whether on the ground of equity (*cf.* the *North Sea Continental Shelf Cases*, I.C.J. Reports 1969, at 3) or *ex aequo et bono.*

[52] See *supra* n. 1.

[53] See *supra* n. 41.

[54] See e.g. Greig, International Law (2nd ed., 1976), at 31; Bogdan *supra* n. 33, at 52 f.

[55] See e.g. Kelsen, The Law of the United Nations, at 531; Stone, Legal Controls, *supra* n. 35, at 145.

[56] See e.g. *supra* n. 54.

[57] (United Kingdom v. Iceland) I.C.J. Reports 1974, at 24. See further Hambro — Rovine, The case law of the International Court, Vol. VI—A, at 259 (with further references); Vol. VIII, at 63 f. (with further references).

[58] (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands), I.C.J. Reports 1969, pl. 3, at 49.

[59] *Id.*, at 166 f. *Cf.* W. Friedmann, The North Sea Continental Shelf Cases — a Critique, 64 Am. J. Int. L. 229, at 235 f. (1970); F. Münch, Das Urteil des Internationalen Gerichtshofes vom 20 Februar 1969 über den deutschen Anteil am Festlandssockel in der Nordsee, 29 Z.a.ö.R.V. 455 (1969). Also see Judge Tanaka's dissenting opinion in the same case.

[60] *Supra* n. 52, at 19.

[61] Bruns, Völkerrecht als Rechtsordnung, *supra* n. 3.

[62] *Id.*, at 26 and 32. Whether Bruns is arguing *de lege lata, de lege ferenda* or from the viewpoint of strict logic, is unclear.

[63] *Id.*, at 32.

[64] See *supra* p. 3 f. and n. 10 ff.

[65] Stone, Legal Controls, etc. *supra* n. 63, at XXXII ff., 136 f., especially 136, n. 169.

[66] Stone, *supra* n. 14, at 149.

[67] *Id.*, at 150.

[68] See *supra* n. 46 ff.

[69] See Stone, Legal Controls, etc., *supra* n. 35, at XXXI ff. and XXXV (see n. 23).

[70] See Stone, *supra* n. 14, at 150 f.

[71] *Id.*, at 155.

[72] *Id.*, at 154 f. *Cf.* the separate opinion of Judge Ammoun in *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), I.C.J. Reports 1970, p. 3: "This conception of Equity [referring to a particular type of equity], which really consists of a possible derogation from general law in a particular case, has never been applied in international law. An international court which conferred such jurisdiction upon itself would appoint itself a legislator. Its decision would create an atmosphere of uncertainty which would drive States away from a tribunal as to which they could not foresee, with any degree of probability, what law would be applied by it." (At 334).

[73] See *supra* n. 10 ff. and 61 ff.

[74] See Brierly, The Basis of Obligation in International Law, at 170 f.; Verdross, Völkerrecht, at 149 f.; Kelsen, Principles of International Law, at 304 f.; Science and Politics, 45 Am. Pol. Science Rev. 641 (1951), at 661; Ross, 312 f.; Drost, Grundlagen des Völkerrechts, at 71 f.; Wengler, at 367 f.; Dahm, at 48; Berber, at 66; Gihl, Internationell lagstiftning, at 80 ff.; Phillimore and Ricci-Busatti, *supra* n. 1, at 314 ff.; Guggenheim, at 129 f.; Rosswog, at 86; Bär, at 326; Hermanns, at 13; Schlochauer, at 41; Rehbinder, Extraterritoriale Wirkungen, at 57 f.

Chapter X
Presumtion for or against the freedom of states?

Of all the theories advanced for the solution of the lacunae-phenomenon, we have thus found the residual negative principle to be the most probable *de lege lata* and the most desirable *de lege ferenda*. As we have seen, the principle connotes that everything not prohibited or otherwise regulated by international law is permitted by that law. The principle may also be formulated as a presumption for the freedom of the states; it is presumed that where a certain matter is unregulated in international law, any conduct pertaining to that matter is permissive. This is a legal presumption — *praesumtiones juris* — the legal consequense of which, if applied in adversary proceedings, is the acquittal of the respondent state. This legal presumption regulates the unregulated materia or, more correctly, its existence ensures that there is no unregulated materia and, consequently, the completeness of the legal system. When there is nothing else, there is always the residual negative principle.

But why, one might ask, is the *reverse* principle *a priori* rejected, the principle that everything not permitted or otherwise regulated, is prohibited? What is it that makes that principle implausible? It is not unusual in municipal law systems, especially in areas such as taxation and antitrust law, to invoke a rule that declares everything prohibited which is not expressly permitted (alles was nicht erlaubt ist, ist verboten). Why, then, is not the presumption *against* the freedom of the states?

First of all, it must be remembered, that we are still discussing the *structure* of international law as a whole, and not specific areas of international law. It may well be that in municipal law systems certain fields of law hold a presumption against the freedom of the individual, but that can hardly apply to the municipal system as such. For, if in the beginning there was a broad general prohibition, then the structure of the system must be one of permissive rules, and surely it is not. In these days of rapid change, surely the legislator is not anxious to cope with the change by creating permissive rules. Who would dare to be a part of the rapid change, should the legis-

lator be unable to cope with the change, or rather, anticipate the change? The whole idea of a presumption against the freedom of the individual in the municipal system as such seems absurd. That it may function in specific areas of law is mainly due to the limited character of that area and the fact that the general prohibition governing the area is carefully defined (*e.g.*, all agreements between enterprises — as defined — producing certain — carefully defined — effects are prohibited, with the exclusion of certain — carefully defined — agreements). In the areas of life yet *unregulated* by law, individuals remain free to act at their own discretion.

In international law, the situation cannot be different. A presumption against the freedom of states would lead to stagnation of international life. In order to enjoy the fruits of development, the states would have to await a permissive international rule. All new measures would be prohibited unless they were permitted by international law: the dropping of the Hiroshima bomb, the sending up of satellites to outer space, the extension of the territorial waters, the transmission of radio- and TV-programmes across borders, etc. The first state to take a measure of such a kind would act in violation of international law. In this perspective, international law would seem to be a mere paper product, a fragment of real life, and the general prohibition merely an empty phrase. Moreover, if there were a presumption against the freedom af the states, the treaties, customary rules and other principles of international law, would be constructed to hold permissive rules.

What all this amounts to is that a residual principle for the regulation of yet unregulated areas in international law cannot be formulated as a presumption *against* the freedom of states; its consequences would be untenable and would run counter to realities. As regards the "unregulated" areas, the presumption thus must be *for* the freedom of states.

Seen from the standpoint of an international court ruling in accordance with international law, the court — in the individual case — having found that no principle of international law is applicable (despite, perhaps, a broad and generous interpretation of the existing law), would have to rule for the respondent. Thus, where there is no prohibition and no obligation upon states, there is permission (either directly by a permissive rule, indirectly by virtue of the residual negative principle or by virtue of an exception — in the form of a permission or license — from a prohibition). It lies in the interest of the applicant — the party claiming that international law is violated — that a prohibitory or obligatory rule be "found", and only *if* a such can be "found" will the permissive rules come into play. As a corollary, it cannot be that in the absence of a permissive rule the respondent —

accused of having violated international law — would be found guilty of violation.

The reasoning thus far, and the approach to the international law structure, is in accord with the majority opinion in the well-known *Lotus* case,[1] the *cause célèbre,* a case still so much under debate that the facts hardly need be recalled; but, briefly, they were as follows: In 1926 the French steamer *Lotus* collided with the Turkish collier *Boz-Kourt* on the high seas outside Turkish territorial waters, whereby Boz-Kourt was sunk and eight Turkish nationals were killed. The Lotus, however, proceeded to Constantinople. Two days later, the officer of her watch at the time of the collision, a French national, was tried in a criminal court and sentenced to imprisonment and a fine. The dispute which arose between France and Turkey was submitted to the Permanent Court of International Justice. The issue formulated in a *compromis* was, in essence, whether Turkey had acted in conflict with the principles of international law by instituting criminal proceedings against the French officer and, if so, what principles.

Before the Court the French Government contended that Turkey, in order to have criminal jurisdiction over the French national, should be able to point to some title to jurisdiction recognized by international law in favour of Turkey.[2] The French Government thus required that a permissive rule be established, without which Turkey could not have exercised criminal jurisdiction, without which therefore Turkey would have acted in violation of international law. The Turkish Government, on the other hand, took the wiew that Turkey was permitted to exercise jurisdiction, in so far as it did not come into conflict with a principle of international law. In the absence of a prohibitory or an obligatory rule of international law, the Turkish Government claimed, Turkey was free to exercise jurisdiction.

At first glance, it may seem that the litigating Parties had fundamentally divergent conceptions of the international law structure, the French Government favouring a presumption against the freedom of the states and the Turkish Government a presumption for such freedom. But this is not necessarily so. From the arguments advanced in the course of the proceedings, it seems clear that the French Government was not suggesting a presumption against the freedom of the states.[3] The point of departure for the French Government was a prohibitory rule in this specific area of criminal jurisdiction according to which a state is not entitled, apart from express or implicit special agreements, to extend the criminal jurisdiction of its courts to include a crime or an offence committed by a foreigner abroad, solely in consequence of the fact that one of its nationals has been a victim of the crime or offence.[4] This is the general principle of international law (in

combination with the alleged principle that jurisdiction over the French officer belonged exclusively to the French courts since the case involved a collision on the high seas) which the French Government argued that Turkey had violated. When it therefore required a title to be pointed to by the Turkish Government, it was in effect soliciting an exception from the prohibition.

The Court examined the *compromis* — which simply enquired whether Turkey had acted contrary to the principles of international law and, if so, what principles — and reached the conclusion that its task was to formulate the principles, if any, which might have been violated by Turkey, but not the principles which would permit Turkey to take criminal proceedings. The Court thus did not accept a general presumption against the freedom of states; basically, it reasoned, the states are free. Their freedom is limited by international law, by prohibitory and obligatory rules. And this conception of international law, the Court submitted, "is dictated by the very nature and existing conditions of international law".[5] The Court continued: "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 coexisting independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed."[6]

These oft-quoted lines simply state the view of the Court given above that there is no general presumption against the freedom of the states. In other words, beyond obligatory and prohibitory rules of international law, there is freedom. In order to determine whether the freedom is limited, state conduct must be scrutinized under the existing principles of international law independently in each individual case with regard to the specific area of international law governing the conduct. As regards the jurisdiction exercised by a state within the territory of another state (or at least outside its own territory), the Court exemplified, there existed in international law a general prohibition.[7] In order thus to exercise such jurisdiction, a state must be able to cite a permissive rule of international law; an exception from the general prohibition. With respect to the jurisdiction, criminal or civil, exercised within the state's own territory, however, even if affecting persons, property and acts outside the territory, no such general prohibitions existed, the Court continued. Here, international law leaves the states a wide measure of discretion, limited only in certain cases by prohibitive rules. And it is for this very reason and for the purpose of removing the

conflicting jurisdictions which may arise from this wide discretion, the Court argued, that steps were taken on the international level to reach agreements defining and limiting state jurisdiction (implying that if there were a general presumption against the freedom of the states such efforts would have no sense).[8]

Narrowing down the area further to what was pertinent in the instant case, to the scope of crimininal jurisdiction with respect to offences committed outside the territory of the state, the Court concluded that it was unable to find an absolute prohibition. Here the Court provided additional illumination of its position for the presumed freedom of the states: The situation regarding the extent of criminal jurisdiction, it reasoned, "may be considered from two different standpoints corresponding to the points of view respectively taken up by the Parties [that according to the French Government, Turkey must cite a permissive rule and, according to the Turkish Government, a prohibitive rule or a rule of obligation must be demonstrated]. 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 ... would therefore rest on special permissive rules forming part of international law."[9]

In the end, however, the query is the same, the Court found,[10] whichever of the two standpoints be adopted: whether or not there is a principle of international law that prohibits Turkey from exercising jurisdiction in the particular case. This result is evident if the first standpoint is taken. With respect to the latter standpoint it becomes evident, the Court explained, when one realizes that before ascertaining whether Turkey is permitted to exercise jurisdiction, as it did, it is necessary to establish that the standpoint itself is well-founded, *i.e.,* that a general prohibition restricting the discretion of states as regards criminal jurisdiction exists and that the prohibition is applicable in the particular case.[11]

In conclusion, thus, while the Court rejected a general presumption against the freedom of the states in international law, as such, it did not *a priori* exclude the possibility that in the domain of criminal jurisdiction over foreigners, for acts committed abroad, there existed a general prohibition. It, was *inter alia,* the existence of such a prohibition that the Court

subsequently was set to inquire.

Judge Loder, dissenting,[12] was unable to concur in the Court's opinion that "every door is open unless it is closed" under international law. Loder's main objection was, it seems, that this approach is "at variance with the spirit" of international law. The "fundamental consequence" of the independence and sovereignty is, he argued, that no municipal law can apply or have binding effect outside the national territory: "This fundamental truth, which is not a custom but the direct and inevitable consequence of its premiss, is a logical principle of law, and is a postulate upon which the mutual independence of States rests."[13] Without, for the moment, questioning the substance of this fundamental principle of Loder, one may entertain doubts a to its inevitability and its logically imperative character. In essence, Loder's argumentation seems to be as follows: International law is built on the existence of sovereign and independent states. Sovereignty and independence are thus the fundamental and indispensable elements of international law. The principle that no municipal law can apply or have binding effect outside the territory of the law-state (the state enacting the law) is, in turn, a fundamental and indispensable element of sovereignty and independence. In effect, without a such principle there is neither sovereignty nor independence. It is almost as if the principle is identified with sovereignty and independence, and *vice versa*. And all this by bare logic.

Again, however, it must be said that mere logic does not solve the issue. Loder works here with definite and ivariable concepts of sovereignty and independence. But soon enough he himself is forced to recognize that these are not definite concepts,[14] and that the fundamental principle he has adduced is not indispensable. States may, he admits, apply their laws to their own nationals who commit crimes outside the state territory. States may also apply their laws to foreigners who commit crimes directed against the state itself, its security or its credit. These "exceptions", as Loder describes them, apparently do not demolish the foundation of sovereignty and independence (and consequently, of international law). How many more "exceptions" may there be before states lose their sovereignty and independence; before the exceptions become the rule? To this, mere logic supplies no answer.

Bruns, commenting on the case, reasons somewhat in the same spirit as Loder: "Gesetze, die sich auf Ausländer beziehen, stellen einen Eingriff in die Rechtssphäre anderer Staaten dar und sind daher grundsätzlich völkerrechtswidrig. Nur auf Grund einer speziellen Erlaubnisnorm verlieren sie diesen Character."[15] And further: "Wäre das Recht auf Handlungsfreiheit

nicht generell beschränkt, so wäre jedem Staat jeder Eingriff in fremde Rechtssphäre gestattet, solange nicht eine besondere Verbotsnorm existierte. Auf solcher Grundlage ist eine Rechtsordnung überhaupt nicht denkbar."[16] With respect to the first statement: What is it that makes the application of a law to a foreigner more of an intrusion into the legal sphere of his home-state than the non-application and the obligation to accept the killing of countrymen into the legal sphere of the law-state? To paraphrase: Only a *prohibitive* rule of international law would change the "intrusive" character of the latter situation. From what we think is an intrusion into the legal sphere of other states, we cannot deduce anything. It is an intrusion only if there is a rule that qualifies it as such, a rule of international law, a prohibitive rule.

Bruns' thesis is that this prohibitive rule lies inherent in the international law structure; international law is a "Verteilungs- und Friedensordnung", and therefore the presumption must be against the freedom of the states.[17] (See the latter statement quoted above). The question is, however: How much less of a "Verteilungs- und Friedensordnung" would international law be if the presumption were *for* the freedom of the states. Is such a legal order "unthinkable"? Surely not; neither logic nor experience compels such a conclusion. There is nothing illogical or unrealistic about a legal system that covers most areas of life by specific ("besondere") prohibitive rules and leaves the remaining areas free to the discretion of is addressees.

Hidden behind these arguments by both Loder and Bruns, is the fear that international law would not *function* without a general presumption against the freedom of the states. Significative is the reasoning of Loder.[18] He realizes the partly primitive, partly embryonic nature of international law: "This law is for the most part unwritten and lacks sanctions; it rests on a general consensus of opinions; on the acceptance by civilized States ... of rules, customs and existing conditions which they are bound to respect in their mutual relations, although neither committed to writing not confirmed by conventions."[19] Under such circumstances, Loder seems to imply, international law can function only with a presumption against the freedom of the states.

This reasoning, however, appears to be somewhat misleading: On the one hand, we have a legal system in an incipient stage, an incomplete law; on the other hand, the system must, because of logic or the nature of things, be entirely complete, occupied by prohibitive rules, since what is not expressly permitted is prohibited. In other words, for the incomplete system to function it must be complete. This is an argument against *non liquet*. It has no bearing on the question whether the presumption should

be for or against the freedom of the states.

Moreover, the common ground of three of the dissenting judges in the *Lotus* case — Loder, Weiss and Nyholm — was the notion that the structure of criminal jurisdiction *is* the structure of international law, and *vice versa*.[20] The proposition thus that criminal jurisdiction over foreigners for acts committed abroad is prohibited unless authorized by international law was thought as valid for the international as such, so valid, it seems; that it was to be implicitly understood. The majority thought differently: "The territoriality of criminal law ... is not an absolute principle of international law and by no means coincides with territorial sovereignty."[21] Criminal jurisdiction, in the view of the Court's majority, is only a part of legislative jurisdiction, which forms a part of state jurisdiction *in toto*; the capacity or power of a state exercised under international law.[22] And this certainly seems to be the better view.[23]

A presumption for the freedom of the states is also favoured in the *Case Concerning the Barcelona Traction, Light and Power Company, Limited* (New Application, 1962, Belgium v. Spain, Second Phase).[24] Here Belgium, by an Application, instituted proceedings against Spain before the International Court in 1958. In the Application and the subsequent Memorial, Belgium asked the Court to adjudge and declare, *inter alia,* that certain measures taken by organs of the Spanish State against the Barcelona Traction, Light and Power Company, Ltd., *e.g.,* declaring the company in bankruptcy, seizing and liquidating its assets, were contrary to international law and that the Spanish State was under an obligation to makereparation for the consequential damage suffered by Belgian nationals, shareholders in the company. The Barcelona Traction Company was Canadian, but with several Spanish subsidiaries.[25]

The main issue in the case was whether Belgium had *jus standi* to exercise diplomatic protection of the Belgian shareholders, an issue of substantive law. Whether Belgium has capacity to bring an action under international law for losses suffered by the Belgian shareholders, the Court reasoned, is contingent upon whether Spain has broken an obligation under that law, *i.e.,* whether the losses suffered were the consequence of the violation of obligations imposed upon Spain by international law.[26] Thus, the right of Belgium had its necessary corollary in the obligation — or responsibility — of Spain. Taking notice, and accepting as a factor in international law, the municipal law distinction between the corporate entity, on the one hand, and its shareholders, on the other, the Court reached the conclusion that the Spanish measures taken against the Barcelona Traction Company caused damage to the corporate entity as such and only indirectly to its

shareholders. Entitled to compensation was thus the company (Canada) but not its shareholders whose rights were not directly infringed. Therefore Belgium was held to lack *jus standi.*

What interests us here is specifically whether Belgium had to prove the breach by Spain of an international obligation, or whether Spain had the burden of proving that it was permitted under international law to take action against the company causing economic damage to Belgian nationals.

To the proposition advanced by the Belgian Government that it is inadmissible under international law to deny the shareholder's national state a right of diplomatic protection merely on the ground that another state (Canada) possesses a corresponding right in respect of the company, the Court replied:

"In strict logic and law this formulation of the Belgian claim to *jus standi* assumes the existence of the very right that requires demonstration. In fact the Belgian Government has repeatedly stressed that there exists no rule of international law which would deny the national State of the shareholders the right of diplomatic protection for the purpose of seeking redress pursuant to unlawful acts committed by another State against the company in which they hold shares. This, by emphasizing the absence of any express denial of the right, conversely implies the admission that there is no rule of international law which expressly confers such a right on the shareholder's national State.

International law may not, in some fields, provide specific rules in particular cases. In the concrete situation, the company against which allegedly unlawful acts were directed is expressly vested with a right, whereas no such right is specifically provided for the shareholder in respect of those acts. Thus the position of the company rests on a positive rule of both municipal and international law. As to the shareholder ... appeal can, in the circumstances of the present case, only be made to the silence of international law. Such silence scarcely admits of interpretation in favour of the shareholder."[27]

In conclusion, thus, a permissive rule is relevant only as an exception to a prohibition. If it is stated that criminal jurisdiction cannot affect foreigners for acts committed abroad, that the exercise of jurisdiction in this respect is prohibited (or that an obligation lies), then this statement must be proved.[28] If it is said that administrative law (*e.g.,* taxation) must not affect foreigners abroad, then that must be proved. If it is said that there is a general prohibition against (or obligation with respect to) any extension of law to affect persons, property and acts outside the territory, that also must be proved. Or a prohibition against (or obligation with respect to) exercising power or against acting (or omissions) in general; all such prohibitions (obligations) must be proved, and the only way to prove them is to specify

an existing principle or rule of international law. And if proof can be given, then first the permissive rules — the exceptions — will become operative. Prohibitive rules will not be presumed.[29] This conclusion cannot be reached by way of mere logic or the very nature of things. Nor would historical arguments suffice to support it.[30] Its only foundation, it seems, is the circumstance mentioned in the beginning of this section namely, that a presumption *against* the freedom of states would put the state taking action in a field *not* regulated by international law — examples of which have been afforded — in an impossible position: Unable to specify a permissive rule or principle of international law in its favour, its conduct would be held a violation of international law.[31]

With this conclusion, *Brownlie* and *Meessen* would not agree. They both, independently, reject the idea that there must be an absolute choice, a presumption for or against the freedom of the states. As elaborated by Brownlie: "In the *Lotus* case the Court decided the issue of jurisdiction on the basis that 'restrictions upon the independence of States cannot be presumed'. However, there is no general rule, and in judicial practice issues are approached empirically. It is also the case that a general presumption of either kind would lead to inconvenience or abuse. The context of a problem will determine the incidence of particular burdens of proof, which may be described in terms of the duty to establish a restriction on sovereignty on the part of the proponent of the duty. The jurisdictional 'geography' of the problem may provide useful indications."[32] And Meessen, to whom there cannot be a *non liquet,* and to whom state conduct therefore is either prohibited or permitted,[33] reaches the following conclusion, having analyzed the *Lotus* case and the arguments pro and contra:[34] "Im Ergebnis gilt also, dass ein Verhalten, das nicht verboten ist, erlaubt ist, ebenso wie die Umkehrung, dass nämlich ein Verhalten, das nicht erlaubt ist, verboten ist. Da beide Sätze zutreffen, kann eine Vermutung für oder gegen die Freiheit der Staaten nicht anerkannt werden. Aus diesen Sätzen folgt lediglich, dass ein Verhalten nicht als 'weder verboten noch erlaubt' beurteilt werden kann."[35]

Both Brownlie and Meessen believe that a general presumption for the freedom of the states would lead to abuses (in Meessens' words: "Vielmehr wäre den Staaten in allen modernen Fragen ein unübersehbar weiter Freiraum eingeräumt"), and that, on the other hand the presumption against freedom would lead to inconveniences (that the states, in Meessens' words again, "eines völkerrechtlichen Erlaubnissatzes abwarten müssten").[36] While Brownlie's analysis ends with the quotation provided above, Meessen proceeds somewhat further, although neither Brownlie nor Meessen

cares to expound on the substance of the "abuse" which they fear a presumption for freedom would result in. (It seems, that herein lies the fear again that international law would not function.[37] The "abuse"-argument is the only argument advanced against a presumption for the freedom).

Meessen's theory, which is the core of his standpoint in this context, is that international law is a complete system of law, not by virtue of a residual principle, but by way of judicial "law-finding" ("Rechtsfindung"). (The theory is claimed to be supported by the reasoning of the International Court in the *North Sea Continental Shelf Cases*).[38] But the theory is more than so; it is the foundation of Meessens scientific method ("die Rechtsfindungsmethode"). And since Meessen's theory suggests that this method paves the way for the solution of all novel legal issues, including problems pertaining to antitrust jurisdiction, the theory warrants a closer examination. For if it is found that the theory is sound, then the proposition so boldly stated above — that the presumption is for the freedom of states — would have to be reconsidered.

The work of Meessen is devoted to the jurisdictional problems of antitrust regulation under international law. The object of his work is to define as clearly as possible international law *de lege lata* in this area rather than to formulate proposals *de lege ferenda.*[39] In the absence of treaty rules and customary rules of international law, Meessen looks elsewhere for the finding of *de lege lata.*[40] As he thinks it unrealistic that relevant rules should be readily available, and that they need only to be discovered, Meessen endeavours to study the initial stages of the process in which international law comes into existence. Here he finds the Court's decision in the *North Sea Continental Shelf Cases*[41] to be guiding. In these (joined) cases the Court was requested, *inter alia,* to decide what principles and rules of international law were applicable to the delimitation as between Denmark, the Federal Republic of Germany and the Netherlands of the areas of the continental shelf in the North Sea. (Art. 1 of the Special Agreements). Having rejected the "equidistance-special circumstances" principle embodied in Article 6 of the Geneva Convention on the Continental Shelf of 1958 as a binding ("mandatory") rule (principle) of international law — the Federal Republic of Germany was not a party to the Convention, the rule was not binding as a general rule of international law or customary law, nor was the Federal Republic bound by the rule by way of estoppel — the Court proceeded further in search of additional principles and rules of law. And these the Court found in the "basic legal notions" according to which delimitation must be the object of agreement between the states concerned, and that such an agreement must be arrived at "in accordance with

equitable principles".[42] This rule of equity rests, the Court explained, on a foundation of "very general precepts of justice and good faith". It is not a question of applying equity simply as a matter of abstract justice, but of applying an actual rule of law binding upon the states, a rule of law which itself requires the application of equitable principles, the Court continued repeatedly emphasizing that it was not departing from the principles of law.

This, it seems, is the core of the "Recthsfindungsmethode" which Meessen takes as a starting point. This is what Meessen describes as law-development within the framework of judicial law-finding, in which he also finds an element of law-creation.[43] And Meessen comments: "Der Gerichtshof hat die Enge des Art. 38 des Statuts nicht durch eine Erweiterung des Rechtsquellenkatalogs, sondern durch die Absage an ein positivistisch verkürztes Verständnis des Begriffs 'Anwendung des Völkerrechts' überwunden ... Rechtsanwendung ist vielfach Rechtsfindung und impliziert eine vorsichtige Fortentwichlung des Rechts, die zu den legitimen Aufgaben des Internationalen Gerichtshofs gehört."[44] The principles of international law developed from this law-finding, law-creating procedure, consist not of detailed norms, Meessen maintains, but of generalized legal viewpoints (considerations) applied in the individual case. They are applied, not so much by way of a mere subsumption, as by way of an open argumentation.[45]

Observe, however, that the "Rechtsfindungsmethode" is in no way identical with the application of equitable principles. The equitable principles are rather the *result* of the application of the "Rechtsfindungsmethode". From the perspective of the *North Sea Continental Shelf Cases* the method could best be described as follows: Having established that there may be several principles of delimitation, including the equidistance principle, the Court endeavoured to define the underlying and more general legal notions hidden behind these principles — the common denominator of these principles; and here the Court found the equitable principles (and the obligation to negotiate) — equity governed this field of law. On the basis of the equitable principles (equity) the Court prepared *guidelines* or *considerations* aimed at producing an equitable result in the individual case, at the same time emphasizing the fact that there "is no legal limit to the considerations which States may take account of" for the purpose of reaching an equitable result, and often it is "the balancing-up of all such considerations" that produces this result rather than reliance on one to the exclusion of the other.[46]

Thus, the finding of general underlying principles on the basis of which

guidelines can be formulated, is the central element of the "Rechtsfindungsmethode".

This "Rechtsfindungsmethode", extracted from the *North Sea Continental Shelf Cases* (but which, Meessen claims, is no novelty in the Court's practice),[47] is the instrument by which the international law system is completed and by which the lacunae are eliminated. As to the bearing which this method has upon the question of presumption for or against the freedom of states, Meessen elaborates: If one by *lex lata* understands the recognized and fully developed legal principles and rules, and by *lex ferenda* the politically desirable — the principles and rules yet to be introduced — then the distinction may, perhaps, be upheld in the domestic sphere, where the necessary adjustments may always be rapidly made by the legislative organs; not however in the international law system. "Im Völkerrecht müssen zur lex lata auch die *in der Bildung* befindlichen Normen gezählt werden, soweit sie richterlicher Rechtsfindung zugänglich sind. Der evolutionäre Character der Völkerrechtsordnung ist zu beachten. Hieraus folgt, *dass die Staaten auch ausserhalb der voll ausgebildeten völkerrechtlichen Regeln nicht stets frei oder stets gebunden sind.* Die Entwicklung völkerrechtlicher Grundsätze aus einer Vielzahl völkerrechtlicher Regeln erlaubt vielmehr ein *differenziertes Urteil*: Zum Teil ergeben sich völkerrechtliche Bindungen, zum Teil völkerrechtliche Freiräume für staatliches Handeln; in der Regel werden allerdings nur — dies liegt an der unvollkommenen rechtlichen Ausformung völkerrechtlicher Grundsätze — die Gesichtspunkte erkennbar, die die Entscheidung des Einzelfalles leiten. Die Aussicht, auf diese Weise jedes im Bereich der internationalen Beziehungen auftretende Problem einer sachgerechten völkerrechtlichen Beurteilung zuzuführen, erscheint beträchtlich erhöht."[48] Against this background, Meessen concludes, a decision for one or the other *presumption* cannot prejudice the results of international law law-finding ("Rechtsfindung") in the sense of a well-nigh total freedom or total restriction of the states.

First a minor reflection: If the "Rechtsfindungsmethode" is supposed to complete the international law system, it does not seem adequate that the chances ("Aussicht") of a such completion are considerably enhanced ("beträchtlich erhöht"); it would rather require a full coverage. Secondly, it may be asked whether Meessen is suggesting that the function of the international courts in the international sphere should correspond to the functions of legislative organs in municipal law, *i.e.*, is the function of the courts that of a legislating body effecting "necessary adjustments"? And is this the reason why *lex lata* should be extensively interpreted to cover those norms too, still in formation ("in der Bildung")?

It is agreed, the distinctions between applying, refining, developing and creating law are fine,[49] and certainly matters of degree. It is also agreed that international law has an evolutionary character, that what is *de lege ferenda* today may be *de lege lata* tomorrow and that the court should take this evolutionary character into account. Nevertheless, the principal questions must always be: Is the international court empowered by *international law* to function as a legislative body?; is the international court authorized to transform *de lege ferenda* into *de lege lata*? And here, we have found, the answer is no.[50] Norms, still in formation, are not part of the existing law, *lex lata*; they are not norms at all within the international law system. "Ausserhalb der voll ausgebildeten völkerrechtlichen Regeln" there is no developed law, binding upon the states. It is quite another matter that the court does and will exhaust every available source of law to its very limits, and may, realistically seen, at times even have exceeded those limits. Yet, in such cases and in cases of doubt, the court will always take care to provide ample evidence to the effect that the boundaries of law have not been overstepped, in order to remove possible suspicions to the contrary.[51] In the international law system the court is not the legislator, and should not be, if its real function is to be upheld: that of resolving disputes.[52] This is not strict positivism; it is a simple expression of the belief that international law — without the residual negative principle — does not provide a solution for *all* the problems which may arise in the international arena, and that at some point the court must halt and say: "This is as far as we can go. What follows is *lex ferenda*".

And no more than a belief and a suggestion *de lege ferenda,* is Meessen's theory that the lacunae in international law can be eliminated by judicial law-finding; this is evident from Meessen's own cautious formulation: "[D]iese Lücken *erscheinen* aber in Wege rechterlicher Rechtsfindung *ausfüllbar*"[53] The fact that no international court has so far declared a *non liquet,* does not, as Meessen asserts, substantiate his theory, no more than it substantiates the theory giving prominence to the residual negative principle, which the analysis in the foregoing section should have demonstrated.

Whether the "Rechtsfindungsmethode" is applicable within the field of international antitrust law, will be discussed in a subsequent section. What interests us here is whether the method has the quality of ruling out a presumption for the freedom of the states. That the "Rechtsfindungsmethode" of *North Sea Continental Shelf* found no place in *Barcelona Traction,* Meessen recognizes.[54] This difference in approach is, in Meessen's view, explicable by the fact that it was not easy for the Court in

Barcelona Traction to develop the law, or chart new ground, in the old, perhaps too old, but relatively established field of diplomatic protection, whereas in the virgin areas of the *North Sea Continental Shelf Cases* there was wider scope for the law-creating element of "Rechtsfindung".

But is it really as simple as that? Let us compare the prerequisites in both cases. In *North Sea Continental Shelf Cases*,[55] Denmark, the Netherlands and the Federal Republic of Germany together requested the Court to decide what principles and rules of international law were applicable to the delimitation as between the parties of the North Sea continental shelf area appertaining to each of them. In the *Barcelona Traction* case,[56] Belgium sought an adjudgement and a declaration to the effect that Spain had breached an obligation under international law and, in addition, reparation for damages suffered by Belgian nationals in consequence of that breach. In the former case, the Court formulated guidelines for future negotiations between the parties, based on the basic principles of the field of law in question. In the latter, the Court denied Belgium standing on the ground that shareholders had no right to claim damages for company losses caused by Spanish measures taken against the company. In question in the former case was primarily the equidistance principle — a principle of delimitation — which was held not to apply; the right to the continental shelf as such was never an issue. But the case could not end there: Equity provided a basis for further negotiations between the parties. In question in the latter case was the scope of diplomatic protection. This was a right-no-right situation (obligation-no-obligation). Since there was no right (no obligation), the question of damages never arose. (Had there been a right, the question of damages would have arisen and thereby possibly a subject for further negotiations on the basis of Court guidelines).

In the former case, delimitation was necessary; it did not stand or fall with the equidistance principle. The parties had a single goal, but differed as to the means with which to reach that goal. The reasoning of the Court was "goal-oriented". In the latter case the right to damages was entirely contingent upon whether there was a right to diplomatic protection or not. The parties were aiming in opposite directions.[57]

The proceedings in the former case were not, in the true sense, adversary; there where no real defendants, all of the parties were rather claimants, if anything. The absence of law would not have been favourable to any of the parties; it would have put them back in the position they were in before the case was brought to court. An incomplete system of law was of little use to any of them. Their intention was to eventually complete the system by an agreement. Under these circumstances a presumption for or

against the freedom of any of the litigating states would have made no sense. If there had been a presumption for freedom a such there was for all states.

In *Barcelona Traction,* again, the proceedings were adversary; there was a claimant (applicant) and a defendant (respondent). The absence of law could have been exploited by one or the other party. And in that situation the question of presumption would be — and was — vital.

The distinguishing factors here mentioned, as between the *North Sea Continental Shelf* cases and the *Barcelona Traction* case, are crucial in this context. They throw light on the fact that the cases are inherently different in structure and therefore incommensurate. They show that the *North Sea Continental Shelf Cases,* with their specific features, belong to a particular category of cases, and — the submission is — a minor category. The *Barcelona Traction* case, the *Corfu Channel Case,* the case concerning *Reparation for Injuries Suffered in the Service of the United Nations,* the *Fisheries Case* (United Kingdom v. Norway), the *Nottebohm Case,*[58] etc., would have belonged to that category had the parties — prior to bringing the case to court — agreed about their obligation (and corresponding right) under international law to compensate losses and disagreed only about the *amount* of the compensation (and for this reason requested the court to state the principles for the computation). But, as we all know, this was not so. Without prejudizing the question whether the "Rechtsfindungsmethode" is applicable within the field of international antitrust law, it would certainly seem that the reasoning in the *North Sea Continental Shelf Cases* has a limited range; it cannot easily be generalized. Much less can any conclusions be drawn from the reasoning as to whether there is a presumption for or against the freedom of the states, or both, and as to whether the international law system is complete or not.

The conclusion thus is that the Meessen's theory, according to which there is no general presumption for or against the freedom of the states, holds true only in cases of a certain character: the delimitation of a continental shelf, or other territories, the award of damages when the parties agree that such shall be awarded but disagree as to the principles determining the extent of the award, etc. — and only in the very limited sense that a presumption serves no evident function in such cases. But in no case, it is submitted, can the presumption be against the freedom of the states. And further: Whatever the validity and the quality of the "Rechtsfindungsmethode" as such, it has no significant bearing on the issue of the completeness of the international law system, nor on that of presumption for or against the freedom of the states.

Notes, chapter X

[1] *S.S. Lotus*, P.C.I.J. 1927, Series A, No. 9 and Series C, No. 13—11. The case is probably one of the cases most commented upon in the history of international courts. See e.g. Brownlie, at 294 (with further references); Brierly, The Basis of Obligation in International Law; at 142 ff. (44 L.Q. Rev. 154, 1928); Berge, The Case of S.S. Lotus, 26 Mich. L. Rev. 361 (1928); Noël-Henry, Le Lotus à la Cour de La Haye, 11 Revue de Droit International (1928), at 87; Beckett, Decisions of the Permanent Court of International Justice, 11 B.Y. Int. L. I (1930); Rebbe, Der Lotusfall, etc. (with further references).

[2] *S.S. Lotus, id.*, at 18.

[3] *Id.*, at 6 ff.

[4] *Id.*, at 7.

[5] *Id.*, at 18.

[6] *Id.*

[7] *Id.*, at 19.

[8] *Id.*, at 20.

[9] *Id.*

[10] *Id.*, at 21.

[11] *Cf.* Rebbe, at 25 ff.

[12] *S.S. Lotus*, at 34 ff.

[13] *Id.*, at 35.

[14] On these concepts, see further *infra* chapter XI.

[15] Bruns, Völkerrecht als Rechtsordnung, I Z. a.ö.R.V. 1 (1929), at 53.

[16] *Id.*, at 54.

[17] *Id.*, at 9 ff. *Cf. supra* and n. 10 ff.

[18] *Supra* n. 12.

[19] *Id.*

[20] *S.S. Lotus, supra* n. 1, at 34 ff. (Loder); at 42 and 49 (Weiss); at 60 (Nyholm). Lord Finlay (*Id.*, at 52) contrued the *compromis* to hold a request for a permissive rule of international law.

[21] *Id.*, at 20.

[22] *Cf.* the Restatement (2d) of Foreign Relations Law, § 6.

[23] But see Brierly, The Basis of Obligation in International Law, at 143 (44 L.Q. Rev. 154, at 155 (1928)).

[24] I.C.J. Reports 1970, p. 3.

[25] *Id.*, at 13 f. For further details and discussion see references in n. 27 *infra*.

[26] *Id.*, at 32 f.

[27] *Id.*, at 37 f. (§§ 51 f.). See further Briggs, H., Barcelona Traction: The *Jus Standi* of Belgium, 65 Am.J.Int. L. 327 (1971) at 334 ff. But see the dissenting opinions of Judges Tanaka and Jessup, *supra* n. 24, at 131, 188 and 194 (Says Judge Jessup — *id.* at 188:— "No rule of law, no principle, forbids that latter State to extend its diplomatic protection to those interests." And at 194: "I find no evidence or reasoning which precludes such protection"). For further comments on the case, see e.g. Mann, F.A., The protection of Shareholders' Interests in the Light of the Barcelona Traction Case, 67 Am.J.Int.L. 259 (1973); Lillich, R.B., Two Perspectives on the Barcelona Traction Case, The Rigidity of Barcelona, 65 Am.J.Int.L. 522 (1971); Higgins, Aspects of the Case Concerning the Barcelona Traction, Light and Power Company, Ltd., 11 Va.J.Int.L. 327 (1971); Metzger, Nationality of Corporate Investment under Investment Guaranty schemes — The Relevance of Barcelona Traction, 65 Am.J.Int.L. 532. Also see Notes in 1 Cal. Western Int.L.J. 141 (1970); 3 L & Pol. Int. Bus. 542 (1971); 38 Fordham L.R. 809 (1970); 3 N.Y.U.J. Int. L. & Pol. 391 (1970).

[28] As to the maxim *jura novit curia*, see Wengler, at 745, n. 3; S. Rosenne, The International Court of Justice (Leyden, 1961), at 421.

[29] *Cf.* the separate opinions of Judge de Castro and Judge Dillard in the *Fisheries Jurisdiction Case*, I.C.J. Reports 1974, p. 3, at 59 and 78. *Cf.* Judge Alvarez in the *Fisheries Jurisdiction Case*, I.C.J. Reports 1951, p. 116 at, 148.

[30] See e.g. Brierly, *supra* n. 23; Beckett, The Exercise of Criminal Jurisdiction Over Foreigners, 6 B.Y. Int. L. 44, at 50 ff. (1925).

[31] *Cf.* the discussion in Drost, Völkerrechtliche Grenzen für den Geltungsbereich staatlicher Strafrechtsnormen, 43 Niemeyers Zeitschrift für Internationales Recht 111, at 123 ff. (1930—31); Berge, The Case of the S.S. Lotus, 26 Mich. L. Rev. 361, at 375 ff. (1928); Rebbe, at 25 ff. But see Beckett, *supra* n. 30, at 50 ff.

[32] Brownlie, at 282 (footnote omitted).

[33] Meessen, at 79.

[34] *Id.*, at 74 ff.

[35] *Id.*, at 79 (footnotes omitted).

[36] *Id.*, at 78.

[37] See *supra* p. 397 f. and n. 17 ff.

[38] I.C.J. Reports 1969, p. 3. Also the cases mentioned by Meessen at 72 (*Corfu Channel Case*), I.C.J. Reports 1949, p. 244; *Reparation for Injunes Suffered in the Service of the United Nations* (*Bernadotte case*), I.C.J. Reports 1949, p. 174 and *Nottebohm Case*, I.C.J. Reports 1955, p. 4).

[39] Meessen, at 65.

[40] *Id.*, at 65 ff.

[41] See *supra* n. 38.

[42] *Id.*, at 46 f.

[43] Meessen, at 69 ("Fortentwicklung des Rechts im Rahmen richterlicher Rechtsfindung").

[44] *Id.*, at 71.

[45] *Id.*

[46] I.C.J. Reports 1969, p. 3. at 46 ff.

[47] Meessen, at 72.

[48] *Id.*, at 78 (footnote omitted, all emphases added).

[49] See *supra* p. 382 f. and n. 55 ff.

[50] One need not look far to find a strict interpretation of international customary law *de lege lata*, namely the *North Sea Continental Shelf Cases*, I.C.J. Reports 1969, p. 3, §§ 70 ff. *Cf.* Berber, at 58 f.; Brownlie, at 9; F. Münch, Das Urteil des Internationalen Gerichtshofes vom 20. Februar 1969 über den deutschen Anteil am Festlandsockel in der Nordsee, 29 Z.a.ö.R.V. 455, at 464 f. (1969).

[51] See *supra* n. 49.

[52] See Judge Ammoun's separate opinion in the *Barcelona Traction* case, *supra* chap. IX, n. 72.

[53] Meessen, at 79 (emphasis added). *Cf. id.*, at 65: "Es ist nicht die Aufgabe dieser dem geltenden Recht gewidmeten Arbeit, derartige Überlegungen de lege ferenda anzustellen."

[54] Meessen, at 72.

[55] See *supra* p. 401 and n. 41.

[56] See *supra* p. 405 and n. 56.

[57] In this sense the *Barcelona Traction* case parallels the *Corfu Channel Case*, I.C.J. Reports, p. 4 and the case concerning *Reparation for Injuries Suffered in the Service of the United Nations*, I.C.J. Reports 1949, p. 174 (*Bernadotte case*).

[58] I.C.J. Reports 1970, p. 3; I.C.J. Reports 1949, p. 4; I.C.J. Reports 1949, p. 174; I.C.J. Reports 1951, p. 116; I.C.J. Reports 1955, p. 4.

Chapter XI
Sovereignty and independence

One of the most frequent arguments in the diplomatic protests lodged against the United States exercise of jurisdiction in antitrust cases, has been that the extension of American jurisdiction over foreign nationals and enterprises infringes the sovereignty of their home states. Thus, for instance, in the U.S. antitrust proceedings against the Swiss watchmaking industry, the Swiss Government, appearing as *amicus curiae,* contended that the application of U.S. antitrust law in the instant case would "infringe Swiss sovereignty, would violate international law and would be harmful to the international relations of the United States."[1] And in the case of *Federal Maritime Commission Investigation (1960/61)* the Danish Government in an Aide Mémoire considered the investigatory practices of the United States to be "incompatible with the sovereign rights of Denmark".[2]

While the cogency of such arguments might set in doubt, the vitality of the concept of sovereignty and the tremendous tension it carries cannot be denied. This is true of the diplomatic reasoning not only in this field of law, but in the international arena as a whole. The great significance attached to the notion of sovereignty in international life, is partly due to the arisal of numerous new states, or of new regimes within old states, and with it an anxiety to protect the integrity and independence of the newly borned; partly, of course, to the fact that the notion — in the minds of its users — is believed to carry a certain persuasive force. Or as observed by Jenks: "[C]laims to sovereignty are more widely and sometimes more vigorously asserted than ever before. The concept has, moreover, tended to become a bulwark behind which groups in the world community ... are apt to retrench themselves, and, within such groups, a protection of national freedom against super-power control or domination by extremist influences ... the catchword of sovereignty continues to intoxicate national policies".[3] As a sociological fact — and a political factor — of international life, "sovereignty" is still very much alive.[4] The question is, however, what is the *legal* significance of the concept? Which are its legal implications?

Few international law institutions have been more vehemently debated in the legal doctrine than the notion of sovereignty. And hardly any legal in-

stitution has been so elastic, so much subject to modifications and — inevitably — so confusing as that of sovereignty. Its manifestations, as *Ross* observes with a slight sigh of resignation,[5] have been almost as many as the participants in the debate revolving around it.From Bartolus to Bodin, over Suarez, Grotius, Wolff, and Pufendorf, further to Kant, Hegel, Lasson, Zorn, Seydel and Jellinek, and further, again, to the international theorists of our century, sovereignty has varied not only as to its alleged content, its legal implications and the prerequisites upon which it may be founded.[6] Varied has also the subject (or object) of which it is supposed to be an attribute. Varied has, finally, the fundamental connotation of "sovereignty"; from the relative sovereignty of Bodin and Grotius, to Hegel's absolute sovereignty and back again to the relative character of sovereignty in the minds of Verdross, Guggenheim and other theorists of our time. And these variations run so closely parallel to the political changes all through history that it becomes almost impossible to determine whether the variation is a product of the political change, or *vice versa*. In the past two or three decades, however, one discerns a stabilizing tendency.

Today, all international lawyers agree that sovereignty is attributed to the states in the world community. So much seems clear. When states within a federal system carry the epithet "sovereign", this means sovereignty solely under municipal law, and not under international law.[7]

States are characterized as sovereign under international law on the ground that they are equipped with certain qualities. The attribution is thus made, not arbitrarily, not on the ground of a "state's" own will, not because of the will of another single state, but according to a formula embedded in international law. Since only states can be sovereign, apparently one of the elements in that formula disqualifies other subjects of international law, such as international organizations, from being sovereign. Why this is so, we know only after establishing that formula.

There is also a general consensus among legal writers that sovereignty is not absolute — *i.e.*, no state has absolute sovereignty, no state is absolutely free, at least so long as we have more than one state in the world community. Absolute sovereignty as we have seen earlier in this theses,[8] would imply the denial of international law — a law binding on all states — would imply freedom from a binding international law. Thus, from the perspective of international law the sovereignty attributed to states cannot be of an absolute character — which would be a contradiction in terms. Absolute sovereignty is excluded as a characteristic of states qualified as sovereign states. It follows that sovereignty must be relative: International law imposes

restrictions on states; their freedom is relative to those restrictions. States are sovereign under international law. This follows already from the presupposition that sovereignty is an attribute conferred upon states by international law, because they possess certain qualities. The relative sovereignty, as observed by *de Visscher,* "acknowledges the fact that the individual states are included in a pattern of relationships which necessarily imposes certain limitations upon their will".[9] And these limitations vary, of course, from time to time, all according to the development — whether in a expanding or a retracting direction — of international law.

In this connection, it is said that one of the characteristics of sovereign states as subjects of international law is that they are immediately subrodinated to international law ("völkerrechtliche Unmittelbarkeit") and, consequently that there is no intermediate municipal law governing the state. So, for instance, *Verdross:* "Die Ordnung der souveränen Staaten kann also nicht von einer anderen Staatsordnung abgeleitet sein, sondern nur *ausschliesslich und unmittelbar* auf grund des VR bestehen. Mangels des Merkmales der Völkerrechtsunmittelbarkeit sind daher weder die Gliedstaaten eines Bundesstaates, noch andre autonome Verbände eines Staates Völkerrechtssubjekte."[10]

Thus, in order to determine whether a state is sovereign under international law, and therefore subject to it, we must ascertain the character of the law immediately governing the state, *i.e.,* whether the law is international or municipal in nature. And here obviously, as *Ross* shrewdly points out,[11] one would run in circles if simply applying the definition of international law as a law binding on (sovereign) states. What is it for instance that distinguishes the United States' Constitution — binding upon the several states of that nation — from the Treaty of Rome? Why is it that the states in the former case are considered to be immediately subordinated to municipal law, and in the latter case to international law? To this the notion of "Völkerrechtsunmittelbarkeit" supplies no answer, nor does the definition of international given here — nor, of course, does the denomination of the specific order, or its historical background.

The answer, Ross concludes,[12] must lie in the order itself. If a treaty, originally concluded between sovereign states, stipulates — from the very start or at any other given moment during its existence — that one or several of its signatories shall be deprived of some of the qualities which under international law are considered essential for sovereignty, then the treaty, at least in that respect, is no longer international law. The several states of the U.S. federal system have, we all know, lost their sovereignty in the international law sense, the signatories of the Rome Treaty have not.

In order to know when sovereignty is lost (or gained) we have to look for a formula in international law. According to this formula, one may very tentatively assume that sovereignty has to do with the power (competence, authority) of the states to impose duties and confer rights. And a certain minimum of this power, it seems, a state must retain in order to be sovereign. What does it take for the signatories of the Rome Treaty to lose their sovereignty, and consequently for the Community as such to become a sovereign (federal) state? Would it suffice with abolition of the veto power in the sector of agriculture of May 18, 1982? Surely not; no one would (and has) seriously so assert (-ed). Would the abolition of the veto power in several sectors suffice? In all sectors? Would the establishment of a central government? Somewhere along this line the point must have been reached where the members of the Community are no longer sovereign under international law.

Kelsen would disagree,[13] it appears. Kelsen pictures a treaty by which an international agency is established in which only some of the contracting states are represented and the decisions of which — binding upon all contracting states — are adopted by a majority vote. "[I]t is a misuse", he thereafter argues, "of the concept of sovereignty to maintain that it is incompatible with the sovereignty of the States to establish an agency endowed with the competence to bind by a majority vote States represented or not represented in the law-making body."[14] The freedom of action of the contracting states would certainly be more restricted by this than by any other treaty. Yet: "the difference remains only a quantitative, not a qualitative one, since under any legal order unlimited freedom of action is impossible."[15] The agency may, as an international community with legislative powers, differ from other international communities, but only in the degree of its centralization. It is not correct therefore, Kelsen continues, to say that such a community, owing to its centralized character, is a state which has ceased to be an international community. And he concludes: "[N]either the fact that a treaty establishing a legislative agency does very much restrict the freedom of action of the contracting States nor the fact that the community constituted by such a treaty is more centralized than other international communities usually are, justifies the argument that the establishment of a legislative agency is incompatible with the nature of international law or, what amounts to the same, with the sovereignty of the States."[16]

Is Kelsen here suggesting that if a contracting state were to transfer its competence to an international agency, sovereignty would be left unaffected — that sovereignty does not presuppose a minimum competence;

that there is no definite (no absolute) borderline distinguishing sovereignty from non-sovereignty? Would all of the Member States of the European Community still be sovereign, even if some of them were not to be represented in its legislative organs and although legislation is passed by majority vote in all sectors? Would state A transferring its legislative competence to state B still be? Is Kelsen proposing that state A is not subordinated to B? Would the difference still remain a quantitative and not a qualitative one? In light of the statement made in a prior paragraph in the same article — "Sovereignty in the sense of international law can mean only the legal authority or competence of a State limited and limitable only by international law and not by the national law of another State"[17] — the conclusion would hardly seem warranted. But how else can we understand Kelsen?

The key to the problem seems to be that Kelsen over-emphasizes the significance of the basis of the specific legal order which the contraction parties have established.[18] If the basis is a treaty, Kelsen appears to imply, then it is international law and remains so, and the parties concluding that treaty are subordinated to international law alone — *i.e.,* they are still sovereign. Quite different, he claims, is the case where a constitution of a federal state is established by an international treaty.[19] (Here, national law "arises" from international law). Kelsen's view is, of course, intimately linked to (or better, a consequence of) his general concept of law and his legal hierarchy. In separating treaties and constitutions into strict comparments — international law and national law — the thesis that sovereignty loses only in quantity but not in quality can be upheld — *i.e.,* that under a treaty the freedom of state action may be more or less restricted without the loss of sovereignty.

But surely this is over-formalism. From the standpoint of state A, which has transferred its legislative competence to state B by the conclusion of a treaty, it is no more the treaty that represents the highest level of the legal order in this respect, but rather the constitution of state B. And from the standpoint of state B, it has full freedom of legislative action as against state A, wherefore the treaty has become wholly incorporated into B's sphere of power.[20] One would even be correct in saying that there no longer is a treaty in the true meaning of the word, which denotes an agreement between states, since the treaty extinguishes the existence of state A in the world community.

In his "Principles of International Law", published a few years later (1952), Kelsen, however, seems to have shifted opinion ("shifted", provided, of course, that his views theretofore have been correctly interpreted

here). "[A] state", he reasons, "loses its quality as a state if the law created by the treaty assumes the character of national law because of the centralization of the community constituted by the treaty, as is the case of a treaty by which a federal state is established."[21] When discussing the international law status of a protectorate he further remarks: "The community constituted by the protectorate treaty is *international only with regard to its creation* by an international agreement entered into by two states, but not with regard to its structure."[22] And, as regards the status of a state in a federal system, Kelsen expounds:

"Centralization of the administration of foreign affairs of two more states may also be achieved by a treaty of the states concerned conferring the administration of their foreign affairs not upon an organ of one of them, but upon an organ of the community composed of the contracting states, the constitution of the community being stipulated by that treaty. The community constituted by such a treaty has the character of a state, and the constitution the character of national law when not only the administration of foreign affairs but also other functions of the contracting states are conferred upon organs of the new community; that is to say, when the degree of centralization established by the constituting treaty is that characteristic of a state. This is the way by which a federal state may be established. By concluding such a treaty and submitting to the federal constitution, the contracting states *lose their character as states in the sense of international law.*"[23]

With this we can only agree, for what else does the loss of the "character" of a state "in the sense of international law" imply but the loss of sovereignty under international law, as defined herein.

The view presented here seems to coincide with the Advisory Opinion, 1931, of the Permanent Court of International Justice, concerning the *Customs Régime between Germany and Austria.*[24] Here, the Court interpreted the peace treaty of Saint-Germain of 1919, which spoke of the "inalienable independence" of Austria. "Inalienable independence" was construed in a way that coincides with the concept of sovereignty; the right of Austria to remain independent of other states, a right not to be subordinated to the national law of another state (or a group of states) — nothing but the status of a state as sovereign under international law and restricted only by that law. The subordination of the will of Austria to the will of another state, or group of states, would imply the loss of Austria's independence and sovereignty. In respect of this perception of the concept of sovereignty, the Court was, it seems, united.[25] It seems too that there are few dissenters to this view amongst legal writers today.[26]

Thus, the conclusion so far is that states, in order to be subjects of inter-

national law, must be sovereign, and in order to be sovereign they must enjoy a certain competence — a minimum of competence. Mark, however, that this competence the state must enjoy only in a horizontal respect — as against other states — but not in the vertical respect — as against international law.

In the relation international law-municipal law, as opposed to the interstate relation, there is no minimum competence required of the states in order to be sovereign. Indeed, in this relation the notion of sovereignty serves no purpose. As we have seen earlier in the present study,[27] international law can restrict the freedom of states to any extent without reaching a point where the bounds of sovereignty are transgressed; such a point does not exist. International law may restrict the freedom of states, it may limit their competence (power) until there remain only minor administrative functions, and may go even further. International law may even imply the abolition of multiple statehood altogether and the creation of a world state (international law, world law or universal law is a terminological issue). And, of course, in the absence of a multitude of states one can no longer speak of sovereign states — in that sense sovereignty is lost — but of a single sovereignty.

Thus soverignty is lost to another state, or a group of states (or all other states), but not to the sphere of international law. Sovereignty is a horizontal, not a vertical, phenomenon. This is not to suggest that treaties always confer rights and impose duties upon states co-extensively, or that it is incompatible with international law that a state surrenders its sovereignty by concluding a treaty, or that customary law, especially if particular in character, cannot have like effects; because, as we have seen, this is not so. It is merely suggesting that the international law system may expand its jurisdiction at the expense of the municipal law systems as such — *i.e.*, as a group of systems (municipal law in general terms) — without touching upon sovereignty, and that this issue lies entirely within the realm of the international law-municipal law dichotomy. In other words, *all* states cannot lose their sovereignty, unless a world state is created the consequence of which is the extinction of the multitude of states.[28]

This seemingly obvious conclusion has one further implication. The formula in international law on sovereignty cannot — logically — be substance-oriented; substance cannot constitute the criteria for sovereignty. The basis for conclusion is the following reasoning: Starting from the proposition that the international law system may encroach upon municipal law without limits, that international law may, by regulating and restricting the freedom of states, reduce to any extent the domestic sphere, and thus

that there is no aspect of life that cannot be regulated by international law. Taking, secondly, as self-evident the fact that international law is a flexible legal system in a process of continuous development — expansion, further expansion and retraction, etc. Assuming, thirdly, that international law were to hold an international criminal code binding on all states. Would a state which transfers the competence to determine the content of its criminal law to another state, be surrendering its sovereignty? Of course not; it would not be surrendering anything, since it had no competence in the first place to independently determine the content of such laws. Likewise, if an international civil code were to be introduced, or an international tax code, there would be no sense in transferring the competence pertaining to such matters, since no competence would lie for the transferring state, the competence already having been transferred to the international law sphere. Thus a matter regulated by international law cannot be a matter the transfer of which to another state's jurisdiction would result in the loss of sovereignty.

It follows that the substance of sovereignty, if such there is, varies with the development of international law; there cannot be a fixed substance. In other words, in order to establish any kind of substance of sovereignty one must first analyze the principles of international law in general. It is the total effect of international law upon the domestic sphere that determines the boundaries of sovereignty, and not the reverse procedure. Hence, when Judge Loder, dissenting in the *Lotus* case, claims that the fundamental consequense of the sovereignty and independence of states is that "no municipal law can apply or have binding effect outside the national territory", he seems to be starting at the wrong end.[29] Sovereignty, as international law as a whole, is in a constant state of flux. The substance of sovereignty, if such there is, is variable; it cannot be regarded as static and definite.[30] Consequently, there is no area of law, no subject-matter, that is indispensable to sovereignty for all time.

The concept of sovereignty, as we can see, is intimately linked to matters falling within the domestic domain and unregulated by international law.[31] The formula on soverignty seems to relate to the possibility of a state to independently govern matters in the domestic domain. Or somewhat more concretely: In order to be subject to international law, a state must be able to independently govern — without the legal authority of another state — matters that fall within the domestic sphere (and not the international law sphere),[32] that is, it must be sovereign. The scope of the domestic domain can be determined only on the basis of the relation between international law and municipal law at a particular moment, and hardly with any exacti-

tude. An international court, for instance, could decide that a state lacks sovereignty on the basis of that relationship at the time of the decision. Since — and this is vital — the substance of sovereignty is not fixed for all time there cannot exist an international law formula on sovereignty that is substance-oriented — *i.e.*, which prescribes that, in order for a state to be sovereign, it must be able independently to govern certain matters. All that such a formula may convey is that sovereignty has to do with substance within the domestic domain.

The conclusion itself may seem trivial. Most legal writers of today would, no doubt, agree with the result.[33] It is the way in which the conclusion is reached that differs. Thus, *Erler,* to name one example, is of the opinion that "[e]ine inhaltliche Grenze für die Erhaltung der Souveränität ist nicht festzustellen" and that "[d]ie immer wieder gemachten Versuche, die eigene Bewältigung bestimmter *inhaltlicher* Aufgaben als unabdingbar für die Aufrechterhaltung der Souveränität hinzustellen, müssen ... scheitern".[34] The reason for this he believes is the following:

"[I]m Laufe der Geschichte [hat] der Staat *ganz verschiedene* Aufgaben als wesentlich an sich gezogen oder als unwesentlich abgestossen und anderen Mächten überlassen ... Das Verhältnis des Staates zu Religion, Handel, Wirtschaft, Weltanschauung, Kultur, Wissenschaft und Jugenderziehung, aber auch zu einzelnen Bereichen des auswärtigen und militärischen Politik zeigt immer wieder Perioden liberalen Desinteressements und Aktiver Verplanung. Ein extrem liberalen Staat, der die Bewältigung inhaltlicher Aufgaben in weitestem Umfange anderen sozialen Kräften überlässt, ist nicht weniger souverän als ein extrem dirigistischer."[35]

This would all be sound if it were possible to measure the significance ("Wesentlichkeit") of a subject-matter (for sovereignty) in terms of how liberal or "dirigistisch" the approach of a state is towards these matters. For a state that honours free market economy, freedom of religion, of culture, science, etc., hardly considers these matters less significant for its sovereignty than a state that prefers a centralized economy and a meticulously restricted religion, culture, science, etc. That the significance of a subject-matter has shifted from one year to another all through history, does not support the conclusion that Erler reaches, unless he can provide an objective criterion for what *is* significant for a state at a given moment. In this he does not succeed. The extent to which a matter is regulated is not a such criterion.

If thus the international law formula on sovereignty is not substance-oriented, what else can the notion of sovereignty denote? Here, the modern theory advances the concept of function. "Der Begriff der Souveränität ist ein Funktionsbegriff, kein Substanzbegriff: Souveränität ist nicht Wesens-

grund oder Gestaltungsprincip des Staates, sondern nur Ausdruck für eine bestimmte Position des Staates im dynamischen Prozess der Geschichte",[36] says *von der Heydte.* And *Erler* concurs: "Es kommit *nicht* auf die *inhaltliche Tätigkeit* der Staaten an, sondern auf seine *funktionale* Möglichkeit zur Aufnahme solcher Tätigkeit. Die Grenze der Souveränitätseinbusse liegt erst bei der *Funktionseinbusse.*"[37]

Functionality, according to the prevailing view, implies that, in order to be sovereign, a state must have the capacity to independently govern such matters that according to the degree of development of the international law fall within the domestic domain. Sovereignty thus implies independence.[38] Independence means the ability to make decisions without the *legal* requirement of an authorization by another state or group of states; not, of course, the freedom from limitations imposed by international law, viewed in its general posture.[39] It is freedom of legal action under international law and the legal power to act, in freedom from legal restrictions imposed by other states. And if a state enjoys a such position, international law regards it as sovereign and thus a subject of international law.

Terminologically the concept of sovereignty and that of independence do not, as we can see wholly coincide. "Independence" alone cannot signify sovereignty, since the questions remains: Independence to do what? To govern independently of other states matters falling within the domestic domain. Since the world is divided into territorial states one should add: Within the territory of the state. As summarized by *Max Huber* in the *Palmas* case: "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State."[40]

Schaumann, however, discerns a wider distinction between sovereignty and independence. Independent in the international law sense, Schaumann reasons, is every sovereign community ("Gemeinschaft") immediately, *i.e.,* not through an intermediary community, subordinated to internatonal law. Here, he claims, we have the distinction: The concept of independence presupposes a sovereign state; only a sovereign state can be independent under international law.

Stated this way, it certainly seems that there cannot be an identity between sovereignty and independence. To say that every sovereign community is sovereign, would be an empty tautology; Schaumann appears to be playing a terminological trick, hardly convincing.[41] But Schaumann continues: "Im Masse der Unterordnung eines souveränen Staates unter eine völkerrechtliche Organisation ergibt sich eine Beschränkung der Unabhängigkeit, ohne dass damit ein Verlust der Souveränität verbunden

sein muss."[42] These lines reveal that independence for Schaumann has a quantitative connotation while soveriegnty is used as a qualitative concept. A state is either sovereign or not sovereign. Independence, however, is a matter of degree; independent a state may be more or less.[43] On the other hand — and this is somewhat puzzling — a state may, in Schaumann's view, entirely lose its independence without surrendering its sovereignty. As an example, he mentions the federal state system.[44] Thus a state may be sovereign without being independent, but not independent without being sovereign. Here, "independence" is added a qualitative aspect; independence requires, after all, and more so than sovereignty, a certain minimum competence under international law.

In so far as Schaumann maintains that this is not the terminology commonly applied by legal theorists, he is correct. The reason for avoiding this terminology, however, seems to be that it adds a dimension to the problem of sovereignty which the legal theory can easily do without. It appears to be too impractical to work with two different concepts in this field, one of which — independence — carries far too many complexities. If all we want to know is whether a state is an interntional law subject or not — and Schaumann does not, as far as can be ascertained, attach any other function to the concept of sovereignty — it suffices to determine whether the state is sovereign or not. What is beyond that seems to belong to the metalegal world.

Yet, fully acceptable is Schaumann's view that sovereignty is not a matter of degree (although, for practical purposes, he uses the expression "limitations on sovereignty"). In common with *Korowics* and others: States are either sovereign or not sovereign; logically there are no such things as "non-fully sovereign" states or "half-sovereign" states.[45] The only essential questions are: Can a state dispense with any part of the competence it possesses under international law and, if so, to what extent may the state transfer its competence and yet not lose its sovereignty? As to the first question, most writers agree that a state's competence under international law does not have to be fully covered; some of it may be dispensed with without the loss of sovereignty.[46] A different conclusion would be untenable. It would paralyze international relations. The second question — how much — is far more complex.

The question cannot evoke a concrete and detailed answer. Specific state functions cannot be given precedence over other functions:[47] This lies in the non-substantive character of the international law formula in sovereignty. Only an abstract standard that points in the right direction can be provided.

Ross, for instance, concludes that the loss of sovereignty (independence) may be the consequence of different situations, not necessarily combined, *inter alia*:

1. A restriction of self-government in that another state *to a certain degree* controls the internal affairs of the restricted state.
2. An *extraordinary and extensive restriction* of one state's freedom of action for the benefit of another.[48]

For *Rousseau,* independence implies exclusiveness, autonomy and full competence, whereof exclusiveness signifies the exclusive competence, *in principle,* of a state within a given territory.[49] And according to *Schaumann,* the substantial ("wesentliche") functions are determinative.[50]

Abstract, but somewhat differently phrased, is also the standard proposed by *Berber*: "[W]enn durch einen völkerrechtlichen Vertrag *nicht die Freiheit in einzelnen Ausübungsarten, sondern gerade ihr Kern, ihre Substanz, ihr Wesensgehalt ganz oder treilweise* in der Weise aufgehoben oder *gemindert* wird, dass eine Kontrolle fremder Staaten, sei es eines einzelnen, sei es vieler, sei es aller übrigen Staaten, *auf die Substanz der Freiheit selbst* ausgeübt wird".[51]

Brownlie, finally, uses the term "dependent states" apparently to denote the existence of a distinct situation, such as "(1) the absence of statehood, where the entity concerned is subordinated to a state *so completely* as to be within its control and the origin of the subordination does not establish agency or representation; (2) a state which has made concessions to another state in matters of jurisdiction and administration *to such an extent* that it has in some sense ceased to be sovereign".[52]

As noticed above, and as these few quotations tend to show, the standard for sovereignty is necessarily vague and abstract. At the most it could be maintained that in order to be sovereign a state must retain full control over a *predominant part* of the competence which states generally possess under international law. The final determination and the concrete specification of the standard is better left to the decision-making process in the individual case, which embraces an overall consideration of all relevant factors. *Korowicz's* discussion on the case of *The Rights of Nationals of the USA in Morocco* (International Court of Justice, *France v. USA,* 1952)[53] is most illuminating.

There the Court, with respect to the status of Morocco, stated, *inter alia,* that under a protectorate treaty of 1912 (the Treaty of Fez), wherein the rights of France in Morocco were defined, Morocco remained a sovereign state. All Morocco had made was an "arrangement of a contractual

character whereby France undertook to exercise certain sovereign powers in the name and on behalf of Morocco, and in principle, all of the international relations of Morocco".[54] In order to establish the soundness of this conclusion, Korowicz makes a brief analysis of the treaty in question and finds that, according to Article I France was authorized to institute a new régime in Morocco as well as reforms it deemed proper in a wide variety of fields covering a broad spectrum of the internal life, including the military, judicial, administrative and financial fields; that according to Article II, France was authorized to proceed to military occupation of the Moroccan territory to the extent it deemed necessary according to Article V 2; that the French Resident General (and the French Government, Article VI 2) should conduct the interntional relations of Morocco and have the power to approve and promulgate the decrees of the Sultan (Article V 3). From these and other stipulations in the Treaty of Fez, together with the fact that the Treaty did not provide for a time-limit, nor a possibility of denunciation by the Sultan, Korowicz draws the following conclusion: "Thus, Morocco surrendered in perpetuity the exercise of its sovereign rights to France. Since French reforms and administration in Morocco were subjected to the will and approval of the French Parliament, it may be said, that French municipal law, and not international law, governed Morocco".[55] Hence, in Korowicz's view, Morocco, under the Treaty of Fez, was neither a sovereign state nor a subject of international law. With this, one cannot but agree.

In conclusion, therefore, the international law formula on sovereignty may be summarized as follows: A state, in order to be sovereign, and consequently a subject of international law, must have full control of the predominant part of the competence which states generally — according to the degree of development of international law — possess under international law with respect to a certain territory; a control exercised to the exclusion of all other states. And when we speak of control, we mean the formal control, the control *de jure,* not the control in fact. The control *de jure* the state can surrender to another state, or a group of states, by a treaty or other agreement. Or a state may be subordinated to another state through occupation, if this is recognized by the world community as such.

To express the same formula otherwise, a state in the international law sense is a community that is sovereign as now defined. Communities that are not sovereign are not states at all under international law, and consequently not subjects under that law.[56] For pedagogical purposes, however, the former formulation is preferable. That the formula is entirely one of international law, and as such purely formal, deserves renewed emphasis:

sovereignty, as used here, is a legal concept and nothing more. And, thus, this concept conveys nothing of the political and economic realities in the world of today, nothing of the growing world-wide *inter*dependency in almost every facet of life,[57] the movement from co-existence to co-operation,[58] and the inherent anomaly of sovereignty.[59] For, if all these aspects were to be considered, one would certainly be right in asking "Wer ist heute noch wirklich souverän?".[60] Much more appropriate of consideration is the political environment of the world today for the purposes of proposals *de lege ferenda.*

The function of the concept of sovereignty has in the foregoing text been narrowed down to the definition of states as subjects of international law. International law *applies* to sovereign states; rights are conferred upon them, obligations imposed. The right of one state corresponds to the obligation of another. The right implies the right to make use of the international law remedies. Obligation implies responsibility. States, as subjects of international law, are responsible for breaches of obligations. Thus, intimately connected to the question of sovereignty or not — sub-ordination or not — is the question of state responsibility.[61]

The function of the concept of sovereignty, as here presented, is not necessarily exclusive. Other functions may be, and have been, attached to it — functions of a less formal nature. Not unusual is the suggestion that sovereignty is an abstraction or aggregation of numerous international law rules, the sum of which form the principle of sovereignty. Thus *Schwarzenberger,* for instance, states that the "principle of legal sovereignty" is an abstraction from a number of rules, among which he mentions that international law subjects are bound by general international law, but are bound by treaty obligations only to the extent to which they have consented to such, that the territorial judisdiction of a state is exclusive within the limits of international law, and further that:

"(4) Subjects of international law may *claim* potential jurisdiction over persons or things outside their territorial jurisdiction. In the absence of permissive rules to the contrary, however, they may actually *exercise* such jurisdiction in concrete instances only within their territories.
(5) Unless authorized by permissive rules to the contrary, intervention by subjects of international law in one another's sphere of exclusive domestic jurisdiction constitutes a breach of international law."[62]

Of Schwarzenberger's five rules here stated, the first is not a rule but a self-evident statement: International law subjects are, *par definition,* bound by international law. The second and third rules coincide with our formula on sovereignty, outlined above. The fourth and fifth rules, together with the

third, include different aspects of a principle which is not a direct and necessary consequence of our formula, the principle that the exercise of jurisdiction within the territory of another state (or at least outside the territory of the exercising state) is prohibited. Our formula implies only that *if* a state exercises exclusive competence within a certain territory, then it is considered sovereign. The additional element is thus the principle that the exercise of jurisdiction within the territory of another state is prohibited by international law, unless that state has consented to it. (A permanent consent of a broad content may, on the other hand, lead to the loss of sovereignty).

Hence, we have here an international rule of substance not included in the formal formula supplied above. And the consequences of this rule, Schwarzenberger summarizes in a principle of legal sovereignty. While this "compiling" function of the concept of sovereignty is conceivable, it seems neither necessary nor indispensable. Why not simply accept the prohibitive rule as it is? Why reformulate the prohibition in terms of sovereignty, a concept so much burdened with confusion already? For practical purposes, yes, expressions such as "this is a breach of our sovereignty", "our sovereign right", etc., may serve to arouse associations which point in the right direction. Scientifically, however, there seems to be no sense the use of such expressions. As an international lawyer one has to start by establishing the substantive rules of international law, and not by examining the abstractions of such rules.[63]

Moreover, why should the abstraction be restricted to the five (or actually four) rules enumerated by Schwarzenberger. There is, of course, no rule of international law that so requires, unless it is maintained that there is a such customary rule of international law — judging by the use of the concept of sovereignty in international relations it seems that it may have *any* content. Nor does there exist, it appears, such a general usage of the concept among legal theorists and writers. So why not extend the abstraction to cover additional rules? Why not extend it to *all* international law rules and principles of a general character?[64]

The question that remains to be examined in this section is whether "sovereignty" in any respect provides a solution for the jurisdictional issues arising in the international antitrust field. It should be clear from the foregoing analysis, that whichever of the functions described we attach to the concept of sovereignty, one cannot derive — extract or deduce — substantive rules or principles, whether general or specific, from that concept. The futility of this has been repeatedly emphasized by international law publicists. *Kelsen,* for instance concludes: "It is an illusion to believe that legal

rules can be derived from a concept such as sovereignty".[65] And as observed by *Ross:* It is entirely unjustified to derive any rights for the sovereign state from the concept of sovereignty. One cannot draw any conclusions from this concept, other that that a sovereign community is a subject of international law, a subject upon which rights are conferred and obligations imposed. The nature of these rights and obligations, cannot be determined by examining this concept of sovereignty; it depends solely on the content of the actual principles and rules of international law in force.[66]

The only "right", one could add, derivable from sovereignty is the "right" of the state, when sovereign, to be a subject of international law (so long as it remains sovereign).

Notes, chapter XI

[1] See Extracts From Some Published Material on Official Protests, Directives, Prohibitions, Comments, etc., compiled by G.W. Haight, ILA 1964, at 565, 575.

[2] *Id.,* at 579. See further *supra* n. 1, at 565 ff.

[3] C.W. Jenks, A New World of Law (1969), at 131. *Cf.* W. Friedmann, The Changing Structure of International Law, at 35.

[4] *Cf.* Korowicz, Some Present Aspects of Sovereignty in International Law, 102 Recueil des Cours 1 (1961, I), at 5 f.

[5] Ross, at 40.

[6] See e.g. Kelsen, Das Problem der Souveränität, at 5 f.; Ninčić, The Problem of Soverignty in the Charter and in the Practice of the United Nations, at 1 ff.; Sauer, Souveränität und Solidarität, at 19 ff.

[7] See e.g. Korowicz, *supra* n. 4, at 90 f. and 102 f.

[8] See *supra* chapter VII.

[9] C. de Visscher, Théorie et réalité en droit international public (Paris, 1953), translation by Ninčić, *supra* n. 6, at 9.

[10] Verdross, Völkerrecht, at 194 (footnote omitted). *Cf.* Kelsen, The Principle of Sovereign Equality of States As a Basis for International Organization, 53 Yale L.J. 207, at 208 (1944): "If sovereignty means 'supreme' authority, the sovereignty of States as subjects of international law can mean, not an absolute but only a relatively supreme authority. A State's legal authority may be said to be 'supreme' insofar as it is not subjected to the legal authority of any other State; and the State is then sovereign when it is subjected only to international law, not to the national law of any other State. Consequently, the State's sovereignty under international law is its legal independence from other States." Also see Kelsen, Principles of International Law, at 441 f.

[11] Ross, at 45 ff.

[12] *Id.*, at 27 and 45 ff.

[13] Kelsen, *supra* n. 10, at 211.

[14] *Id.*

[15] *Id.*

[16] *Id.*, at 211 f.

[17] *Id.*, at 208.

[18] *Cf.* Verdross, Völkerrecht, at 194.

[19] Kelsen, *supra* n. 10, at 211.

[20] *Cf.* Ross, at 46 ff.

[21] Kelsen, Principles of International Law, at 111 (footnote omitted).

[22] *Id.*, at 168 (emphasis added).

[23] *Id.*, at 169 f. (emphasis added).

[24] P.C.I.J., 193 Series A/B, No. 41.

[25] Cf. Korowicz, *supra* n. 4, at 11.

[26] See e.g. Dahm, at 152 ff.; Ross, at 40 ff.; Korowicz, *supra* n. 4, at 5 ff. and 92 ff.; Berber, 121 ff.; Erler, Staatssouveränität und internationale Wirtschaftsverflechtung, I Berichte 29 (1957); Brownlie, at 283 f.; Morgenthau, The Problem of Sovereignty Reconsidered, 48 Colum. L. Rev. 341, at 348 f. (1948); Aufricht, On Relative Sovereignty, 30 Cornell L.Q. 137 (1944).

[27] See *supra* chahpter VIII.

[28] See e.g. Korowicz, *supra* n. 4, at 98 ff. and 103 ff.

[29] *S.S. Lotus,* P.C.I.J. 1927, Series A, No. 9, at 34 f.

[30] This view seems to be dominating among writers of international law, see e.g. Ross, at 42 f.; Kelsen, Principles of International Law, at 438 ff.; Heydte, Völkerrecht 1, at 96 ff.; Kunz, Die Staatenverbindungen, Handbuch des Völkerrechts, Vol. 11 (1928), at 59; Rosswog, 96 ff., 98 f.; Drost, Völkerrechtliche Grenzen, at 128; V. Simson, Die Souveränität im rechtlichen Verständnis der Gegenwart (Berlin, 1965), at 20 ff.; Dicke, at 66 f. (with further references).

[31] See *supra* p. 412 f.

[32] Here, again, the international law is understood as a system and municipal law as the entirety of municipal law systems.

[33] See *supra* n. 30.

[34] Erler, *supra* n. 26, at 37.

[35] *Id.*

[36] Heydte, Völkerrecht 1, at 97.

[37] Erler, *supra* n. 26, at 37. *Cf.* Ross, at 50; Berber at 123 f.; Ninčić, at 12 ff; Rosswog, at 98 ff.; Korowicz, *supra* n. 4, at 16, 18 ff.; Schaumann, at 78; Dicke, at 66 f. (with further references).

[38] See Korowicz, *supra* n. 4. at 11 ff.

[39] A treaty, under which state A transfers some of its competence to state B, is not general international law in this sense; not even a treaty whereunder state A unilaterally transfers competence to *all* other states. As pointed out above (*supra* p. 416), it is only when international law applies to all states without exceptions that one could speak of general international law in the sense understood here.

[40] Reports of International Arbitral Awards (United Nations) II, at 838. *Cf.* Verdross, Völkerrecht, at 193; Guggenheim, at 164; Berber, at 123; Brownlie, at 80 f.; Dahm, at 154 f.; Rosswog, at 98 f.; Gunst, at 105 ff.; Dicke, at 50; Kelsen, Principles of International Law, at 438 ff.; Korowicz, *supra* n. 4, at 11 ff. (with further references).

[41] *Cf.* Dahm, at 154, n. 6: "Die neuerdings von *Schaumann*... vertretene Unterscheidung Zwischen Souveränität und Unabhängigkeit scheint uns sachlich und sprachlich nicht überzeugend."

[42] Schaumann, at 83 (footnote omitted).

[43] At the same time Schaumann (at 84) speaks of a *limitation* of sovereignty ("Beschränkung der Souveränität"), admitting, however, that this is logically a contradiction in terms.

[44] Schaumann, at 84. Also see *id.*, n. 130: "Kein Verlust der Souveränität, wohl aber der Unabhängigkeit, ist nach unserem Begriff mit dem Verlust des unmittelbaren Mitbestimmungsrechts in der Völkergemeinschaft verbunden, sofern an dessen Stelle ein mittelbares Mitbestimmungsrecht durch eine übergeordnete souveräne und unabhängige Gemeinschaft tritt."

[45] Korowicz, *supra* n. 4, at 88 and 103; Ross, at 50; Schaumann, at 85; Rosswog, at 96 ff.; Heydte, Völkerrecht I, at 97 ff.; Brownlie, at 80 f.; Berber, at 123; Gihl, Huvuddragen, at 90 ff.; Eek, at 373 ff.; Morgenthau, *supra* n. 149; Ninčić, at 45; Gunst, at 102; But see Sauer, *supra* n. 135, at 158 f.

[46] Ross, at 50; Verdross, Völkerrecht, at 194; Erler, *supra* n. 26, at 38 ff.; Guggenheim, at 166; Schaumann, at 84; Korowicz, *supra* n. 4, at 86 ff.

[47] *Cf.* Erler, *supra* n. 26, at 39.

[48] See Ross, at 51 (emphasis added).

[49] Rousseau, Droit International Public (Ist e. Paris, 1953), at 90 ff.

[50] Schaumann, at 84.

[51] Berber, at 126 (footnotes omitted, emphasis added).

[52] Brownlie, at 77 (footnotes omitted, emphasis added). In Brownlie's view, however, "statehood", it seems, is the crucial criterion for legal personality under international law, and "independence" only one of the incidents of "statehood". As to the concept "sovereignty", Brownlie expounds: "The term 'sovereignty' may be used as a synonym for independence, an important element in statehood considered already. However, a common source of confusion lies in the fact that 'sovereignty' may be used to describe the condition where a state has not exercised its own legal capacities in such a way as to create rights, powers, privileges, and immunities in respect of other states. In this sense a state which has consented to another state managing its foreign relations, or which has granted extensive extra-territorial rights to another state, is not 'sovereign'. If this or a similar content is given to 'sovereignty' and the same ideogram is used as a criterion of statehood, then the *incidents* of statehood and legal personality are once again confused with their existence. Thus the condition of Germany after 1945 involved considerable diminution of German sovereignty in this sense, and yet Germany

continued to exist as a state." (Footnotes omitted). Applying the same reasoning, Brownlie seems to claim, the states of a federal system are states under international law, the federal government acting as an agent for the states (see Brownlie, at 62 f.). The difficulty, however — as Brownlie himself realizes — in distinguishing this agency-construction from the "true" transfer of competence, is conspicuous. Moreover, an agency relationship lasting for a period of 100—200 years is doubtlessly a mere fiction.

The difference in views is probably not so much a material difference, but rather terminological. Nevertheless, it seems more practical to distinguish between states in the municipal law sense and states in the international law sense. We are here only discussing the latter. See further *infra* chapter XII and XV.

[53] I.C.J. Reports 1952, p. 176. See Korowicz, *supra* n. 4, at 91 ff.

[54] I.C.J. Reports 1952, p. 176, at 188.

[55] Korowicz, *supra* n. 4, at 93. *Cf. id.* n. 13. Also see Brownlie, at 78. In Brownlie's terminology (see *supra* n. 52) France was not — although the language of the Court ("in the name and on behalf", see *supra* n. 54) may suggest otherwise — a mere agent to Morocco. The relation was rather one of subordination.

[56] *Cf.* Brownlie, at 62 ff., 73 ff. and 80 f.

[57] See e.g. H. Huber, Weltweite Interdependenz (Bern, 1968).

[58] See e.g. W. Friedmann, The Changing Structure of International Law (London, 1964).

[59] See e.g. C.W. Jenks, A New World of Law, at 130 ff.

[60] Mosler, statement in discussion, I Berichte der deutschen Gesellschaft für Völkerrecht (1957), at 61. *Cf.* Jellinek, *id.*, at 63; Krüger, *id.*, at 1 ("die Souveränität [steht] auf der Grenze zwischen Recht und Wirklichkeit").

[61] This is a subject not further discussed here. See further e.g. Brownlie, at 79 and 441 ff.; Ross, att 21 ff.; Gihl, Huvuddragen, at 94 f. and 99 f.; Westlake, International Law 1 (1910), at 1 ff.

[62] Schwarzenberger, A Manual of International Law, at 52 (footnotes omitted) *Cf.* Brownlie, at 282 f. Also see B. Johnson, Suveränität i havet och luftrummet (Stockholm, 1972), at 11 f.; Brierly, The Law of Nations (6th ed., 1963), at 47, to whom the concept of sovereignty is "merely a term which designates an aggregate of particular and very extensive claims that states habitually make for themselves in their relations with other states."

[63] Also see Schwarzenberger, The Forms of Sovereignty, 10 Current Legal Problems 264 (1957). *Cf.* Dicke, at 68 ff. Dicke uses the concepts "external" and "internal" sovereignty as substitutes for different forms of jurisdiction. Morgenthau, *supra* n. 26, at 343 ff.

[64] *Cf.* Brownlie, at 281: "The manner in which the law expresses the content of sovereignty varies, and indeed the whole of the law could be expressed in terms of the co-existence of sovereignties." (Footnote omitted).

[65] Kelsen, The Principle of Sovereign Equality of States As a Basis for International Organization, 53 Yale L.J. 207, at 210 (1944).

[66] See Ross, at 42. *Cf.* Verdross, Völkerrecht, at 6 ff.; Korowicz, *supra* n. 4, at 18 ff.; Berber, at 126 ff.; Eek, at 374 f.; Rosswog, at 97 ff.; Glatzel at 87 ff. and 122 ff.; Drost, Völkerrechtliche Grenzen für den Geltungsbereich staatlicher Strafrechtsnormen, 43 Niemeyers Zeitschrift für Internationales Recht 111, at 128 (1930—31); V. Simson, Die Souveränität im rechtlichen Verständnis der Gegenwart (Berlin, 1965), at 21 f.; Rousseau, L'Aménagement d e s

compétences en droit international, 4 Revue Générale de Droit International Public (3me série) 420, at 425 (1930); Lauterpacht, The Function of Law in the International Community, at 95 f.; Kelsen, Principles of International Law, at 439; Brierly, The "Lotus" Case, 44 L.Q.R. 154, at 156 (1928); L. Siorat, Le problème des lacunes en droit international (Paris, 1950), at 370. As to the East-European concept of sovereignty, see e.g. Korowicz, *supra* n. 4, at 27 ff.; Dicke, at 32 ff. and 193 ff.; Gunst, at 81 ff.; Stone, Legal Controls, at 60 ff.; Sauer, Souveränität und Solidarität, at 130 ff.; Schweisfurth, Sozialistisches Völkerrecht? (Berling-Heidelberg-New York, 1979), at 299 ff.

Chapter XII
Sovereignty and equality

In the preceding chapter we came to the conclusion that sovereignty is a formal concept of international law, the function of which is to qualify states as subjects of international law; that the concept thus is devoid of any substance and, consequently, that principles or rules of international law cannot be derived from it. The concept implies that *if* a state is sovereign, *if* it can independently govern its affairs appertaining to a certain territory, it is a subject of international law. We have also observed the close connection between the concept of sovereignty and that of independence. A third concept, often brought forward in the same context, is that of equality, that is equality, between states as subjects of international law. Before proceeding further, just a few words to elucidate the connections.

The concept of equality in international law is as much debated and controversial as sovereignty, and has a history at least as long. Just like sovereignty, its significance has varied with the historic swings of the pendulum, from the absolute equality of Vattel to mere legality of Kelsen.[1] Somewhere inbetween we have the notion of "sovereign equality", invoked in the Charter of the United Nations. What interests us here, however, is the connotation which the concept has today and its relation to sovereignty within the ambit of international law.

To begin with: What do we learn about equality as a rule of law by scrutinizing the international law formula on sovereignty? Do we learn that all states that are sovereign are equal? Of course, the formula conveys that all states which meet the criteria of sovereignty are, according to international law, sovereign (and, as such, subjects of international law) without discrimination. But this, as *Kelsen, Dahm* and others have observed, is a mere tautology: "[E]quality so formulated is but a tautological expression of the principle of legality, that is, the principle that the general rules of law ought to be applied in all cases in which, according to their contents, they ought to be applied."[2] It is thus but saying that the formula on sovereignty is a rule (of law) which applies as a rule of law, which rules (of law) ought to do if they are to be rules[3] (of law). Equality would in this sense be another expression for legality. And a legalistic application of the formula on sover-

eignty would, imply not only that states which meet the criteria of sovereignty are sovereign, but also that as such they are subjects of international law and, further, as such they are amenable to international law, its rights and obligations.

Transposed to the field of international law in general, this form of equality is an empty expression of the circumstance that the rules and principles of international law ought to apply when, according to these, they ought to apply. This is what is usually termed "equality before the law", or that the law applies equally to all to whom it is addressed, without discrimination. It is a "formal" equality, as distinguished from substantive (material) and actual equality. It is formal in the sense that it conveys nothing of, and has no bearing on, the (substantive) content of the law and thus it is compatible with any substantive inequality in law. And, of course, actual inequalities between states, in terms of power in the economic, political and technological fields, in terms of natural resources etc., are left entirely untouched. If thus, for instance, an international law rule should provide that only states which have been sovereign for a continuous period of fifteen years shall have voting power at international conferences, formal equality implies that the rule shall apply, according to its content, to all states whatever its substantive inequalities. Relevant to the voting power is only the stated time period and the question whether sovereignty exist or not, all other factors are irrelevant. Whether a rule of international law applies to all states is determined by the rule itself. If it does not, then the rule supplies criteria (fifteen years of sovereignty) by which its scope of application may be determined: states of war, states which lose a war, states which are neutral, states bounded by sea or rivers, states which have more than ten million inhabitants, etc. No matter how inequal the formulation of these criteria may seem, formal equality would nevertheless exist so long as they are applied in all cases in which, according to the specific rule, they should be applied. Formal equality thus has nothing to do with substantive (material, normative) equality.

That there exists a such formal equality in international law — as in any other legal order — with the narrow implications now described, hardly no one denies. As such, the formal equality is obvious; it is inherent in the concept of law. Without formal equality there would be no law, only arbitrariness.[4]

To be distinguised from mere equality before the law is, claims *Dahm,* the principle that, under the same conditions, states must have equal rights and equal duties, summarized in the maxim that what is equal, should be treated equally and what is unequal, unequally. Although this too is

nothing but a formal principle, it is, Dahm maintains,[5] more meaningful ("sinnvoller") than equality before the law; the question of distinction, however, is not elaborated. Indeed, as the preceding remarks have shown, there is no distinction.[6] If states are equal in that they are sovereign, they should be treated equally in the given formal sense, if they are unequal in that some are sovereign and some are not, then they should be treated accordingly. Or what else does Dahm imply by equality?

But is there anything else than this empty shell of formal equality that could be anchored in sovereignty? Does sovereignty, for instance, comprehend a *right* to be equal? Such a right seems to be indicated by *Morgenthau*[7] who suggests: "Equality, too, is nothing but a particular aspect of sovereignty. If all states have supreme authority within their territories, none can be subordinated to any other in the exercise of that authority."[8] So far Morgenthau is merely stating the essence of sovereignty — that subordination precludes sovereignty — and if this is equality, it is nothing but sovereignty. But then Morgenthau proceeds: "No state has the right, in the absence of treaty obligations to the contrary, to tell any other state what laws it should enact and enforce, let alone to enact and enforce them on the latter's territory."[9] Hence, does equality, as an aspect of sovereignty, embrace this right? To begin with, what Morgenthau really is expressing is not a right to equality, but a "right" to sovereignty (a sovereign state has the "right" to be sovereign, or more correctly, to remain sovereign, a right not encompassing the right of a state, not yet sovereign, to become sovereign). But, moreover, as we have emphasized before, from the concept fo sovereignty alone we cannot derive a right to be protected against such intrusions as are exemplified by Morgenthau. The "right" to be a subject under international law is the most that can be derived from sovereignty, and as such to claim the protection of that law; a right existing as long as the state is sovereign. This, however, does not include the right to remain sovereign, which is exactly what Morgenthau is suggesting. Such a right presupposes the existence of other international law principles, actually in force.

Somewhat troublesome — and controversial — is the usage of the concept of equality in the United Nations' Charter, Article, 2 p. 1, providing: "The Organisation is based on the principle of the sovereign equality of all its Members."[10] Whether the principle alluded to deviates from the concept of sovereignty, as herein defined, coupled with formal equality, is uncertain. The variant of it, "equal sovereignty", seemingly would not.[11]

In a special Report of Committee 1 to Commission 1 (for the preparation of the Charter) some clarification was provided. The concept of "sovereign

equality" was held to consist of the following four elements: 1) that all states are juridically equal; 2) that each state enjoys the right inherent in full sovereignty; 3) that the personality of the state is respected, as well its territorial integrity and political independence; and 4) that the state should, in accordance with the international order, comply faithfully with its international duties and obligations.

Leaving aside whatever political statements and appeals to morals and general courtesy this "declaration" may contain, we may concentrate on its international law contents. What do these elements add to what we already have? The first element seems to be another way of expressing formal equality or equality before the law. The second and the fourth elements — despite the fact that the word "full" is anomalous — seem to contain no more than the international law rule that a sovereign state shall be subjects of international law, and as such it has to comply with the obligations of international law. The first part of the third element appears to be a repetition of the second element in the given sense. Raising the most doubt is the phrase "[respected] territorial integrity and political independence". If this is a formulation of the principle that a sovereign state is one whose territorial integrity and political independence is respected, there is full congruence with the formula discussed above.[12] But if it implies a right to territorial integrity, the same objections apply here as those above regarding the reasoning of Morgenthau. All in all, however, the deviation from what may be summarized in the concept of "equal sovereignty" is insignificant. It seems, therefore, that the concept of sovereignty would have sufficed to cover the *legal* contents of "sovereign equality", in other words, there was no *legal* necessity to add the term "equality"[13] (from a political standpoint, there may have been), unless the Committee perceived the concept of equality as something more than formal equality. The question thus becomes, what else could equality imply than mere formal equality?

In dispute is *Oppenheim's* attempt to inject more substance into the concept of equality. The member states of the family of nations are equals as international persons, Oppenheim notes. There is an equality before the law.[14] So far Oppenheim is suggesting nothing more than formal equality. This "legal equality", he adds however, has four important consequences. These can be summarized as follows:

1 When a question arises which has to be settled by consent, every state has a right to vote, but to one vote only.
2 The vote of the weakest and smallest state has as much (legal) weight as the largest and most powerful.

3 No state can claim jurisdiction over another, according to the rule *par in parem non habet imperium;* a state cannot be sued in the courts of another state (immunity from jurisdiction).
4 The courts of one state are not, as a rule, competent to question the validity of the official acts of another state, insofar as those acts purport to take effect within the sphere of the latter state's jurisdiction.[15]

Oppenheim is here listing rights (and obligations) which, in his view, lie inherent in the international personality of states. On the other hand, Oppenheim does not seem to regard these rights (not all of them at least) as *logical* consequences of international personality, as he recognizes that the legal equality comprehending the rights has undergone modification in many respects.[16] Moreover, all of these rights may be surrendered by the consent of the state involved, and this is fully compatible with the rights as such. But what then is the connection between these rights and international personality? Are they not merely those rights (and obligations) which states possess by virtue of their international personality, just like any other right (or obligation) under international law? This certainly seems to be true of the rights (and obligations) enumerated under 3) and 4): Whatever the international law rule may be in these fields — the doctrines of sovereign immunity and act of state — it would not affect the equality of states. Thus, if the rule were to be that there is no sovereign immunity, or only partial immunity, or that there is no obligation to honour the official acts of other states, or that such an obligation is conditional upon circumstances other than those defined here, equality is unaffected, provided that there is legality, *i.e.,* that the rule applies equally to all states. Like any other right (or obligation), consequently, the right to sovereign immunity and the rights pertaining to the act of state doctrine are applicable to states as international law subjects (persons). No other connection between these rights and international personality can be detected.

With the rights defined under 1) and 2) — the right to one vote and the right to an equal legal weight of the vote — the situation is different. If in international law a state, *without its consent,*[17] could be deprived of its vote or be given only half a vote, or imposed treaty obligations, then surely international law would differentiate between states, then international personality would mean one thing to one state and quite another thing to other states. In order for the international law to retain the epithet "law", it would have to furnish criteria for the differentiation. Such criteria could, for instance, imply that a full vote and full weight of a vote requires that a state has a certain number of inhabitants or that a state has been sovereign

for a specified period of time. Under these circumstances there would be formal equality. Whether there is substantive (material) equality we cannot decide without supplementary guiding principles. What we do not have — and this is really what Oppenheim is discussing[18] — is "equal sovereignty" for all states, since some states would not be sovereign at all. Only, those states that meet the additional criteria and, thus, whose consent is required for treaty obligations, etc., are, as understood here, sovereign or independent.[19] These states, enjoy equal sovereignty.

The difference between the rights listed under 3) and 4), on the one hand, and those under 1) and 2), on the other, is that an amendment of the former as described affects all (sovereign) states whereas an amendment of the latter necessarily affects only some states and therefore alters the legal balances between the states. These are changed, not by consent, not by aggression or some other violation of international law, but by virtue of international law itself. A change in the legal balances between states and the status of some states, without the consent of the states negatively affected, is nothing but a change in the formula on sovereignty.

In effect, what Oppenheim is saying is that states as international persons are equals in as much as they all are sovereign, and sovereign they remain under the present formula on sovereignty — if they do not lose sovereignty otherwise. Another formula would no doubt lead to a different composition of the family of nations. It is not so much a question of right to a vote, or an equal legal weight to a vote, it as question of the conditions for sovereignty under international law.

Equality seen in this perspective, is in the words of *Dahm,* merely another expression for sovereignty.[20] And Dahm continues: "Souveränität und Gleichheit gehören nicht nur zusammen, sondern sie sind geradezu dasselbe, von verschiedenen Seiten betrachtet. Souveränität, so wurde gezeigt, bedeutet Unabhängigkeit, d.h. kein Staat ist der Hoheitsgewalt eines anderen Staates unterworfen. Souveränität erträgt keine Hegemonie. Es ist nur eine andere Formulierung dieses Gedankens wenn man sagt, dass jeder Staat dem anderen gleich sei."[21] Equality in this sense does not fill the empty vessel of formal equality, since it is compatible with any inequality in voting power, with or without consent. That inequalities with respect to voting power may arise with the consent of the state involved, Oppenheim himself admits: Just as a state may surrender its sovereignty, it may surrender voting power.[22] Inequalities between sovereign states in voting power without the consent of the states discriminated, is a contradiction in terms, since the latter states would by definition not be sovereign; thus, the inequalities alluded to cannot really arise.[23]

Kooijmans' studies of the concept of equality does not take us much further, although we do not deny the value of these studies. Kooijmans' notion of equality rests on the idea that the world was created by a personal God, that man was created of one blood after His Image and that God in the moment of creation also laid down certain definite abstract directives for man to discover, elaborate, "positivize" for concrete situations and adapt to changes.[24] To this act of creation, all law can be traced back; it is the origin of *all* norms, not only legal norms, but other norms as well.[25] The common origin of all norms reflects the unity of all mankind and the communal nature of international society, which in itself is of normative value.[26] In this world community, the states have particular functions, of both communal and internal nature.[27] When the state is performing its internal state-functions it is absolutely equal to any other state. In the communal field, however, a differentiation may exist. Each member state of the world community has a task and a function of its own which benefits the community, each according to its kind. There must thus, Kooijmans concludes, be a division of tasks to enable the community in question to develop fully.[28]

These are some of the basic ideas in which Kooijmans' conception of equality is anchored and as such they would deserve a particular penetration — for instance: whose God? the God of Christianity or the God of some other religion?; what about those who do not have a God? Even if we consider all men to have only one God, whose image of God shall be decisive?, etc. — but then the discussion would be carried too far astray. The question is here solely, whether Kooijmans' equality is anything more than formal equality.

In formulating his theory, Kooijmans is anxious to avoid the results of both the form-logic of the Vienna School (especially Kelsen and his pure theory of law) and the irrevocability of the traditional doctrine of natural law. Kooijmans, therefore, chooses a middle way. The abstract directives, once laid down by God — the "material directives" or "general principles of law" — are not invariable legal rules, valid for all times and all places. They are *principles* that find expression in all instances and every system of law, principles that must make themselves apparent in a "real" legal order.[29] These general principles of law are inherent in the very essence of law itself.[30] They are directives which the legislator cannot ignore "with impunity" in the process of concretization. They can be found in the concept of law, the core of law.

In this context Kooijmans mentions the elements of regularity, balance, equality, authority and respect for the legal subject. These interrelated ele-

ments are the constant components of the idea of law, without which a legal order is unthinkable. But though they have a clear meaning, they lack a precise content. The concretization of these in a certain legal order is determined by the idea of law in general, which , "having a dynamic character, lends a varying character to the law".[31] The general principles must be adapted — rendered positive and concrete — for each particular time and place "with due regard to the nature of the community within which, and of the relations for which, these legal rules will apply" and it must "undergo the influence of the conceptions and convictions which obtain in the particular phase of culture for which the directives are to be made relevant".[32] The general principles of law do not, of course, allow of any arbitrary content in the legal order. (That would render the principles nullities). No, Kooijmans denies that the principles have a purely formal character: "This would be true if the idea of law indeed progressed in an arbitrary manner, but that is definitely not the case. The idea of law is a manifestation, with respect to the life of law, of the insight into the divine principles of order for this temporal reality and their relevance for a particular phase of culture, and thus a manifestation of an insight also that is bound to the structure of the communities and relationships in which this order must apply."[33]

However inviting it is to scrutinize and critize the reasoning of Kooijmans — his "train of thought" — so far — the vagueness of his last-quoted argument; the fact that he believes that the Nazi régime of Germany ignored the general principles, while the Romans, despite their system of slavery, did not; the substantive base for such conclusions (seemingly non-existent); his concept of law as a concept of values, etc. — we shall accept it as it is, for the moment, in order to bring the concept of equality into focus.

Equality, as we have seen, is one of the elements in the concept of law, which also constitutes one of the general principles or material directives. We have observed above[34] that formal equality lies embedded in the concept of law; without it there would be no law, only arbitrariness. On this Kooijmans agrees, yet he denies that equality, as a general principle, is purely formal.[35] Equality in international law, he maintains, has also a material meaning, which is determined by the "structure of the international society".[36] On the other hand, there is no general formula (which is in line with the variable and adaptable nature of the concrete rules): "In each case the question must be asked, whether the international legal order demands that in a concrete situation the existing differences between the states should be considered as relevant, and should therefore be drawn into the

standard of valuation, or whether they are irrelevant."[37]

Kooijmans then applies his theory on equality to the hypothetical situation where the votes of the various states in international organizations and conferences are weighed in proportion to the importance of the states, in respect of, for instance, population, size and economic power. For example, certain Great Powers may be awarded a large number of votes on account of their strong political position. This method of weighing votes, he concludes, does not "do full justice to the principle of equality"; it is even a "violation of the principle of equality".[38] And why is that? The method is not in conformity with the structure of the international society, Kooijmans answers. From this structure we learn, he argues, that the international society consists of states. "[E]quality demands therefore, that every state, as a legal subject, has a right to a proper place."[39] The method of weighing the votes would make the smaller states "disappear into nothingness".[40]

This is thus Kooijmans' principle of equality applied. How far beyond formal equality and "equal sovereignty" does Kooijmans lead us? Not a single inch, it is submitted. For what else than "equal sovereignty" is there in the right which states have, as legal subjects, to a "proper place" in the international society? What else than a loss of sovereignty is Kooijmans implying when he claims that smaller states would "disappear into nothingness" if Great Powers were awarded a very large number of votes in proportion to their "greatness"? That as a legal subject of international law, a (sovereign) state has the right to a "proper place" is, at best, legality, at the worst a mere tautology, unless the right to a "proper place" means something more than the right to be a legal subject. For what is the word "proper" more than just another empty vessel, as is equality in the formal sense. To replace one empty vessel by another, or more correctly, to change the label on the vessel, does not make the vessel less empty. What we have thus far is nothing but the formal equality with which the formula on sovereignty coincides.

Equality demands, Kooijmans continues, that no differentiation in the value of votes is made with respect to a regulation of matters that belong to the internal sphere of the state. Here, Kooijmans explains, the "decisive factor is the structure of the international community which, in this case, demands that the actual differences of the states are not to be considered relevant, because it concerns all states in an exactly equal manner.[41] Again, however, Kooijmans is discussing sovereignty in terms of equality. If a state transfers competence to regulate internal affairs to another state, it will ultimately surrender sovereignty. If what "equality demands" is that a

state, in order to retain equal sovereignty, must remain sovereign (must not surrender sovereignty), then the expression is correct but non-productive. And of course, if the formula on sovereignty in international law is applied, actual differences between states as regards size, population, economic power, etc. are irrelevant only because the formula itself deems them to be so. This, again, expresses the principle of legality.

Still, Kooijmans does not, in the name of equality, wholly condemn the weighing-of-votes method. In some instances, factors, such as size, population and economic power may be relevant. Whether this is so can only be found pursuant to an "assessment and valuation" in the particular case "with observance of the specific purpose (of an organization or conference) and its place in the international legal order".[42]

Differentiations, Kooijmans suggests,[43] may be compatible with equality if they serve a purpose ("functional equality") in international organisations and conferences. Thus the system of voting and of representation in an organization may be so moulded as to promote the purposes of the organisation, thereby, for instance, giving certain states with special capacities in the particular field a leading position. Legal equality in Kooijmans' view, however, can find full expression only if a special (actual) capacity or political characteristic is relevant to the particular purpose; then it is *legally* relevant. But then the question arises, when is such an actual capacity (characteristic, factor) legally relevant? Here the answer must be: It is relevant when the treaty (constitution) establishing the organization (conference) deems it to be relevant. All equality requires is, that the differentiation is made within the rules of the treaty (legality again, or formal equality). If a differentiation is considered unequal, though based on treaty rules — which would amount to material inequality — then a principle or rule of international law would have to be specified which would determine the relevance of a certain actual capacity (characteristic, factor) for the purposes of differentiation; a principle which governs these issues and which therefore would render a certain treaty rule unequal, if not in conformity with it; a principle which, for instance, would provide that if states establish organizations for the purpose of maintaining peace and security, a differentiation between the member states may be made on the basis of certain factors only. But Kooijmans does not maintain that such principles exist; he does not even attempt do so. He declares from the very start that there are no general formulae.[44] The directives laid down by God are too abstract to serve as such, and, as we have seen, they require concretization. Equality is something that must be assessed from one case to another, without a general formula, he suggests. And this is really Kooijmans' dilemma. By deny-

ing the possibility of general formulae he inevitable ends up by assessing the equality of treaty rules from the standpoint of the treaty itself — *i.e.*, on the basis of the particular treaty rules — and this principle of equality applied (within the rules) is nothing but a formal equality or legality. The assessment of substantive (material) equality requires an objective standard independent of (and above) the treaty rules and, as such, the "communal structure of the international society" or the "unity of mankind" is no more concrete a concept than equality itself. But such an objective standard would no doubt show traces of traditional natural law, which, as we have seen, Kooijmans is anxious to avoid. Kooijmans wavering between the structure of international law, which conveys nothing about substantive equality (sovereignty at the most), and individual general treaties as a basis for organizations (and broader regulations), is fruitless, as regards the illumination of substantive (material) equality, unless there is some intermediate stage en route.

Moreover, Kooijmans' practical elaboration of his principle of equality is, consciously or unconsciously, limited to the area of treaties. On how to assess the substantive equality of the general international law, we learn nothing. What is substantive equality, for instance, respecting the law of outer space, the law of the high seas, sovereign immunity, diplomatic protection, rules of jurisdiction, the law of the continental shelf, human rights, etc.? One may even argue that if a principle of substantive equality there is, it should govern this field, and not individual treaties. There seems to be no sense in assessing the substantive equality of treaties, so long as its signatories have truly consented to it.[45] A state is entirely free to grant advantages to another state without a reciprocal claim; it is even free, we repeat, to surrender its sovereignty. What is crucial in terms of equality is not so much the substantive content of the treaty as the existence of a true consent.[46] The only form of equality involved here is equality (or inequality) of bargaining power, which might or might not — depending on the amount of military, political or economic pressure imposed — render the treaty invalid, or at least subject to revision, if international rules to that effect were to exist.[47] The question of pressure or no pressure, consent or no consent, has nothing to do with either the legal equality under discussion or substantive equality. The assertion that the situation when a state, with or without consent, surrenders its sovereignty to another state is substantively unequal, must rest on a principle of law which defines not only when a state is a subject of international law, but also *which* states are and ought to be such subjects; a principle of this kind does not, of course, exist.

To conclude: In order to establish a principle of equality by which to assess the substantive equality of international law rules and principles, one must provide an objective standard more specific than that which lies in Kooijmans' "communal structure" and "unity of mankind", but without the degree of "concretization" mentioned by Kooijmans, which leaves no criteria other than the purpose and function of an individual treaty. Since, however (as Kooijmans himself has eloquently demonstrated),[48] all such standards, or at least those hitherto presented, seem to stumble on the requirement for "objectivity", one finds it advisable to give up the idea of substantive (material) equality in international law altogether and rest content with formal equality.[49]

Let us, finally, for a moment consider equality in the perspective of international antitrust law. Let us assume that there were to develop an international law rule providing that a state — as a subject of international law — has jurisdiction to try and convict any foreign company whose anticompetitive practices produce certain minimal effects in the market of that state (irrespective of the evident possibility that such jurisdiction is fully compatible with international law as it stands today). Assume further that this jurisdictional rule is a customary rule of international law. Equality there is in the formal sense (legality) that the rule applies to all states without distinction: it applies when according to its requisites it should apply (equality before the law). In the same sense it may be said that all states possess equal legal capacity under the rule (for duties and rights),[50] being subjects of international law. But this, it seems, is as far as equality as a legal concept extends; this is the limit for claiming that an inequality is a violation of international law. All other "inequalities" that may exist in relation to this rule may violate the ethics, common courtesy, subjective perceptions or other values, yet they are irrelevant from the point of view of international law — *i.e.*, they do not constitute breaches of international law and the rule cannot be rendered invalid on account of such inequalities. And this for the very reason that there is no objective standard of international law by which to determine whether certain conditions are unequal or not. Since these inequalities are consequently not legal inequalities one can speak only of actual (existing) inequalities. Thus, for instance, there may be an actual inequality in the fact that the jurisdictional rule was developed predominantly on the initiative of the highly industrialized Western World and especially of the countries in which the antitrust rules constitute one of the cornerstones of the national economy, and in the fact that the rule was accepted by other, less developed countries, on account of the overwhelming economic power of the Western World. There may, further,

be an actual inequality in the fact that, in the case of a violation of the jurisdictional rule, all states are not equally able to enforce their rights under the rule — *e.g.*, to elevate diplomatic protests, to bring the case to court, to argue the case before the court or to make use of the ultimate remedies:[51] economic, political or military sanctions. There may also be an actual inequality in the fact that only a very few states can derive advantages from the jurisdictional rule, states economically powerful enough to make foreign companies comply with domestic antitrust rules, states which constitute significant export markets for companies in other states, and so on. There may, finally, be an inequality in the fact that states which have the actual capacity to take advantage of the jurisdictional rule are given a possibility to influence the conduct and practices of companies located on other states and thereby the possibility to influence the antitrust policies and indirectly the general economic policies in other states.

All of these supposedly inequal conditions are irrelevant from an international law viewpoint. That they should have been taken into consideration when the rule was formulated, that they might have been if the rule had been a result of treaty negotiations and that they should be *de lege ferenda,* is an entirely different matter. The crux is that there is no principle of international law concerning equality which governs these supposed inequalities.

Notes, chapter 12

[1] The history of the concept will not further be touched upon. For an extensive description, see e.g. Kooijmans, The Doctrine of the Legal Equality of States; Schaumann, Die Gleichheit der Staaten; Dickinson, The Equality of States in International Law (1920); Goebels, The Equality of States, A Study in the History of Law (1923).

[2] Kelsen, The Principle of Sovereign Equality of States As a Basis for International Organization, 53 Yale L.J. 207, at 209 (1944). *Cf.* Dahm, at 162.

[3] See further e.g. Ross, (4th ed.), at 233 f.; Kooijmans, at 33 f.; Schaumann, at 3f., 16 f., 141 f.; Gunst, at 162 f.

[4] See further Dahm, at 163; Kooijmans, at 33 f.; Schaumann, at 3 f. ("egalitären Gleichheit"); Kelsen, Principles of International Law, at 155; *supra* n. 2, at 209; F. Buchholz, Gleichheit und Gleichberechtigung im Staats- und Völkerrecht (Bleicherode am Harz, 1937), at 30 f.

[5] Dahm, at 163.

[6] *Cf.* Kelsen, *supra* n. 2, at 209; Buchholz, *supra* n. 4, at 30; Kooijmans at 35.

[7] Morgenthau, The Problem of Sovereignty Reconsidered, 48 Colum. L. Rev. 341 (1948).

[8] *Id.*, at 346.

[9] *Id.* This circumstance Morgenthau repeats with the following words: "Being sovereign, states can have no law giving or no law enforcing power above them operating directly on their territory. International law is a law among coordinated, not subordinated entitites. States are subordinated to international law, but not to each other, that is to say, they are equal." *(Id.)*

[10] See e.g. Ninčić, at 42 ff. (with the history of the Article); Korowicz, *infra* n. 11, at 37 ff.; Gunst, at 100 ff.; Sauer, att 155 ff.; Kelsen, *supra* n. 2; Morgenthau, *supra* n. 7; Berber, at 178 f.; Oppenheim-Lauterpacht, at 237 f. (with further references); Goodrich and Hambro, Charter of the United Nations (Boston, 1949), at 99 f. Also see the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, the resolution adopted by the General Assembly on October 24, 1970. (See 65 Am. J. Int. L. 243 (1971).

[11] *Cf.* Korowicz, *supra* chapter XI, n. 4, at 38.

[12] See *supra* p. 427 f.

[13] See the authors referred to in *supra* n. 10. Also see Kelsen, General Theory of Law and State (Cambridge, Mass., 1945), at 252; Principles of International Law, at 149 ff. *Cf.* Heydte, Völkerrecht I, at 96 f.; Thomas and Thomas, Equality of States in International Law — Fact or Fiction, 37 Va. L. Rev. 791 (1951); H. Weinschel, The Doctrine of the Equality of States and Its Recent Modifications, 45 Am. J. Int. L. 417 (1951); A.D. McNair, Equality in International Law, 26 Mich. L. Rev. 131 (1927).

[14] Oppenheim-Lauterpacht, at 238. When Oppenheim *(id.)* claims that equality before the law is a quality of states derived from their international personality, he seems merely to be alluding to the fact that the rule of sovereignty (international personality) applies equally to all states, as a rule should. See *supra* p. 430 f.

[15] Oppenheim-Lauterpacht, at 238 ff.

[16] *Id.*, at 238. ("This legal equality, which has now been modified in many respects...").

[17] *With* the consent of a state, a majority-vote system may be introduced.

[18] In Oppenheim's terminology state equality is a synonym for state sovereignty, see Oppenheim-Lauterpacht, at 238 ("one result of State equality — or, as some will prefer, of State sovereignty...").

[19] See *supra* p. 431.

[20] Dahm, at 164.

[21] *Id. Cf.* J.F. Felder, Das Problem der Staatengleichheit in der Organisation der Völkergemeinschaft — (Schumpfheim, 1950), at 19 ff.

[22] Oppenheim-Lauterpacht, at 238.

[23] *Cf.* Kelsen, *supra* n. 2, at 208 f.; Weinschel, *supra* n. 13, at 419.

[24] Kooijmans, at 27.

[25] *Id.*, at 12 f.

[26] *Id.*, at 194 ff.

[27] *Id.*, at 203 ff.

[28] *Id.*

[29] *Id.*, at 210.

[30] *Id.*, at 213.

[31] *Id.*

[32] *Id.*, at 211.

[33] *Id.* at 213.

[34] See *supra* p. 431 f.

[36] *Id.*

[37] *Id.*, at 238.

[38] *Id.*, at 240.

[39] *Id.*

[40] *Id.* Also see Schaumann, at 129 ff.

[41] *Id.*, at 240. Also see Schaumann, at 136 ff.

[42] *Id.*

[43] *Id.*, at 239.

[44] *Id.*, at 238.

[45] See e.g. Dahm, at 163: „Verträge können gleiches ungleich behandeln, Handelsverträge etwa die Angehörigen bestimmter Staaten unter gleichen Voraussetzungen vor denen anderer Staaten privilegieren. Auf das allgemeine VR angewandt aber hat der Grundsatz die Bedeutung eines *formalen Prinzips.*"

[46] See e.g. Nozari, at 111, 118 ff., 295 ff. Also see Schaumann, at 144 ff.; Kooijmans, at 246.

[47] See e.g. Nozari, 295 ff.; *Cf.* Schaumann, at 146 ff. Whether they do exist, is a question of no relevance here.

[48] See e.g. Kooijmans, at 223 ff.

[49] Not the reasoning of Kooijmans, but his results coincide to a great extent with the results of Schaumann, at 120 ff.

[50] See Kelsen, *supra* n. 2, at 209.

[51] See e.g. Thomas and Thomas, *supra* n. 13, at 802 ff.

Chapter XIII
Sovereignty and the "fundamental" rights of states

The status of a state as sovereign does not in itself generate rights (or obligations); the concept of sovereignty is not a legal source. At the most one might speak of a "right" for the sovereign state to be a subject under international law, an international person. Sovereignty does not even induce the right to *remain* sovereign, much less the right to become sovereign. Sovereignty — and international personality — simply denotes the legal capacity under international law to be a bearer of the rights and obligations which international law, from time to time, may prescribe. Sovereignty is a fact recognized by international law for the establishment of legal personality. These are some of the conclusions reached in the preceding sections.

This unveiled concept of sovereignty is slightly troublesome. It contains nothing that guarantees — or at least protects — the sovereignty of the state; to *remain* sovereign, as we have seen, is not a right that can be derived from sovereignty, nor is the right to function as a sovereign state. The purpose of the so-called fundamental rights is, in a sense, to fill this gap. The "fundamental" rights, it is therefore said, are certain "indispensable", "inalienable", "necessary", "perpetual", "absolute", etc. rights with which a state is either endowed before it enters the international arena — *i.e.*, becomes sovereign — or will automatically be endowed with at the moment when it becomes sovereign.[1] Although the wiews of legal writers vary as to the nature of these rights, they are usually referred to as the right to self-preservation (self-defence), the right to independence, the right to equality, the right to dignity and the right to international intercourse.[2] Without these rights, it is said, international law cannot exist; they are a *conditio sine qua non* for international law; they are a logical necessity for international law; they are necessarily inherent principles of international law and as such they lie in the nature of international law, or the nature of law, or the law of nature.

Thus, by international lawyers, whose world of thought wholly or partly rests on a natural law foundation, we are told that these fundamental rights

are derived from the law of nature. Just as men by nature, as subjects of the state, have certain absolute rights manifested in various declarations and constitutions, so do states possess such rights as subjects of international law.[3] Significative for this man-state analogy are the "absolute international rights" conceived by *Wheaton* and implicit in the expression: "Every State as a distinct moral being, independent of every other, may freely exercise all its sovereign rights in any manner not inconsistent with the equal rights of other States."[4]

Advocates of fundamental rights with shifting explanations, however, can also be found among those who claim to be uninfluenced by natural law thinking. Hence, *Liszt,* for instance, regards the fundamental rights as the firm foundation of general international law, without which international law is unthinkable. These rights are inherent in the state personality and may therefore be regarded as international personality rights ("völkerrechtliche Persönlichkeitsrechte").[5] *Berber* agrees with Liszt. Though he would not venture to analogize from the situation of man as a subject of the state, and though he refuses to accept the designation "fundamental rights", which he finds misleading, he nevertheless comes to the conclusion that there are certain fundamental material (substantive) principles of international law which, by *logical necessity,* follow from the nature of international law as a law of coordination between independent "sovereign" states.[6] These principles, he claims, are indispensable to international law, to the degree that without them the international law is not conceivable. An explicit "positivization" of these principles is not warranted, since they lie inherent in the international law — *i.e.,* they exist in international law as a permanent attribute or quality. As such inherent principles of logical necessity Berber mentions the right to self-government ("Selbstgestaltung"), the right to self-preservation (and dignity) and the right to equality.[7] Somewhat in the same direction is the view of *Verdross:*[8] Fundamental rights are the rights of general international law which states enjoy immediately as international persons; an abrogation of these rights implies an abrogation of international law. *Oppenheim* concurs in principle.[9] While, on the one hand, rejecting the notion of fundamental rights he acknowledges, on the other hand, that numerous rights and duties are "customarily recognized" under the "wrong heading" of fundamental rights. These are rights and duties which states "customarily enjoy and are subject to simply as international persons, and which they grant and receive reciprocally as members of the Family of Nations."[10] And Oppenheim continues:

"In entering into the Family of Nations, a State comes as an equal to equals; it demands that certain consideration be paid to its dignity, and to the retention of its independence and of its territorial and personal supremacy. Recognition of a State as member of the Family of Nations involves recognition of such State's equality, dignity, independence, and territorial and personal supremacy. But the recognised State recognises in turn the same qualities in other members of that family, and thereby it undertakes responsibility for violations committed by it. All these qualities constitute as a body the international personality of a State, and international personality may therefore be said to be the fact, involved in the very membership of the Family of Nations, that equality, dignity, independence, territorial and personal supremacy, and the responsibility of every State are recognised by every other State."[11]

Moreover, Oppenheim concludes, without international intercourse "the Family of Nations would not and could not exist".[12]

One of the most vehement attacks against the doctrine of fundamental rights is launched by *Brierly*.[13] A part of Brierly's criticism affects the natural law character of the doctrine, part of it the man-state analogy made in international law. Let us examine, for a moment, Brierly's arguments, but — for the sake of clarity — in the reverse order.

The doctrine of fundamental rights, as noted, is rooted in the idea of the natural rights of man within the state. As Brierly observes: "It is obvious that the doctrine of fundamental rights is merely the old doctrine of the natural rights of man transferred to states."[14] These national rights are assumed to exist to protect a man not so much from wrongs done by another man, as from wrongs done by the state; rights constituting a personal "territory" not to be encroached upon by the state, rights inherent in the individual human being, not conferred upon him by the state, or by the legal order, but existing in consequence of the sole fact that the man is a man.

In international law, the doctrine of the natural rights of man — and, consequently, the doctrine of fundamental rights — is misplaced and, to some extent, destructive, Brierly argues, and he explains: The doctrine tends to over-emphasize man as an individual in the state, thereby overshadowing the role of man as a *social* being. This has consequences for international law. "It is especially misleading to apply this atomistic view of the nature of the social bond to states ... [I]n the society of States the need is not for greater liberty for the individual states, but for a strengthening of the social bond between them, not for the clamant assertion of their rights, but for a more insistent reminder of their obligations towards one another."[15] And Brierly concludes: "[I]t is manifest that the doctrine is a product of the pure gospel of individualism applied in the international

field."[16] The doctrine of the natural rights is misplaced — cannot be transferred to the international law sphere — Brierly seems to imply, because ther is no central government in international law against which the states need protection. It is destructive, on the other hand, because — in times of growing interdependence — it impedes the development of international law towards increased centralization.[17]

The latter aspect — as regards the destructive character of the doctrine — we leave aside, at least for the time being: it is a suggestion *de lege ferenda* (or mere politics) and can only be assessed as such. The former aspect, however, touches the question whether the doctrine of fundamental rights serves a (legal) function in international law and, if so, what function. Here, Brierly argues that the doctrine was invented to justify the growth of the national state, as a basis for the independence of the post-Renaissance prince against the claims of the pope and the emperor. In that era of history the doctrine certainly fulfilled a function. Today, as the situation has changed, the doctrine has lost its function and rather become an obstacle to the growth of international relations. And without a function, Brierly seems to reason, the fundamental rights cannot exist or, at least, *should not* exist (which again is a *lex ferenda* argument). *Graf,* who anchors his criticism of the doctrine entirely, it appears, in the reasoning of Brierly, concurs: "Im Interesse der Weiterentwicklung des Völkerrechts müssten also scheinbar die Grundrechte daraus verbannt werden."[18]

However, the fundamental rights — if such exists — do not necessarily stand without a (legal) function. Within the state, one of the functions of the government is to protect one citizen from wrongs committed by another. In international law, it is precisely the absence of a central government that would assign a function to the fundamental rights: the function-of protecting one state from the wrongs of another, in the interest of peace. (In that way, the fundamental rights would constitute the essence of international law). Thus, the fundamental rights had as much function — if, indeed, they had any — in the decolonization period, for instance, as in the post-Renaissance era; and as they would have today, in the era of superpowers. This thought does occur to Graf, but only to be refuted for swiftly explained reasons.[19] He recognizes that the fundamental rights may have a *moral* function, and therefore they may constitute an expression of the "infrastructure morale internationale". But they have no legal function, he concludes.[20]

Hence, if the "to be or not to be" of fundamental rights depends on whether it has a function or not, then there most certainly exists such a function.

What the traditional doctrine of fundamental rights, however, is generally criticized for (also by Brierly, Verdross, Liszt, Graf and others), is its foundation in the concepts of natural law. "[A] right", says Brierly, "is a meaningsless term unless we presuppose the validity of an objective legal system; it is a delusion to imagine that a system of law [*droit objectif*] can be constructed out of rights [*droit subjectifs*] conceived as existing in the nature of things."[21] And *Kelsen* agrees: "an unbiased analysis of the natural-law doctrine shows that it is impossible to deduce from 'nature' any rights. For the right of an individual presupposes the duty of another individual, and nature, that is, a complex of facts determined by the laws of causality, does not impose duties and therefore does not confer rights upon men or other beings."[22] Duties and rights of states we find within the legal order, in international law and stipulated by general customary international law or by international agreements. This is true of the so-called fundamental rights — and their corresponding duties — as of other rights and duties of states. But Kelsen goes further and demonstrates that the theory — *e.g.*, as indicated by Liszt and Berber as discussed above — according to which the fundamental rights are principles inherent in or presupposed by international law, suffers from similar fallacies. "Legal principles", Kelsen claims, "can never be presupposed by a legal order; they can only be created in conformity with this order. For they are 'legal' only because and insofar as they are established on the basis of a positive legal order."[23] These "fundamental" principles are not the source of the international law; international law is rather the source of the principles. Their "obligatory force" is not greater than the force of other principles of international law, unless international law prescribes that it shall be more difficult to abolish or modify the principles — which however, Kelsen concludes, is impossible with respect to customary law: the legislative process by which customary law acquires its validity does not differ from the process by which it loses its validity.[24]

That the fundamental principles are thus no more fundamental than other principles of international law, in the sense that they have no more obligatory force, seems clear enough. But are they more fundamental in any other sense — in the sense, for instance, that they are indispensable for international law, a *sine qua non,* as Berber and Verdross, for instance, maintain. The only way to answer that question is to seek to determine whether international law would vanish in the absence of a such principle. Assuming, for example, that the right to independence (right to remain sovereign) is a fundamental right, would the international law vanish in the absence of that right? It seems not. Even if there were to exist no obligation

on states to abstain from taking military action, or from using economic or political force, or sending military forces or agents to other states, or carrying out official activities or threats of such action or force, or using other means that would encroach upon the independence of other states (assuming that this is the obligation corresponding to the right to independence), we would still have an international law *differing only in degree* from a law encompassing this obligation; a law that would simply prescribe rights and duties for states that are *de facto* independent (and sovereign) but not establishing a right to remain independent (and sovereign). It is willingly admitted, this is not good law — no one can seriously so suggest — but it is none the less law, and it is international law. And it must be emphasized again that the difference is one of degree, not of kind. For the law we have today is, in many ways, fragile, primitive and inadequate compared to the law of which most of us cherish illusions, and nevertheless we persist in calling it internaional law.

The only "right" that lies inherent in the concept of law is, as we have seen in the foregoing section, the formal equality (legality); without formal equality one would not be able to speak of law.

In a similar, purely formal, sense one may speak of fundamental rights — to independence, to intercourse, etc. — if one defines international law as a law governing the relations between sovereign and independent states. By definition, there would therefore not exist an international law if there were not at least two sovereign states which, in addition, communicate. It is obvious, however, that the term "rights" here is utterly misplaced: it is hard to imagine how any subject of international law could take advantage of the "rights" here alluded to.

The quality of fundamentality in certain rights does not appear to have any legal significance. That certain rights are fundamental merely implies, it seems, that the rights are found to be more important (in a subjective sense) for the functioning of international law than other rights. When certain rights are characterized as fundamental, they are so because it is feared that international law would not function in their absence. Significant is the conclusion reached by *Verdross:* "Da es nun aber das Hauptziel des [Völkerrecht] is, die *friedliche Koexistenz der Staaten* zu sichern, würde mit der Aufhebung der Grundrechte das [Völkerrecht] selbst aufgehoben werden."[25] "Fundamental" denotes nothing more than that the rights (or principles) are *essential for the functioning* of international law as understood by the international lawyer attributing certain rights that quality.

If we thus conclude that the so called fundamental rights are not more fundamental — at least not in any legally relevant way — than rights in

general under international law, the question remains: Do we have such rights as are usually qualified as fundamental, in other words, have we a right to self-preservation, a right to independence, to dignity and intercourse (equality we have discussed)?[26] Certainly, there exist among all the rules and principles of international law, some which directly or indirectly are intended to protect the independence and dignity of the states, facilitate the intercourse between states and secure the possibilities for self-preservation. This one cannot doubt. On the other hand, states have no right, in the true sense of the word (a right corresponding to an obligation), to decide on matters falling within the domestic sphere — *i.e.,* matters unregulated by international law — at their own discretion.[27] The only obligation conceivable here would be an obligation upon the international courts and tribunals not to rule otherwise. The creation of international law rules and principles which restrict the domestic sphere and which "intrude" on "rights" not properly so is fully in harmony with the structure of international law, as described above,[28] and constitutes no invasion of rights in the true sense. This situation cannot be compared with municipal law legislation violating constitutional rights, unless it is maintained that such constitutional rights, are embodied in international law also; and this, we have seen, cannot be substantiated.

It is not the purpose of this thesis to define and structure the rules and principles that can be brought under the heading of right to independence, right to dignity, etc. What the foregoing analysis was intended to demonstrate was only that the doctrine of fundamental rights provides no guidance in any attempt to formulate the jurisdictional rules in international law concerning, in particular, the international antitrust law.

Notes, chapter XIII

[1] See further e.g. Graf, at 12.

[2] See further e.g. Kelsen, Principles of International Law, 157; Berber, at 178.

[3] As to Vattel and Wolff, see further e.g. Graf, at 22 ff. and 28 ff.

[4] H. Wheaton, Elements of International Law, in Classics of International Law, §§ 60 ff.

[5] Liszt, Das Völkerrecht (12th ed. 1925), at 155 (*cf.* at 116).

[6] Berber, at 179 f.

[7] *Id.*

[8] Verdross, Völkerrecht, at 226 f.

[9] Oppenheim-Lauterpacht, at 235 f. *Cf.* Fenwick, International Law (3d ed.), at 213 ff.

[10] *Id.* (footnote omitted).

[11] *Id.*, at 236 (footnote omitted). See the critique of Graf, at 45 and 48 f.

[12] Oppenheim's line of reasoning is not too easy to follow. Particularly troublesome is his usage of the concepts "rights" and "qualities" of states. In the introductory paragraph (§ 112) he concedes that there are accumulated under the wrong heading of fundamental rights "numerous real rights and duties ... customarily recognised" and "derived from the very membership of the Family of Nations" rights which states are "subject to simply as international persons"; "rights and duties connected with the position of the States within the Family of Nations". On the other hand, he refers to these "rights" as qualities of the state, carefully avoiding the word "right". When discussing the dignity of the state, he, on the one hand, denies that a fundamental right of reputation and of good name belonging to every state exists, since "no duty corresponding to it can be traced within the Law of Nations", while, on the other hand, admitting that a state "as a member of the Family of Nations possesses dignity as an International Person", and continuing: "Dignity is a quality recognised by other States, an it adheres to a State from the moment of its recognition till the moment of its extinction, whatever behaviour it displays. Just as the dignity of every citizen within a State commands a certain amount of consideration on the part of fellow-citizens, so the dignity of a State commands a certain amount of consideration on the part of other States, since otherwise the different States could not live peaceably in the community which is called the Family of Nations... Since dignity is a recognised quality of States as International Persons, all members of the Family of Nations grant reciprocally to one another by custom certain rights and ceremonial priviligies." (§§ 120, 121, p. 250-251). The words "quality" and "right" are seemingly used interchangeably as attributes for the same phenomenon, namely dignity. But yet it is denied that dignity is a right. What then, one might ask, is it that "commands" states to give other states "certain amount of consideration", that is, dignity? Is it not an obligation of international law, an obligation the correspondent of which is a right of the state to whom consideration is paid (*cf.* Ross, 227 ff., § 33), whether you call it fundamental or not; a right the components of which Oppenheim himself lists in the text to follow?

A like confusion tinges the text a few paragraphs later (§ 124) when Oppenheim discusses independence, and territorial and personal supremacy: "Independence and territorial as well as personal supremacy are not rights, but recognised and therefore protected qualities of States as International Persons. The protection granted to these qualities by the Law of Nations finds its expression in the right of every State to demand that other States themselves abstain, and prevent their agents and subjects, from committing any act which constitutes a violation of its independence or its territorial or personal supremacy." By whom or by what are thes qualities of the states protected? Is it not again international law that provides the "protection". an obligation of international law? On what grounds can a state "demand" that certain consideration be paid to its dignity, independence, territorial and personal supremacy, equality, etc., after having entered as a member into the Family of Nations (see p. 236, § 113)? Is it not on the ground of rights and duties of international law?

It might be that the solution to the confusion lies in the omission to adequately emphasize the distinction between the qualities the state is required to have in order to be a subject of international law (*i.e.*, what is summarized in the concept of sovereignty), on the one side, and the possible right under international law to *remain* sovereign, to have its sovereignty protected, on the other. When a state "enters into the Family of Nations", it is equipped with certain qualities, that is, it is sovereign; the fact of sovereignty is recognized by international law. As a sovereign, a state is also a subject of international law. No rights can be derived from these qualities. But as a subject of international law a state has rights and duties. To learn which those

rights and duties are, international law must be analyzed. The qualities are not conferred upon states by international law, they are merely recognized.

[13] See Brierly, The Law of Nations (6th ed.), at 49 ff.; The Basis of Obligation in International Law, at 3 ff.

[14] Brierly, The Basis of Obligation, at 4.

[15] Brierly, The Law of Nations, at 50.

[16] Brierly, The Basis of Obligation, at 7 (footnote omitted).

[17] *Cf.* Graf, at 60 ff.

[18] Graf, at 173. Again we have here a confusion of arguments *lex lata* and *de lege ferenda*. In this quoted sentence, Graf seems to assume the existence of fundamental rights; how else can they be "verbannt"? A like confusion lies in the following statement: "Wir können nicht umhin, diesen Argumenten recht zu geben und müssen Grundrechte im bisherigen System des Völkerrechts als deplaziert empfinden." (*Id.*) Can rights that do not exist be "deplaziert"? Graf's reasoning makes sense only if one understands the quoted lines as follows: What should be "verbannt" and what is "deplaziert" is the *discussion* concerning fundamental rights in the doctrine of international law. (But would not that be too presumtious?)

[19] Graf, at 172 f.

[20] *Id.*, at 173 f.

[21] Brierly, The Basis of Obligation, at 6.

[22] Kelsen, Principles of International Law, at 149. *Cf.* Ross (4th ed., 1961), at 231 ff. See further Graf, at 45 ff.

[23] Kelsen, *id.* at 151. *Cf.* Ross, *id.* See further Graf, *id.*

[24] Kelsen, *id.* at 151. *Cf.* Ross, *id.* See further Graf, *id.* Kelsen (*id.*, at 152 f.) finally also criticizes the theory that fundamental rights can be deduced from the personality of the state or from its sovereignty. This question we have dealt with in a previous section, see *supra* chapter XI.

[25] Verdross, Völkerrecht, at 226 (footnote omitted).

[26] See *supra* chapter XII.

[27] *Cf.* Verdross, Völkerrecht, at 226 f.

[28] See *supra* chapters VIII and X.

Chapter XIV
The international law limits on the exercise of jurisdiction — generally

In the search for rules and principles of international law that govern state jurisdiction in the area of antitrust law, the foregoing analyses have not brought us much further. This conclusion alone, however, justifies the analyses made; for it is exactly the attempt to demonstrate that the concepts of sovereignty and independence, the notion of equality and the doctrine of "fundamental" rights — all as classical as controversial — convey nothing; that nothing can be derived from these notions and doctrines; that they give no guidance with respect to the substantive jurisdictional rules and principles of international law.

Sovereignty, we have concluded, is nothing but a quality of a state required for international law personality; a state is sovereign when, independently of any other state or organization, it governs such matters — pertaining to a certain territory — as fall within the domestic sphere (matters unregulated by international law). Equality, furthermore, there is only in the sense of formal equality — equality before the law — amounting to legality; an equality wholly compatible with any substantive inequality. Fundamental rights, finally, can be fundamental only in a subjective non-legal sense, reflecting a writer's personal view of the importance of certain principles for the functioning of international law; the attribute "fundamental" has thus no legal significance — in international law there exist rights and duties, one as fundamental or non-fundamental as the other. With these crucial conclusions in mind we proceed in our search for specific jurisdictional rules and principles.

The starting point is the fact that in the world community the state is a territorial state; sovereignty pertains to a certain territory; a state is sovereign and a subject of international law in relation to a limited part of the earth. That this is so not because of logical necessity but because of the historical development, requires no emphasis.[1] In the world of today, how-

ever, there are no states, in the international law sense, without a territory.[2] The world is divided into territorial states.

As has been repeatedly emphasized, the concept of sovereignty in international law does not imply a right to become or to remain sovereign. Nor is there a "fundamental" right to independence. Yet there exists a general principle of customary international law, a principle long recognized, the indirect purpose of which is to protect the independence of states (and the direct purpose of which is conflict-avoidance). According to this principle, a state is prohibited from carrying out enforcement measures within the territory of another state, including the performance of coercive acts, or any other acts performed in its capacity of a state.[3] In the *Lotus* case the permanent Court of International Justice gave the principle the following formulation:

"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."[4]

Thus, the independence of states is here sanctioned by international law. A state has a right to exercise power exclusively within its territory and a corresponding duty to refrain from exercising power in the territory of another state; such an exercise constitutes a violation of international law.

In its general posture, this principle — hereinafter, the principle of territorial enforcement — is wholly uncontroversial. In dispute is only the exact extension — issues that affect the outer periphery — of the principle. For how exactly is the "power" defined that a state is prohibited from exercising in another state and when exactly is that power "exercised"?

In the core of the principle we have the clear cases already alluded to. Prohibited is the performance of state activities in another state by government agents, officials, armed forces, etc. physically present within the territory of the other state. (As regards armed forces, the mere transgression of the state border would suffice. Whether such conduct falls under this principle or any other rule or principle of international law is of no import for the present purposes. In the *Lotus* case, the Court regarded the principle as embracing the exercise of power "in any form"). Considered as government agent, official, etc. is any person actually carrying out state activities within the territory of another state, whether permanently employed or employed on a mere temporary basis. Hence, whether the state performs its activities through components of its own organization (the

police, the courts, other enforcement authorities) or through persons outside the state organization (lawyers, private detectives, accountants, arbitrators, surveyors, companies, etc.) is immaterial for the purposes international law:[5] *any* person carrying out state activities is considered an agent of the state. Considered as state activities are, no doubt, arrests, seizures, investigations, inquiries, searches, hearings, distraints, and other enforcement measures, if the performance of them entails the physical presence of a state agent in another state.[6] Covered is also the service of process or writs, the taking of testimony of other types of evidence, provided it is done by physical presence.[7] *Akehurst* seems correct in suggesting that the character of certain activities as state activities, should be determined in accordance with the law and practice of the state in which the activities are carried out and not those of the acting state.[8]

Should, however, the state affected by such state activities give its consent to the performance of these within its territory, the prohibition does not apply. A consent by the particular person affected by the enforcement measures does not, on the other hand, suffice; the prohibition can be neutralized only by a consent of the state itself as a subject of international law. And it makes no difference whether the individual "voluntarily" agrees to the carrying out of an investigation, a search, a seizure or an arrest, or to the taking of a testimony, or whether he does so under coercion: An individual, in his capacity as such, has no power to set aside the prohibition. Nor is the consent of an enterprise or an association a substitute for the state's consent.[9] The individual cannot dispose over the sovereignty of the state.

Concerning the substance of the principle of territorial enforcement, as now briefly outlined, there is a general agreement among international lawyers. The controversial issues present themselves when an attempt is made to extend the principle further, to cover power exercised otherwise. The question is, what else does the principle embrace? Here, the Court in the *Lotus* case draw, in its opinion, a definite line: From the principle of territorial enforcement it does not follow, the court made clear, that "international law prohibits a State from exercising jurisdiction in its own territory",[10] and that this is so even if the jurisdiction exercised relates to acts committed abroad. The Court continued:

"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... But this is certainly not the case under international law as it stands at present."[11]

Hence, in the Court's opinion, the principle of territorial enforcement does not cover jurisdiction exercised within the state's own territory even if it affects persons, property or acts in another state — which, of course, does not exclude the possibility that such an exercise may fall under other rules and principles of international law. In other words, if the exercise of power can be localized to the territory of the exercising state, the principle of territorial enforcement does not apply. And consequently, if the exercise can be localized to the territory of another state, the principle applies.

Now, the localization process would be quite unproblematic, should the sole criterion for localizing the exercise of power be actual physical presence. But this is just he problem: Is physical presence the sole criterion? Is not the dispatch — by mail — of court orders, writs, commands, government orders, questionnaires, etc. also an exercise of power within the state of the addressees? Is not the directing or ordering of persons present within the state who exercise jurisdiction at the moment when the directives or orders were given, but residing in another state, wherein also the directives or orders are to be carried out? Where is a state exercising power when its authorities order companies located in the state to produce documents which concern the business of their subsidiaries abroad and which, moreove, are in the charge of the subsidiaries?

The prevailing view in the international law doctrine seems to be that physical presence is determinative, and consequently, in the situations here referred to, jurisdiction is exercised in the territory of the exercising state: in other words, the principle of territorial enforcement is not applicable. One of the very few publicists who have explicitly considered this point is *Wengler,* who states: "Dieses Vebot [the principle of territorial enforcement] bezieht sich zunächst auf alle Fälle, in denen unter *persönlicher Anwesenheit* fremder Staatsorgane für den fremden Staat Organakte hoheitlicher Natur *öffentlich* vorgenommen werden... Die einfache Mitteilung von rechtlich erheblichen Vorgängen und Staatsakten durch Einschaltung der örtlichen Post an intressierte Personen im Fremden Staatsgebiet ist völkerrechtlich *unbedenklich.*"[12]

But before going further into detail, there is a problem of approach. The *Lotus* court, as we have seen, makes a clear distinction between jurisdiction exercised within the territory of the exercising state and jurisdiction exercised in another state. The latter is governed by the principle of territorial enforcement. The principles of international law that apply to the exercise of the former type of jurisdiction — if indeed there are any — are different, and they do not include the principle of territorial enforcement. What remain are criteria for localizing the exercise of jurisdiction to one or the

other state. Physical presence may be such a criterion and it is probably the criterion implicity applied by the *Lotus* court.

The Restatement (2nd) of Foreign Relations Law of the American Law Institute, F.A. Mann, O'Connell, Akehurst and a great many other representatives of the modern doctrine, seem to take another approach.[13] A distinction is here made primarily between so-called legislative jurisdiction and enforcement jurisdiction. State regulation, as explained by *Mann* for instance, "may occur either by prescribing or enforcing legal rules and one thus speaks of prescriptive or, more attractively, of legislative jurisdiction which designates a State's international right to make legal rules, and of enforcement or prerogative jurisdiction involving the right of a State to give effect to its legal rules in a given case."[14] This distinction, Mann claims, is indispensable to the handling of jurisdictional problems. "Failure to observe it has led to much misunderstanding."[15]

In Section 6 of the *Restatement supra,* the distinction is more fully elaborated: "Jurisdiction to 'enforce' refers to the capacity of a state under international law to enforce a rule of law, whether this capacity be exercised by the judicial or the executive branch ... or by some other branch of government".

As examples of the exercise of enforcement jurisdiction the Restatement mentions arrests, criminal or civil trials, entries of judgments by courts and confiscations of contrabands by custom officers.

"Jurisdiction to 'prescribe' refers to the capacity of a state under international law to make a rule of law, whether this capacity be exercised by the legislative branch or by some other branch of government."

Examples provided are: The enactment of a criminal or a commercial code, the issuance of administrative tax regulations, and the issuance of a decree regulating currency transactions.

While thus, according to the Restatement, an act of legislation is characterized as an exercise of legislative jurisdiction, an entry of a court judgement is viewed as an example of an exercise of jurisdiction to enforce. In the common law countries (or other countries), where courts may have been furnished with significant legislative functions, a court may find itself in the situation of exercising both legislative and enforcement jurisdiction in the same case, such as where there is no controlling statute or judicial precedent on which to decide the case.[16] When in such a case exercising its legislative function and determining the applicable legal rule for the case, the court will be exercising legislative jurisdiction. In applying the very same rule in the case before it, the court exercises jurisdiction to enforce.

Section 7 of the Restatement further provides, that while legislative jurisdiction is a necessary prerequisite for jurisdiction to enforce, it is not always a sufficient requisite. There may thus be cases in which there is legislative jurisdiction without enforcement jurisdiction, but not *vice versa.*[17]

Enforcement and legislative jurisdiction are both governed by international law, but by different principles. This seems to be the reason why the distinction is upheld by Mann as well as by the authors of the Restatement. And this approach has had a considerable impact on the modern doctrine in this field.[18] It may be questioned, however, whether the distinction has any relevance or significance from an international law perspective,[19] and whether a distinction should not be made instead between 1) jurisdiction exercised within the state's own territory and jurisdiction exercised in another state, and 2) jurisdiction exercised within the territory but affecting the rights and duties of persons outside the territory and jurisdiction so exercised but affecting only persons within the territory. Moreover, it may be questioned whether in this context the physical presence of state agents, officials, and others should determine whether or not jurisdiction is exercised in another state, and whether not the principle of territorial enforcement is applicable when jurisdiction is exercised in another state, whereas the exercise of jurisdiction within the territory is governed by other principles of international law. This approach seems more accurate, although the end result may not differ from that of Mann (or of the Restatement). For, in effect, Mann too, and the Restatement — without explicitly saying so — conceive two main categories of cases: the exercise within and the exercise without the territory of the state; legislative jurisdiction together with enforcement jurisdiction exercised within the territory belong to one category, while enforcement jurisdiction exercised in another state belongs to the other. In this connection, one should take a closer look at Mann's invaluable contribution to the field of international jurisdiction and its system in particular.[20]

Mann's analysis is divided into two major parts, one devoted to legislative jurisdiction and the other to enforcement jurisdiction. The two areas are governed in his view as we have seen, by "entirely different legal principles."[21] The part dealing with enforcement jurisdiction treats separately, in several sub-sections, different types of enforcement measures. Mann first discusses the exercise of physical force in the territory of another state which, he says, is clearly a breach of international law in the absence of consent. In the following sub-sections he examines the peaceable performance of acts of authority in another state, such as the serving of documents, the issuing of subpoenas, the taking of evidence and the exercising of no-

tarial functions; further, investigations made in foreign territory and enforcement by means of invoking the assistance of the courts in a foreign state. Again, Mann finds that such enforcement measures violate international law, if taken without the consent of the state affected.

Common to all of the enforcement measures so far referred to is the fact that they are implemented in the territory of another state and by the physical presence of an agent of the state exercising jurisdiction. In the last subsection of the part concerning enforcement jurisdiction, Mann puts the following question: If measures performed within the territory of another state (by physical presence, it is assumed), contradict principles of international law (presumably the principle of territorial enforcement),[22] is it "open to a state to have resort to its own legal system and, in particular, its own courts for the purpose of making the conduct of foreigners in foreign countries conform to its own commands?"[23] Can a Dutch court, Mann asks by way of example, order the forfeiture of a car in New York; can it order an American company to grant a free licence of its American patents; can it, via the Dutch branch of an American bank, order the bank to disclose the accounts of Dutch nationals?

Mann considers the answer to be in the negative, and he continues:

"Any other result would be repugnant to one's commonsense and the dictates of justice, to that distribution of State jurisdiction and to that idea of international forbearance without which the present international order cannot continue."[24]

The *legal* support for this view is the practice of all states, which, with a single exception is in accord, and further:

"The strictly legal reasoning leading to this result rests on the submission that the judgment of a court or the order of an administrative agency, no less than legislation in the narrow sense of the term is internationally valid only within the limits of substantive jurisdiction ... [A person's conduct abroad may be regulated by a court's order only if] the State of the forum also has substantive jurisdiction to regulate conduct in the manner defined in the order. In other words, for the purpose of justifying, even in the territory of the forum, the international validity of an order, not only its making, but also its content must be authorized by substantive rules of legislative jurisdiction."[25]

What then, according to Mann, is the principle of international law that governs enforcement jurisdiction exercised within the territory of the exercising state, including criminal and civil hearings and the entry of court judgments?[26] Apparently, it is not the principle of territorial enforcement — at least this is nowhere indicated (which implies that for Mann too the

physical presence determines whether jurisdiction is exercised within or without the territory of a state). It seems rather to be the same principle(s) that govern legislative jurisdiction ("within the limits of substantive jurisdiction"; "authorized by substantive rules of legislative jurisdiction"). At the least, Mann seems to suggest that the principles of enforcement jurisdiction here *coincide* with those of legislative jurisdiction. This is also indicated in the following lines a few paragraphs later: "[I]n so far as the enforcing State requires compliance with its prerogative rights in its own territory it can do so only if and to such extent as it has substantive legislative jurisdiction."[27] Moreover, commenting upon the situation where a court orders a local branch to produce documents held by a subsidiary abroad and concerning the affairs of the subsidiary: "[T]he demand would be lawful only if the enforcing state had legislative jurisdiction to regulate and, therefore, to inquire into those affairs and activities. No such legislative jurisdiction is likely to exist. Without it the demand simply constitutes the illegal exercise of enforcement jurisdiction".[28] As a corollary, enforcement measures taken within the territory of the enforcing state do not constitute violations of international law provided there is legislative jurisdiction.[29]

This is also in line with Section 20 of the Restatement, which reads: "A state has jurisdiction to enforce within its territory a rule of law validly prescribed by it."[30] Thus, whenever a state has legislative jurisdiction, it also has jurisdiction to enforce, to the extent that the enforcement is exercised within the territory.

There is thus in the end one principle — the principle of territorial enforcement — governing jurisdiction exercised (including the act of legislation,[31] entry of judgments, investigations, service of writs and documents, trials — indeed, every state activity, whether it refers to legislative actions or enforcement actions) in the territory of another state by means of physical presence therein (hereinafter the "extraterritorial exercise of jurisdiction") and, on the other hand, there are other principles of international law — principles not yet discussed herein (and the existence of which is disputed) — which cover the exercise of jurisdiction (legislative or enforcement) within the territory of the exercising state — hereinafter "the intraterritorial exercise of jurisdiction" — and somehow affecting persons, property, acts, etc., outside that territory.[32] From the international law perspective, the distinction between legislative and enforcement jurisdiction is of no legal moment. This also becomes evident when juxtaposing legislative jurisdiction and enforcement jurisdiction as exercised within the territory of the exercising state: Why should international law distinguish the introduction of a law affecting foreigners from the entry of a judgment,

wherein the same law is applied, affecting foreigners, or the issuing of a subpoena, an order or a command, which imply the application of an enacted law? Is it not all law in the broad sense of the term: regulation of human behaviour? (An entirely different matter is that the principles of international law may vary all according to the type of law involved: criminal, civil, administrative, etc). At the same time there seems to be no rational reason for prohibiting, under international law, the intraterritorial enforcement of a law in a case where legislative jurisdiction lies; legislative and enforcement jurisdiction go hand in hand. This exactly is the result which the Restatement has come to in section 20, compared to Section 10 and the following sections: a complete parallellism between legislative jurisdiction and enforcement jurisdiction when exercised within the exercising state.

The main target of the following analysis of international jurisdiction in international antitrust law is consequently the intraterritorial exercise of jurisdiction affecting persons, property, acts, etc. in other states, for this is mainly what the jurisdictional problems in international antitrust law are about.

Notes, chapter XIV.

[1] See e.g. Vogel, at 43 ff.

[2] See e.g. Kelsen, Principles of International Law, at 207 ff.; Dahm, at 538; Thalmann, at 18.

[3] See e.g. Oppenheim-Lauterpacht, at 262 f., 295 ff. 327 f.; Vogel, at 101 ff. (With a long list of references); Berber, at 305 ff.; Ross, at 213 ff.; Verdross, Völkerrecht, at 240, 265; Dahm, at 250 ff.; Brownlie, at 299 ff. Kelsen, Principles of International Law, at 208 ff.; Wengler, at 962 ff.; O'Connell, at 659; Neumeyer IV, at 494 ff,; Mann, Studies, at 110 ff.; Schwarzenberger, A Manual of International Law, at 72 ff.; Akehurst, Jurisdiction, at 145 ff.; Rudolf, at 33 ff.; Ingo von Münch, at 64 f.; Vogt, at 4 ff.; The Restatement (2d) on Foreign Relations Law, §§ 6 f., 20; Heiz, at 240 f.; Schlochauer, Extraterritoriale Wirkungen, at 10 ff., 68; Hermanns, at 14 f.; Meessen, at 15 ff.; Haymann, at 290 f.; Rehbinder, Extraterritoriale Wirkungen, at 51 ff; Rahl, at 405 ff.; Schwartz, Deutsches internationales Kartellrecht, at 246 (with further references at 247, n. 6); Bär, 323 ff.; Canenbley, at 12 ff.; Barack, at 398 ff.; Müller, at 188 f.; Bogdan, Om svensk exekutionsbehörighet, 66 Sv.J.T. 401 (1981), at 404 ff.

[4] *S.S. Lotus,* P.C.I.J., Series A, No. 9, at 18 f.

[5] See e.g. Mann, Studies, at 122; Akehurst, Jurisdiction, at 147; Rudolf, at 35; Neumeyer IV, at 496 f.

[6] See e.g. Mann, Studies, at 110 ff.; Rudolf, at 33 ff.; Neumeyer IV, at 494 ff.; Akehurst, Jurisdiction, at 145 ff.; P. Müller, at 188 ff.

[7] See *supra* n. 6.

[8] Akehurst, Jurisdiction, at 146 f.

[9] See e.g. Mann, Studies, at 122 ff. But see Schwartz, Deutsches internationales Kartellrecht, at 248; Schlochauer, Extraterritoriale Wirkungen, at 68; *Cf.* Vogel, at 342 ff.
Also see the notes on United States case law in Canenbley, at 23.

[10] *S.S. Lotus, supra* n. 4, at 19.

[11] *Id.*

[12] Wengler, at 962 (emphasis added with the exception of "öffentlich"). The same reasoning lies implicit, it seems, in the analyses of Ross, at 213 ff; Kelsen, Principles of International Law, at 208 ff; Oppenheim-Lauterpacht, at 262 f., 295 ff., 327 f.; Vogel, at 101 ff.; Neumeyer IV, at 494 ff. But see *infra* n. 29. The majority of the legal writers, however, do not discuss the the problem in specific.

[13] See *supra* n. 3.

[14] Mann, Studies, at 6.

[15] *Id.*

[16] See the Restatement (2d) of Foreign Relations Law, § 6, at 20 f., illustration I.

[17] *Cf.* Mann, Studies, at 112.

[18] Most legal writers from the common law countries seem to have adopted this approach, see e.g. Akehurst, Jurisdiction; Barack; Fugate; Rahl: Brewster; O'Connell, at 659 f.

[19] *Cf.* Meessen, at 89.

[20] See Mann, Studies, at 1 ff.

[21] Mann *id.*, at 112.

[22] *Id.*, at 111.

[23] *Id.*, at 127 f.

[24] *Id.*, at 128.

[25] *Id.*, at 129.

[26] *Cf.* The Restatement (2d) of Foreign Relations Law, § 6.

[27] Mann, Studies, at 131.

[28] *Id.*, at 139. *Cf.* Brownlie, at 301.

[29] On the other hand, Mann seems to be somewhat in doubt as to whether physical presence is the sole criterion for determining whether jurisdiction has been exercised within the territory of another state (*cf. supra* p. 457). Concerning the service of documents in another state Mann argues: "Whether international law prohibits the service of documents by the despatch, through the post, of written communications from the territory of the forum State is open to doubt. In principle it would seem that this method of service should be treated as lawful, at any rate in those cases in which the documents to be served contains merely a notification as opposed to a command (footnote deleted) and does not include a threat of penalties in the event of non-compliance (footnote deleted), for in such cases the sovereignty of the receiving State can hardly be said to be impugned." As regards the taking of evidence abroad, a like doubt arises: "Nor is a State entitled to enforce the attendance of a foreign witness before its

own tribunals by threatening him with penalties in case of non-compliance. There is, it is true, no objection to a state, by lawful means, inviting or perhaps requiring a foreign witness to appear for the purpose of giving evidence." These, slightly equivocal, lines by Mann do not indicate whether it is the principle of territorial enforcement that prohibits the enforcement measures or some other principle of international law. *If* the principle of territorial enforcement governs this area too, then certainly Mann is not regarding physical presence as the sole criterion for localizing the exercise of jurisdiction. Yet, the overall impression of Mann's analysis is that the principle does not apply, but other principles regarding — what is characterized as — legislative jurisdiction of which the following excerpt seems to evidence (regarding the taking of evidence in another state again): (When a state is inviting or requiring a foreign witness to appear)... "the foreign witness is under no duty to comply, and to impose penalties upon him and to enforce them either against his property or against him personally on the occassion of a future visit constitutes an excess of criminal jurisdiction and runs contrary to the practice of States in regard to the taking of evidence as it has developed over a long period of time." The principle here blocking state action is obviously not the principle of territorial enforcement. It is a principle governing legislative (criminal) jurisdiction. *Cf.* Verzijl, The Controvery Regarding the So-Called Extraterritorial Effect of the American Antitrust Laws, 1961 N.T.I. R. 3 (1961), at 10, where the author commenting upon a similar jurisdictional situation, concludes: "[I]t is not so much a question of violation by the prosecuting State of foreign territorial sovereignty [*i.e.* the principle of territorial enforcement] as one of abuse of its own [positive] criminal jurisdiction in respect of acts performed or to be performed outside its borders, perhaps by foreigners. *In the last analysis, therefore, we come back once more to the general principles of international law concerning the delimitation of criminal jurisdiction.*" (Emphasis added). Although Verzilj is referring to the principles of criminal jurisdiction (as does Mann, as quoted above) what is meant is legislative jurisdiction (in the broad sense of the term, including court orders, judgments, etc. see *infra* chapter XVI regarding the intraterritorial exercise of jurisdiction).

[30] Also see Comment a., accompanying the Section: *"Relationship to jurisdiction to prescribe.* Under the rule stated in this Section, a state has jurisdiction to apply in a proceeding brought within its territory any rule of law that the state has jurisdiction to prescribe under any of the bases of jurisdiction to prescribe indicated in § 10."

[31] *Cf.* Wengler, at 962.

[32] *Cf.* Verzijl's approach, *supra* n. 28, at 8 f.

Chapter XV
The intraterritorial exercise of jurisdiction with extraterritorial effects

1. Introduction

From the foregoing we have learned that jurisdiction is strictly territorial in the sense that it may not be *exercised* in another state by way of the physical presence of state agents therein, in the absence of consent by that state (the principle of territorial enforcement, or the prohibition of the extraterritorial exercise of jurisdiction). Generally permitted, on the other hand, is the exercise of jurisdiction within the territory of the exercising state. The problematic area of international law to be analyzed here, we repeat, is the exercise of jurisdiction within the territory of the exercising state affecting persons, property and acts in another state; or, as in the catchword-like title of this chapter announces: the intraterritorial exercise of jurisdiction with extraterritorial effects. The jurisdictional problem in focus is thus the situation where a state, via its legislative and executive organs, its law-enforcement authorities, its courts or other organs authorized to exercise state functions, attempts to regulate human behaviour — the rights and liabilities of persons — the ownership to property, etc., residing or situated in another state, *but* without sending state agents to that state — in particular the attempt to regulate trade and competition in other states.

The phenomenon referred to — and discussed, from a national perspective, in the first part of this thesis — is usually characterized as "extraterritorial application" or "extraterritorial reach" of the antitrust law. This concept has so far been consciously avoided mainly because it is too vague; it conveys nothing of substance. This is not to say that the concept is entirely useless: Its advantage lies in the mere fact that it is frequently, or almost unexceptionally, invoked to direct attention to a certain problem-area in international law, to evoke the correct associations in the minds of jurists, "to pull the right strings"; though no one will know the exact borderli-

nes of the problem-area, most can perceive the general picture. Its frequent use is sufficient reason for not eliminating it from the vocabulary of international law. Inserted in the title of a scientific work or used as a general key-word, the concept has undeniable merits. But this is as far as its advantages extend. For any attempt to find a closer definition of the concept is bound to fail. First, it is not clear whether "extraterritorial application" encompasses both the intraterritorial *and* the extraterritorial exercise of jurisdiction, or the former type only.[1] Does it, for instance, cover the situation where the laws of one state are applied by the courts of another (or the enforcement authorities of another state)?[2] Are thus the antitrust laws of the United States "extraterritorially applied" when they are applied by courts in France (or only taken notice of)? Secondly, assuming that "extraterritorial application" refers to the intraterritorial exercise of jurisdiction only, one does not know whether the concept is confined to the applicability of a law as such or whether it extends to judicial decisions as well (or whether it is confined to judicial decisions). In other words, does "extraterritorial application" refer to the fact that the legislator gives "extraterritorial applicability" ("reach", "scope" to the law) such laws, or to a combination of these circumstances?

Finally, what is the meaning of the statement that a law has an "extraterritorial reach", as such, and is "extraterritorially applied" by courts, *i.e.*, what is it that makes the reach or application of a law "extraterritorial"? In the international antitrust field, some legal writers regard the *situs* of the company involved as decisive: if the company is situated outside the forum state, and the law applies to its activities, then there is "extraterritorial reach" and "application". Others again — the majority, it is believed — regard anticompetitive conduct as the criterion for "extraterritoriality". Choosing the former route entails the problem of defining the *situs* of a company, and here the views diverge. Choosing the latter, on the other hand, means entering a dead-end street, for how are we to localize conduct: Should we localize it where the actor happens to be when be acts? Or where the effects of his action or conduct occur? (And how do we localize the actor if it is a company and how do we localize the place of the (effects). Here, too, a wide variety of opinions emerge. One commentator[3] has even — quite consequently — suggested that the antitrust laws of the United States are not "extraterritorially applied" at all, since the effects of anticompetitive acts actually occur *within* the United States every time the American courts are set to decide a case that includes foreign elements.

The only common denominator to all of those who take part in the discussion on "extraterritorial application" is that the term relates to cases in

which elements are presented which are somehow foreign to the country of the law in question (foreign individuals, foreign companies, foreign conduct, foreign property, etc.) — hence the vagueness of the term.

The intraterritorial exercise of jurisdiction with extraterritorial effects would correspond to the (extraterritorial) applicability of laws to foreign elements *and* application of laws of the forum-state in cases involving foreing elements. The "foreignness" of an element may have significance from both the municipal law and the international law perspecitve. In the former case, in the municipal law system, an element may be deemed to be foreign for the purpose of setting in motion particular municipal rules — conflict of laws rules, for instance, or other rules established for the occasion. In international law, on the other hand, an element may be deemed to be foreign for the purpose of activating jurisdictional rules (to the extent that such exist) which regulate the intraterritorial exercise of jurisdiction involving foreign elements. Therefore, in order to know whether the jurisdictional rules apply or not, international law must not define not only the relevant elements but also what makes these elements foreign.

2. Some fragments of the doctrine

2.1 Hobbes

The problem of intraterritorial exercise of jurisdiction with extraterritorial effects, of course, is not a modern invention. It is as old as international law, or even as law, itself. But then again, in a shrinking world, with intensified communication, the problem is particularly pronounced.

Among those who have reflected upon the question of extraterritorial effects, and one of the first[4] since the arisal of territorial states, was *Hobbes*. Whether he gave the problem conscious systematic thought, however, is open to doubt. In the oft-quoted penultimate paragraph of Chapter 21 of the Leviathan, the problem is nonetheless alluded to:

"If the Soveraign banish his Subject; during the Banishment, he is not Subject. But he that is sent on a message, or hath leave to travell, is still Subject; but it is, by Contract between Soveraigns, not by vertue of the covenant of Subjection. For whosoever entreth into anothers dominion, is Subject ot all the Laws thereof; unlesse he have a privilege by the amity of the Soveraigns, or by speciall licence."[5]

In these few lines, it is said, Hobbes gives expression to the view that laws can have no extraterritorial effects, in other words, that the intraterritorial exercise of jurisdiction is, in all respects restricted to territory; that the borders of a state stand as an invisible wall against which the laws, orders, commands, etc., of the "sovereign" rebound. By leaving his home state, the "Subject" would be detached of all the legal bonds and attached to him as he enters another state would be all the laws of that state, were it not for the "Contract between Soveraigns". The "Subject" would, by leaving his home state, lose his status as subject under the "covenant of Subjection", and by it his allegiance, only to regain it when returning.

This is Hobbes as understood by *K. Vogel.* Since in the mind of Hobbes, Vogel argues, laws can have no extraterritorial effects — no force outside the law-state — the period in which the "Subject" is absent from his home state is legally seen a vacuum; whatever he has done, whatever he has participated in, while staying abroad, is devoid of all legal relevance when he is again in his country of "Subjection": That "alle privatrechtlichen ebenso wie strafrechtlichen Vorgänge *nur nach den Gesetzen des Aufenthaltsstaates beurteilt werden können,* und zwar für die betreffende Zeit auch dann, der Untertan später in das Gebiet seines ursprünglichen Souveräns zurückkehrt",[6] all this, of course, in the absence of a "Contract between Soveraigns".

In fact, Vogel's interpretation hangs on a very frail thread. To begin with, Hobbes did not, as indicated, systematically analyse the jurisdictional problems, he noted these only very casually. The paragraph quoted is a rare, if not unique, instance in which he touches upon international law issues. Of this Vogel is, no doubt, aware.[7] But what is more: if the writings of Hobbes were given the interpretation advanced by Vogel, Hobbes, it seems, would render himself guilty of contradictions. For from what can be construed out of a few paragraphs in Chapter 27, and the following, of "Leviathan", the force of the law, in Hobbes' eyes, did not necessarily cease at the national frontier, even in the absence of a "Contract between Soveraigns". "Where a man is a captive", he writes, "or in the power of the enemy... if it be without his own fault, the Obligation of the Law ceaseth; because he must obey the enemy, or dye; and consequently such obedience is no Crime: for no man is obliged (when the protection of the Law faileth), not to protect himself, by the best means he can."[8] In light of Vogel's understanding of Hobbes, these lines certainly seem redundant (provided it is not envisaged that the enemy is within the territory of the state the laws of which are in question). And what if a "Subject" falls in to the power of the enemy by his own fault? *E contrario,* it would seem, the obligation of the law does not cease.

With respect to *crimina laesae majestatis,* such as the betrayal of the strengths or the revealing of the secrets of the state, or the attempt to diminish the authority of its representatives, these acts, it seems, according to Hobbes are crimes wherever performed.[9] Or can it be seriously suggested that Hobbes regarded treasonous acts performed in a foreign state by a "Subject" as nullities from the perspective of the law of his home state, even after his return? And is it possible that Hobbes considered the disobedience of a soldier to his superiors as a nullity, by reason only of the fact that the act (or rather omission) was committed in a foreign state? (If these cases are to be regarded as exceptions to the general rule, how many more exceptions are there?)[10]

Hence, it seems that one would be doing Hobbes a disfavour by reading the quoted lines from Chapter 21 as a well-deliberated jurisdictional rule on non-extraterritorial force.

2.2 Huber

Of far greater interest in this context are the works of *Ulrich Huber,* and especially his "De Conflictu Legum"[11] the significance of which *Lorenzen* once described as follows:

"Of the vast number of treatises on the Conflict of Laws Huber's 'De Conflictu Legum Diversarum in Diversis Imperiis' is the shortest. It covers only five quarto pages; and yet it has had a greater influence upon the development of the Conflict of Laws in England and the United States than any other work. No other foreign work has been so frequently cited."[12]

Huber's system of conflict of laws was built on the three well-known maxims (axiomata), "which being conceded as they should be every-where": 1) the laws of each state have force within the limits of that state and bind all who are subject to it, but not beyond; 2) all persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof; and 3) sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not prejudice the power or rights of such government, or of its subjects.[13a] These maxims anchored in *Jus Gentium* — the "international law" of those days[13b] — Huber considered, gave the solutions to a wide variety of Conflict of Law issues, foremostly in the field of private law. Thus his "De Conflictu Legum" is structured accordingly: The maxims are introduced in the first pages of the work, whereafter the specific rules follow — amply exemplified by practical cases, some hypothetical, some from the real life — seemingly derived or deduced from the maxims.

The first maxim, in combination with the second, conveys the principle that the laws of one state have no force within the territory of another state — no extraterritorial effect — and thus that the operation of laws is limited to territory. The question, however, is whether Huber professed that the intraterritorial exercise of jurisdiction could have no extraterritorial effects — *i.e.,* that laws are incapable, *ex proprio vigore,* of affecting persons, property and conduct outside the law-state, or whether he merely maintained what today may seem obvious but what in those days (in the 17th century) deserved particular emphasis: that the laws of one state cannot be enforced within the territory of another: the enacting state has no power so to enforce them, nor, of course, have the laws themselves such power and therefore whatever force the laws may have in the territory of another state, it is awarded them entirely by that other state. Or was it, in the third alternative, Huber's intention to summarize both principles in the three maxims.

The majority of commentators seem to understand Huber in line with the second alternative:[14] The thesis that laws cannot be extraterritorially enforced. *Gihl* and *Vogel,* among others, reach the conclusion (both independently), however, that Huber was advocating the third alternative.[15] Common to most representatives of the Dutch school, including Rodenburg, Paul and Johannes Voet and Huber, says *Gihl,* is the doctrine that the laws of one state cannot *per se* be enforced by agencies in another state. The application of foreign laws is exclusively a matter for the state in which the foreign laws are enforced.[16] Thus the courts of on state are not obliged to enforce the laws of another state. This is the doctrine of *comitas gentium,* the significance of which is that the Conflict of Laws is national (municipal) law. The doctrine in its general form is silent as to whether the courts of one state may apply their own laws to persons, property, conduct, etc., in another state.[17] The works of Huber, however, Gihl continues, show a particular feature. Here the territoriality of law is given a singular, particularly strict, formulation: The laws of a state have force and effect within the territory of the enacting state only, but not outside the territory, which implies that they cannot affect persons, property, conduct, etc., in other states — *nec ultra* (unless, of course, the affected state gives its consent thereto). The theses of Huber thus was, according to Gihl, that not only could the laws of one state pretend to be extraterritorially enforced, but, in addition, the intraterritorial exercise of the laws could have no extraterritorial effects.[18]

A corresponding interpretation of Huber is presented by *Vogel,* who pays specific attention to Huber's works. According to Huber, Vogel con-

cludes, laws are not only restricted to territory in that they have no applicability outside the law-state ("intransitive Territorialität"), but also in that they cannot affect persons, property, conduct, etc., outside the law-state even if applied by the courts of the law-state ("transitive Territorialität — im negativen Aspekt").[19]

The territorial character of state law is conceived by Huber as an *a priori* principle of law ("rechtsapriorisches Prinzip"), Vogel claims, a principle which the state legislator cannot surmount, no matter how much it might wish to; it is entirely inadmissible for the legislator of one state to attach legal consequences to legal acts performed in another state.[20]

Gihl's and Vogel's interpretation of Huber may be correct; on the other hand, it may not. It seems that Huber is not clear and consistent enough to allow, without hesitation, one or the other interpretation.[21]

Let us, for a moment, examine Huber's "De Conflictu Legum". In the principal part of this short publication, Huber supplies, what in the more modern terminology of the Conflict of Laws are termed, connecting factors. These are factors that determine which state's law shall apply in the particular case (*lex causae*), they thus announce the law "governing" the case. They constitute the link between a particular item of human conduct (relation), given legal significance, and a particular state whose law is to be applied.

For the making of a contract, Huber considers the place of the making as the decisive connecting factor and thus the law in which the contract was made "governs" (*lex loci contractus,* as regards both substance and form). The same connecting factor — the place of making — is also decisive with respect to marriages (including the rights of husband and wife during and after the marriage, the inheritance rights of children, etc.) and the form of a will (*lex loci actus*). These are some of the general rules. From these Huber makes several exceptions. *Lex loci contractus* does not control where the parties had some other law in mind at the time of contracting. It does further not control with respect to immovable property (where the law of the *situs* is controlling).[22] The law of the place of marriage does not govern, when the parties went to that place for the purpose of evading their home laws, or when the parties intended to live somewhere else. It does furthermore not govern as regards immovable property. Similarly: wills relating to immovables are governed by the law of the *situs.* The status of a person — as a minor, as a married woman, as a ward etc. ("personal qualitites impressed upon a person") — accompany the person everywhere and thus the person will be regarded as having that particular status wherever he goes. The right to make a contract and a will and the right to marry, that

is, the capacity of the person with a particular status is, however, governed by *lex loci actus*.[23] Hence, Huber distinguishes the status of a person from the capacity of a person. But then, again, the rule of *lex loci actus* will have to be modified in order to avoid evasions of *lex domicilii*.[24] Rules of procedure, finally, are governed by *lex fori*.[25]

From these numerous exceptions to Huber's general choice of law rules, it can readily be seen that his second maxim is utterly hollow. While it is true that a person is deemed to be a subject of the state in which he stays, whether temporarily or permanently, he cannot be certain that the laws by which he is governed in that state will govern *every* legal step he takes. This is admitted by Huber himself when he says:

"As for the second maxim, some persons seem to be of a different opinion and to deny that foreigners are subject to the law of the place in which they act. I consider this to be true in certain cases...".[26]

In fact, it seems that the second maxim has little relevance to the choice of law rules which Huber advocates and the connecting factors he has chosen. His slight motive for, nevertheless, mentioning it is apparently that his connecting factors and specific rules are somewhat more oriented to the place of a person's stay at the time of acting than were the connecting factors of his Italian and French predecessors in this field of law (who gave more weight to *lex domicilii*).[27]

Huber's first and third maxims, on the other hand, understood in the sense that the laws of one state cannot be extraterritorially enforced and are applied in other states by way of comity only, permeate his system of Conflict of Laws. Thus Huber repeatedly comes back to the fact that a court may refuse to apply a foreign law if such application implies the evasion of *lex fori*. If a marriage or the making of a will or contract in another state, for instance, constitutes a manifest evasion of *lex fori,* the court, says Huber, is not "bound by the law of nations to recognize and give effect" to such a marriage, will or contract, but will rather declare it invalid.[28] The two maxims are further invoked to provide a basis for the choice of law rule regarding immovables: "Certain qualities ... impressed upon" immovables "by the law of the particular country in which they are situated ... remain unaffected in such state irrespective of what the laws of other states ... may provide to the contrary".[29] "[T]he laws of one state cannot affect the integral parts of another territory ... [I]t is not by reason of the immediate force and operation of a foreign law, but in consequence of the sanction of the supreme power of the other state, that effect is given to foreign laws exercised upon property within its territory, out of respect for

the mutual convenience of the nations, provided, however, that no prejudice is occasioned to a sovereignty or to the rights of its citizens".[30] And with respect to immovables, Huber concludes, it is evident that the laws applicable to such property, enacted in the state in which they are situated, cannot be changed by foreign laws "without great confusion and prejudice to the state."[31]

In Huber's system of Conflict of Laws, the first and third maxim accordingly, understood in the restricted sense indicated, certainly have a function to serve. They not only supply the rationale for the general choice of law rules — the fundamental reason for choosing *situs* as the connecting factor for immovables — but they also motivate the exceptions from the general rules *(e.g.,* in cases of manifest evasion). But if this is the way in which Huber is to be understood, it is also true that the connecting factors which he has chosen, and the substantive choice of law rules which he adduces, are in no way contingent upon the maxims he introduces; the rules are not deduced from the maxims; there is no logical connection between the maxims and the specific substantive rules actually advanced. The maxims rather form a general framework for Huber's system and within this framework any choice of law rule could find a place. It is in introducing and clarifying such a general framework — a Conflict of Laws' policy — that the ingenuity of Huber and his Dutch colleagues is supposed to lie.[32]

Let us, finally, add one more dimension to Huber's system, the principle which Gihl and Vogel suggest is present therein, that laws are strictly territorial and cannot affect persons, property, conduct, etc. beyond the borders of the enacting state even if applied by the courts in that state (that the intraterritorial exercise of jurisdiction can have no extraterritorial effects). As far as can be ascertained, it appears that this principle does not fit in. It is not only that Huber in his "De Conflictu Legum" nowhere expressly mentions the principle (whereas the principle of non-extraterritorial enforcement is repeatedly emphasized). It is also that for his whole reasoning the principle is inappropriate, unnecessary and even an obstacle. First, let us consider how Huber himself comments on maxims one and three immediately after stating them:

"Although the laws of one nation can have no force directly with another, yet nothing could be more inconvenient to commerce and to international usage than that transactions valid by the law of one place should be render of no effect elsewhere on account of a difference in the law. And that is the reason for the third maxim concerning which hitherto no doubt appears to have been entertained."[33]

Huber here stresses the principle that laws cannot be extraterritorially en-

forced — that no state can expect its laws to be applied in the courts of another — and points to the rule of comity. That laws can have no extraterritorial effects in any other sense is not even indicated.

Secondly, if Huber is interpreted as Gihl and Vogel suggest, then the "De Conflictu Legum" contains several contradictions. The choice of law rule, for instance, that a person's status is governed by *lex domicilii* — or by the law of the state in which the status is "impressed upon a person" — would not be possible. If laws have no extraterritorial effect at all, the law — or the status conferred by the law — cannot accompany the person everywhere; its force ends where the territory of the state ends. When a person crosses the border, he is released from the bonds of the laws in the state which he leaves, only to be bound by the laws of the state into which he enters. Of course, the courts of a foreign state may recognize and give effect to *lex domicilii* — that is, the status of the person. But that is not the issue. The issue is: Can the court of the home state apply its own laws to something that has taken place abroad? Assume that a person comes of age at 21 in state A, but at 25 in state B. According to Huber's choice of law rule, a person above the age of 21 from state A shall be treated as such and shall have the rights of a person of age (above 25) in state B. If thus the 22-year-old X goes to B and concludes a contract there, the contract is valid in state B, even if minors may not make contracts therein. But it will also be valid in state A, which means that a court in A will give effect to and enforce the contract therein. By doing so it gives effect to its own laws regarding status to a person and his conduct in another state. And similarly, if Y, aged 22, goes from his home state B to A and concludes a contract there, the contract will be held invalid, since Y was a minor. The courts of B will consider it invalid by applying the laws of B concerning status to what took place in state A.

It is obvious that Huber either did not regard laws as totally lacking extraterritorial effect, or he did, and is here contradicting himself. The former seems the better view. This is further evidenced by the fact that Huber most probably considered the criminal laws of a state applicable to crimes committed abroad. In "De Conflictu Legum", Section 6, Huber discusses *res judicata* and the effect given to sentences pronounced in one state in the territory of another. Sentences shall have effect everywhere, Huber suggests, provided, of course, that they are recognized — which they will be, if this does not result in danger and prejudice to the other states. Of such danger and prejudice Huber gives an example: Titius struck a man on the head on Frisian territory. The man died. Titius escaped into Transylvania, where he was tried and acquitted. Should the sentence be given effect in

Frisia? Huber apparently thinks not, and this although the reason for acquittal may not have been unsound. But why would not the sentence be given effect? Because the escape into the neighbouring Transylvania and the following prosecution *prepares the way too much for an evasion of the Frisian law,* is Huber's answer. It is thus not the fact that the Transylvanian court applied its own law to the crime committed in Frisia — that the court did not apply *lex loci delicti* (Frisian law) seems certain, how else could the Frisian law be evaded? — that generates the danger and prejudice, according to Huber; it is the fact that, if the Transylvanian sentence were to be given effect, it would be too easy to escape the Frisian law (go "forum-shopping"). That Huber was of the opinion that the law of the forum could be applied to crimes committed abroad is admitted not only by Vogel but by others as well,[34] and is substantiated by statements made by Huber elsewhere.[35]

Moreover, if laws cannot *a priori* affect persons, property, conduct, etc., in foreign states, as Vogel interprets Huber, how is it possible that the parties to a contract by mere intention can, in principle, subject the contract to *any* law that originates outside the state in which the contract was made, thereby giving such law extraterritorial effect?[36]

Third, and finally: Whereas the principle concerning the non-extraterritorial enforcement of laws, as we have seen above, plays a significant role in Huber's system of Conflict of Laws, the principle that laws can have no extraterritorial effects, even if intraterritorially applied, seems to fulfil no function therein. On the contrary, it undermines rather than reinforces the foundation of Huber's system. Neither Gihl nor Vogel succeeds in demonstrating an independent function of such a strict territoriality in Huber's works.

Thus, in conclusion, it seems, that Huber did not regard laws as wholly devoid of extraterritorial effect in cases where they were intraterritorially applied, and he certainly did not consider such extraterritorial application as an *a priori* impossibility. Huber concerned himself rather with the possibility of having laws enforced by courts and other enforcement agencies outside the law state — a possibility which he in concert with his Dutch contemporaries, but in contrast to his Italian and French predecessors, denied.[37] If such enforcement there was, it was on the ground of comity, *comitas gentium.*

2.3 Story

The influence of Huber, and his Dutch contemporaries, upon *Story* is evident. In Story's "Commentaries on the Conflict of Laws", references are made to continental writers in general, it is true, still Huber's position remains central. This is particularly true of the general part, the prefatory 39 pages, of Story's 557 page work, where Story, not unlike Huber, introduces his three general maxims. Story also quotes and discusses Huber's maxims, and especially the authority of these, of which he says:

"It is not, however, a slight recommendation of [Huber's] works, that hitherto he has possessed an undisputed preference on this subject over other continental jurists, as well in England as in America. Indeed his first two maxims will in the present day scarcely be disputed by any one; and the last seems irresistibly to flow from the right and duty of every nation to protect its own subjects against injuries resulting from the unjust and prejudicial influence of foreign laws...."[38]

For Story, as for Huber, the maxims constituted a general framework for Conflict of Laws — "a basis upon which all reasonings on the subject must necessarily rest"[39] — a framework anchored in international law; according to Story in the principles of sovereignty, independence and equality. To what extent, however, the maxims of Story correspond to Huber's, is an open question. Of interest here, in particular, is the question whether Story advocated strict territoriality of laws in the sense that they could not have extraterritorial effects, even if intraterritorially applied, or whether he merely suggested, what we have found to be the limited thesis of Huber — in concert with his Dutch colleagues — that laws have no force *ex proprio vigore* for application by courts outside the law-state?[40] Although Story's formulation of the maxims differs from Huber's, it is nowhere indicated that Story *intended* a deviation in substance. Rather than laying down proposals *de lege ferenda,* Story was merely restating in a more elaborate form a doctrine which he considered to be widely accepted. Yet Story's text gives cause for doubt. Therefore, a closer penetration is warranted.

"[T]he natural principle flowing from the equality and independence of nations", Story remarks at the outset, is that "the laws of one country can have no intrinsic force, proprio vigore, except within the territorial limits and jurisdiction of that country."[41] And he continues:

"They can bind only its own subjects, and others who are within its jurisdictional limits; and the latter only while they remain therein. No other national, or its subjects, are bound to yield the slightest obedience to those laws. Whatever extraterritorial force they are to have, is the result, not of any original power to extend them abroad, but of that respect, which from

motives of public policy other nations are disposed to yield to them, giving them effect...".[42]

So far, it seems, Story's view of the territoriality of law is limited to the principle of non-extraterritorial enforcement, in conformity with Huber. What concerns him here is the effect given a law by foreign states and their courts (and other enforcement agencies); whatever effect the law may have is what other states and their courts will give it. That this is so is clear from the lines almost immediately following those just quoted — where Story invokes the reasons for territoriality given in international law:

"For it is an essential attribute of every sovereignty, that it has no admitted superior, and that it gives the supreme law within its own dominions on all subjects appertaining to its sovereignty. What it yields, it is its own choice to yield, and *it cannot be commanded by another to yield it as matter of right. And accordingly it is laid down by all publicists and jurists, as an incontestable rule of public law, that one may with impunity disregard the law pronounced by a magistrate beyond his own territory*... [A]nd it is equally as true in relation to nations, as the Roman law held it ot be in relation to magistrates. The other part of the rule is equally applicable: 'Idem est, et si supra jurisdictionem suam velit jus dicere;' for he exceeds his proper jurisdiction when he seeks to make it operate extra-territorially as a matter of power."[43]

Thus, in question is a long-established principle recognized by all, that a court (or, more correctly a state) applies foreign laws not because of their own intrinsic force or by virtue of the competence of the foreign legislator, but because it chooses to do so. Story is consequently not proposing something new; his principle rests on solid ground. There is not the slightest indication in these lines that, in Story's view, laws can have no extraterritorial effect in cases where they are applied by the courts of the state in which they are enacted. And it would be strange to think that Story regarded such a strict territoriality as accepted by all, incontestable and recognized by the Roman law.

Story's first maxim is that every nation possesses an exclusive sovereignty and jurisdiction within its own territory. The direct consequence of this, Story adds, is that the laws of every state "affect and bind directly" all property, persons, contracts made and acts committed within it.[44] The maxim is clearly founded upon international law. On the question whether Story's territoriality allows any extraterritorial effects at all, the maxim is most equivocal.

Story's second maxim, however, has more to convey: "[N]o state or nation can by its laws directly affect or bind property out of its own territory, or bind persons not resident therein, whether they are natural-born sub-

jects or others."[45] This, Story, explains, is a natural consequence of the first maxim; "for it would be wholly incompatible with the equality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate either persons or things not within its own territory."[46]

But yet we have not become much wiser. Speaking in favour of a strict territoriality is Story's usage of the word "regulate", which seems to imply something more than extraterritorial enforcement; the mere regulation itself, in law, even if not intended to be extraterritorially enforced, is prohibited. However, against such a interpretation is the fact that Story finds support for his second maxim not only in the works of Huber, but also in those of Rodenburg and P. Voet, whose perception of the territoriality of laws clearly cannot be characterized as strict. Even more decisively against it is Story's discussion on the only exception from the prohibition (though already the exception as such speaks very much for itself): the right of a state to bind its own native subjects wherever they go. "Every nation has hitherto assumed it as clear that is possesses the right to regulate and govern its own nativeborn subjects everywhere; and consequently that its laws extend to and bind such subjects at all times and in all places."[47] But this exception, Story interposes, requires qualification. Here Story, for the first time, expressly distinguishes between territoriality in the strict sense and territoriality in the more limited sense — restricted to the non-extraterritorial enforcement. Particularly noticeable, in this context, is that Story, when defining territoriality in the limited sense, continues to apply the same terminology as in the preceding text for the definition of territoriality. The exception is admitted by Story only if it pertains to a state's intraterritorial exercise of jurisdiction over its own subjects, for "it may be truly said that no nation is bound to respect the laws of another nation, made in regard to the subjects of the latter, who are non-residents. The *obligatory force* of such laws of any nation *cannot extend beyond its own territories.*"[48] Hence, even if the laws of a state accompany its subjects everywhere, they have no obligatory force and cannot extend beyond the territory of the state. This is not a contradiction; it is distinguishing between two types of territoriality. Here we learn what Story means by the expressions "obligatory force" and "cannot extend beyond the territory": it is the capability of laws of being applied and enforced outside the law-state. This also is evident from the following excerpt:

"Whatever may be the *intrinsic or obligatory force* of such laws upon such persons *if they should return to their native country,* they can have none in other nations wherein they reside. Such laws may give rise to *personal re-*

lations between the sovereign and subjects, *to be enforced in his own domains;* but they do not rightfully *extend* to other nations."[49]

One thing is, Story seemingly implies, that allegiance may give rise to personal relations between the state and its subjects, that the laws may affect the subject wherever he may travel and that upon his return the laws may be enforced against the subject, for within the state the laws enacted therein have intrinsic or obligatory force. But it is quite another thing that outside the state no such force exists and the laws of one state may therefore be wholly disregarded by another, a matter repeated by Story in the following lines:

"When, therefore, we speak of the right of a state to *bind* its own native subjects everywhere, we speak only *of its own claim and exercise of sovereignty over them when they return within its own territorial jurisdiction,* and not of its right to compel or require obedience to such laws on the part of other nations within their own territorial sovereignty. On the contrary, every nation has an exclusive right to regulate persons and things within its own territory, according to its own sovereign will and public policy."[50]

So, what has here been described as an exception — the right of a state to bind its subjects everywhere — is not a true exception in Story's system of law; it is not an exception to Story's second maxim, since that must be understood to mean territoriality in the limited sense only. From the second maxim, so construed, there are no exceptions, for, as Story remarks, that would be "wholly incompatible with the equality and exclusiveness of the sovereignty of all nations".[51] The so-called, exception, does not affect Story's system. The conclusion thus is that Story, in his second maxim, did not have in mind strict territoriality in the sense that laws can have no extraterritorial effect at all, even when intraterritorially applied, but was merely restating the generally accepted principle that laws enacted in one state are applied and enforced in that state only and not outside; should they be applied in other states it is not by virtue of the competence of the enacting state, not by virtue of an "intrinsic or obligatory force" of the laws, not because they themselves, *ex proprio vigore* "extend" across borders, but because of the sole fact that the foreign states choose to apply them.[52] And this is where Story's third maxim comes in:

"[W]hatever force and obligation the laws of one country have in another depend solely upon the laws and municipal regulations of the latter, that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent."[53]

Finally, the conclusion reached is supported by Story concept of the opera-

tion of penal laws. In line with Story's second maxim, penal laws have of course, no force, *i.e.*, cannot be applied and enforced by authorities, outside the law-state. But there is more: The penal laws of one state are not even *de facto* taken notice of in another; penal laws are strictly local. As to whether a person who commits a crime in one state may be prosecuted in the courts of another under the laws of the forum-state, Story, however, has no clear answer.[54] *Lex loci delicti* "would seem to" govern, Story believes; but, on the other hand he appears to recognize the possibility that *lex domicilii* or even *lex fori* controls.[55] The mere hesitaton on this issue is evidence enough of the fact that Story's second maxim does not cover the territorial question here involved.

2.4 The modern doctrine

The territorial principle of Huber and Story as understood here — that if the laws of one state are applied and enforced in another, they are not so because of the competence of the enacting state, nor by virtue of their own intrinsic force, but solely because other states choose to do so on grounds of comity — was widely spread already in the days of Story. It was later fully acknowledged by *Wächter*,[56] *Savigny*,[57] *Foelix*,[58] and other jurists on the continent as well as in the common-law countries, although the concept of comity was questioned.[59] That laws do not in this limited sense have extraterritorial force is today regarded as almost self-evident and is disputed by no one.

The concept of strict territoriality, however, did never gain terrain. The principle unjustifiably ascribed to Huber and Story,[60] that laws can have no extraterritorial effect even if applied and enforced within the territory of the enacting state, was either denied or wholly ignored by their followers; and in the more modern doctrine, it has no advocates. The question whether there ever was such a principle is fully warranted. As self-evident as the territorial principle in the limited sense has become, as self-evident is it today that laws are not absolutely restricted to territory, if applied intraterritorially.[61] In the *Lotus* case the Court concluded:

"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 to 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 State 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."[62]

Jurisdiction today is certainly not exclusive, but very much concurrent.

The only question open is whether there exist international law restrictions on the intraterritorial exercise of jurisdiction with extraterritorial effect, and, if so, what these restrictions are.

3. The doctrine of international antitrust law — the multiplicity of methodologies

The exercise of state jurisdiction within the territory of another state, without the consent of the latter, is prohibited under international law. In such cases, we have seen, jurisdiction is strictly territorial. International law imposes a restriction on state freedom, or, one may say, state sovereignty is limited by international law, and this restriction applies equally to all states — equality before the law.

The intraterritorial exercise of jurisdiction with extraterritorial effect, on the other hand, is not generally prohibited. The questions here are: Are there any restrictions at all, and if so, which are they? If there are, they will restrict the freedom of the states — equally. The fact that a multitude of municipal legal systems happen to regulate exactly the same matter is not inherently wrong under international law: jurisdiction is concurrent.

These rudimentary principles are not controversial. They are the premises on which international antitrust law must rest too and according to the doctrine of international antitrust, it does. The numerous participants in the debate in the field of international antitrust law, thus far at least, have a common platform. But from here on — from this rudimentary state — the legal writers follow a wide variety of paths, some of which ultimately lead to the same end-result, others, again, to deviating results. In order to answer the questions as to what principles of international law govern the intraterritorial exercise of jurisdiction with extraterritorial effect and to what extent the American practice (or practices of other states or organizations) con-

forms to these principles, a multiplicity of methodologies have thus been displayed.

A. Most writers, particularly in the early debate following the *Alcoa* case but also more recently, advocate the view that the jurisdictional principles, allegedly developed by international custom and governing the international criminal law, are as such equally applicable to international antitrust law. From the five jurisdictional principles generally agreed upon — the principles of territoriality (objective and subjective), of active personality, of passive personality, of universality and the protective principle — only two have been drawn into the discussion: the principle of objective territoriality and the protective principle. The others are generally said to have minor relevance. But the jurisdictional principles governing international criminal law merely constitute the common starting-point. While these writers agree that the principles are applicable as such, they disagree as to three very significant issues: 1. whether the municipal court practice and the jurisdictional rule developed there is in conformity with these principles or not, 2. whether the principles are applicable to "criminal" proceedings only; *i.e.*, the criminal segment of the antitrust laws, or to "regulatory" (administrative) and "civil" proceedings as well, and, 3. whether international antitrust law is *exclusively* governed by the jurisdictional principles developed in the field of international criminal law, or whether there are other principles of international law governing international antitrust law. These are variables that arise in the jurisdictional debate, and the adherents of one or a combination of two or three of them, may express the following views:

1) *Jennings, Haight* and *Verzijl,* to mention some, may be said to represent the conservative view.[63] In their view the jurisdictional principles of international criminal law exclusively govern the whole of the antitrust field. When subjecting the jurisdictional rule of municipal law to these principles — particularly the principle of objective territoriality and the protective principle — they find disharmony. The principle of objective territoriality and the protective principle being exceptions to the principle of territoriality (and in effect implying that the intraterritorial exercise of jurisdiction can have no extraterritorial effect) must — like the other exceptions (the principle of passive personality and of universality) — be strictly construed. The municipal rule of jurisdiction as developed in the American case law and elsewhere — the principle of effects — is thus not in conformity with international law. Support for this view is sought in the *Lotus* case[64] and particularly in international custom.

2) Another group of authorities find, having applied the principle of

objective territoriality, that the municipal rule of jurisdiction is in conformity with international law. Sometimes the difference in result, as compared to the former view, lies in a difference in the interpretation of the municipal rule, sometimes in a difference of understanding of the principle of objective territoriality.[65]

3) As slight variations of either of these first two views, one may regard the views advanced by *Hermanns* and *Krumbein.* The point of departure of both Hermanns and Krumbein is that the intraterritorial exercise of jurisdiction, in order to have extraterritorial effect, presupposes a genuine link ("Binnenbeziehung", "Sinnvolle Anknüpfung") between the state exercising jurisdiction and the matter encompassed. Controlling, both authors find, are the jurisdictional principles governing international criminal law. These principles define what constitutes a genuine link, and there is no reason to deviate from them.[66] Both tentatively distinguish between criminal, regulatory and civil antitrust law, but reach the conclusion that, for the purposes of applying the jurisdictional principles of international criminal law, the distinction is immaterial. Both discuss the applicability of all of these principles and manage to exclude from the area all principles but the principle of objective territoriality. Interestingly enough, Hermanns excludes the protective principle by invoking the abuse of rights theory, and[67] he says: Even if a state, in exceptional cases has jurisdiction under international law to regulate foreign matters, on the basis of the protective principle, it would be an abuse of rights to exercise such jurisdiction. In applying the principle of objective territoriality, Hermanns reaches the result that the American practice at least, is incompatible with international law:[68] Krumbein, however, with some hesitation and a few qualifications, perceives conformity.[69]

4) Another variation is the opinion of *Schlochauer,* who deals primarily with the German antitrust law. He too considers the jurisdictional principles of international law to be relevant but only with regard to *criminal* antitrust law. The jurisdictional rule of United States antitrust law, apparently characterized by Schlochauer as criminal law, does not, in his view, conform to either the principle of objective territoriality or the protective principle and is therefore incompatible with international law.[70] Since, according to Schlochauer, the German antitrust law is basically regulatory, the named principles do not apply. As regard regulatory (and civil) laws, states are free in principle to exercise jurisdiction intraterritorially, whatever the extraterritorial effect.[71]

5) *Akehurst* distinguishes criminal ("sovereign") proceedings from civil proceedings. The jurisdictional principles of international criminal law

are applicable to the former. American antitrust law is basically criminal (private actions for damages and injunctions excepted). The jurisdictional rule developed in the United States courts is in harmony with the principle of objective territoriality.[72] (A further jurisdictional basis may be the principle of active personality — the nationality principle.)[73] An exercise of jurisdiction may, however, constitute an abuse of rights and therefore be contrary to international law.[74]

6) *Rehbinder* proceeds one step further.[75] A distinction must be made, he claims, between criminal-, regulatory- and civil antitrust law, and, accordingly, he sets out to analyze each fraction of the law separately. In the end, however, when summarizing, he finds less reason to uphold the distinction. There is, rather, good ground for treating the antitrust law homogeneously under international law.[76] A genuine link ("sinnvolle Beziehung") is required between the state exercising jurisdiction and the (foreign) matter regulated. As to the criminal antitrust law, the principle of objective territoriality and the protective principle prescribe such genuine links. These principles are applicable as such. To the question whether the jurisdictional rule — the principle of effects — developed in municipal practice conforms to the principle of objective territoriality, Rehbinder gives no conclusive answer. Since the distinction between this principle and the protective principle has become blurred, the question is of minor significance. Instead Rehbinder applies the protective principle and reaches the conclusion that the principle of effects is not incompatible with international law. For — and this is the step further — as the international law of custom stands at present, there is nothing that prevents a state from founding jurisdiction in antitrust cases — the principle of effects — upon the protective principle. The question is — this is how the *Lotus* case must be understood, Rehbinder suggests — not whether a state is permitted to exercise jurisdiction but whether international law prohibits it from doing so.[77] And international customary law contains no such prohibition. Limits of state jurisdiction can only be found in the general principles of law, as defined in Article 38 (I) (c) of the Statute of the International Court, and specifically in the abuse of rights theory — which, however, does not affect the conclusion that the principle of effects is in accord with international law.[78]

7) Generally in line with Rehbinder are *Homburger* and *Jenny,*[79] with the difference, however, that, in their opinion, neither the principle of objective territoriality nor the protective principle justifies the municipal effects doctrine. On the other hand, the jurisdictional principles governing international criminal law are in no way exclusively govern this area — they do not exclusively determine whether the municipal jurisdictional rule violates

international law, or not — and since, Homburger and Jenny seem to imply, international customary law does not prohibit the exercise of jurisdiction in this form, recourse must be had to the general principles of law and particularly the abuse of rights theory, according to which theory no objections lie.[80]

In concord with Homburger and Jenny is basically *Haymann* who is primarily concerned with Common Market antitrust law.[81] From an international law perspective, the antitrust law should be treated as a homogeneous body of law.[82] International law requires a genuine link.[83] The jurisdictional principles governing international criminal law are applicable as such, in particular, the principle of objective territoriality and the protective principle.[84] An analysis of these principles, their underlying rationale, their scope, etc., reveals, however, that the jurisdictional rule in the Common Market antitrust law does not conform to either of the two principles.[85] Yet, this fact does definitely decide the question whether the municipal jurisdictional rule is in harmony with international law, or not. The jurisdictional principles are not conclusive; they do not prohibit a state from exercising jurisdiction on other bases. The ultimate standard is the theory of the abuse of rights[86] which corresponds to the theory of the genuine link.[87] In the end, the jurisdictional principles governing international criminal law are wholly dispensable.

B. From the foregoing swift survey of the views of some prominent scholars, one can clearly discern a gradual break away from the jurisdictional principles governing international criminal law. Still, no one, it seems, has proposed a definite divorce, although Haymann raises the question. One of the first to free himself entirely from the bonds of international criminal law, was *F.A. Mann*. In the centre of his jurisdictional theories stands the genuine link theory. In order to have jurisdiction under international law, a state must have a sufficiently strong interest. A state has jurisdiction, if its contacts with a given set of facts is "so close, so substantial, so direct, so weighty, that legislation in respect of them is in harmony with international law and its various aspects".[88] There must be an absence of abuse of rights and of arbitrariness.[89] And, independently of the jurisdictional principles governing international criminal law, Mann examines whether jurisdiction based on the effects principle is built on a genuine link. It is *not,* he concludes. The *Alcoa* decision, for instance, can therefore not be justified.[90]

Closely resembling the reasoning of Mann, are the theses of *Bär*.[91] Controlling in Bär's view is the abuse of rights theory. Any jurisdictional basis is permitted under international law in so far as it does not constitute an

abuse of rights. The absence of such an abuse presupposes a genuine link. Again Bär points to the intimate connection between the abuse of rights theory and the theory of a genuine link. The theories seem to be but two sides of the same coin. One must remember, however, that Bär approaches the jurisdictional issues basically from a *private law* angle.

There is, finally, the work of *Meessen* who, in many respects breaks new ground.[92] At the outset Meessen draws a fundamental borderline between the basis ("Begründung") for exercising jurisdiction, on the one hand, and the *exercise* ("Ausübung") of jurisdiction itself, on the other. Whether a state has jurisdiction, *i.e.,* whether there is a basis for exercising jurisdiction, is a question of whether there is a genuine link ("sinnvolle Anknüpfung") between the state exercising jurisdiction and the subject matter at issue. The question must be asked generally for all states; it is a question of general jurisdictional principles of international law. The jurisdictional principles governing international criminal law, however, are disqualified as irrelevant.[93] They are helpful only in as much as the "abstraction" of these principles — their "normative core" — pave the way for the genuine link-theory. Any genuine link will suffice, so long as it complies with the minimum standard of international law. As criteria for establishing the "genuineness" of a link, Meessen emphasizes, first, the interest of the state *in* exercising jurisdiction, in regulating a certain subject matter, and, secondly, the interest of the state in a functioning jurisdictional system, its awareness of the fact that unreasonabless may breed retaliations, its expections of these and other counter-reactions, etc., in other words, the element of reciprocity.[94] As genuine, Meessen considers the principle of effects, in a qualified form.[95]

In *exercising* its jurisdiction, however, the state must pay consideration not only to the interests of other states but also to the interests of the individual. A state, Meessen maintains, has a duty to respect the sovereignty of other states, implying, *inter alia,* a duty to refrain from interfering in the affairs of other states. The latter, again, comprehends a duty to weigh the interests of the states involved when exercising jurisdiction.[96] Within the framework, further, of an international minimum standard with respect to aliens, Meessen perceives a protection of individuals, which, he thinks, may encompass protection against conflicting claims, the maintenance of the principle *ne bis in idem,* and other forms of protection.[97]

Meessen conceives the antitrust law as a homogeneous body of law. The abuse of rights theory, he further suggests, is of no use in establishing the basis for exercising jurisdiction. Its function rather is to correct an exercise of a jurisdiction already existing.[98] Methodologically, the abuse of rights

theory is not to be preferred, he concludes.[99]

The international antitrust doctrine offers, as we have seen, a rich medley of methods and theories. Though a difference in methodology does not necessarily entail a difference in solutions — rather it seems that many of the writers mentioned have, although on grounds of varying methods, reached well-nigh identical solutions — the convincing force of the method used, is the lifeblood of the solution. The scattered views in the landscape of international antitrust law, raise a multitude of questions which require answers before entering upon the route leading to final solutions: Are the jurisdictional principles alleged to exist in the realm of international criminal law applicable and relevant to the international antitrust field? How can the antitrust laws be characterized? If these principles are applicable, do they exclusively govern? What other principles are relevant? What is the role of the abuse of rights theory, and of the genuine link theory? Is the borderline, suggested by Meessen, between the basis of jurisdiction and the exercise of jurisdiction feasible?

4. Principles of jurisdiction in international law governing international criminal law

4.1. Generally

A common departing point for most legal writers in the international antitrust field, when discussing restrictions on the intraterritorial exercise of jurisdiction with extraterritorial effects, is, as we have seen, the group of jurisdictional principles developed with respect to international criminal law.[100] These are principles of international law, generated from international custom, and they are said to restrict the intraterritorial exercise of jurisdiction regarding crimes bearing foreign elements. When here referring to international criminal law, the implication is merely that part of the modern international criminal law deals with the municipal regulation of criminal law applicability.[101] As such international criminal law is a component of the Conflict of Laws. As a component of Conflict of Laws, international criminal law contains rules *of national origin* that determine the applicability of the municipal criminal law in the *formal* sense,[102] in cases carrying foreign elements. Unlike the Conflict of Laws in the private law field, however, international criminal law generally consists only of *unila-*

teral conflicts rules, the sole function of which is to determine whether *lex fori* is applicable or not.[103] That states do not apply (or enforce) the penal laws of other states, is still the prevailing view.[104]

Accordingly, all municipal law systems contain — explicit or implicit — Conflict of Law rules determining the extraterritorial effect (reach, scope) of their substantive criminal provisions. Although these rules are national in character, they are to a certain degree controlled by jurisdictional principles of international law — developed by international custom — constituting the framework of international criminal law. Summarized, these principles may briefly be defined as follows:

1) *The territorial principle.* A state has the right to exercise jurisdiction intraterritorially with respect to all crimes committed within its territory, whether by a citizen or other person residing there or by a foreigner, and irrespective of whether the crime was committed within the territory by the criminal's physical presence, or not. The *subjective* application of this principle pertains to crimes commenced within the state but completed or consummated abroad; the *objective* application, to crimes commenced without the state, but completed or consummated within the territory of the state.

2) *The principle of personality (nationality).* A state has the right to exercise jurisdiction intraterritorially with respect to crimes committed (both commenced and completed) abroad by its own nationals (also called the principle of active personality).

3) *The principle of passive personality (nationality).* A state has the right to exercise jurisdiction intraterritorially with respect to crimes committed (commenced and completed) abroad by foreigners but directed against the nationals of the state while residing abroad.

4) *The protective principle.* A state has the right to exercise jurisdiction intraterritorially with respect to crimes committed (commenced and completed) abroad by foreigners but directed against the state itself (its security, stability, independence, etc.).

5) *The universality principle.* A state has the right to exercise jurisdiction intraterritorially with respect to a category of serious crimes committed (commenced and completed) abroad by foreigners, if the crime is universally recognized as such (*e.g.*, piracy, slavery and hi-jacking).[105]

As to the existence of these principles there seems to be a general *consensus* (with the possible exception of the passive personality principle).[106] As to their exact extent, however, the opinions diverge, as we will see below.

The jurisdictional principles listed have, as can readily be seen, the form of Conflict of Law rules. They provide *connecting factors* — crimes com-

mitted on the territory, crimes committed by nationals outside the territory, crimes committed against nationals or against the state outside the territory, and crimes of a certain serious character — factors which a state may invoke for the application of its criminal law. The connecting factors include basically, four variables: the place of the crime, the nationality of the criminal, the nationality of the victim and the character of the criminal act.

As defined above, each jurisdictional principle has an exclusive area of application; each implies an extension of criminal jurisdiction. In practice, however, the principles may very well be intermingled and combined. In envisaging a municipal court in a state the criminal law of which rests on these principles, there is, of course, no need to inquire into the locus of the crime or the nationality of the criminal, when the court is satisfied that the crime was such as defined under the universality principle. And the court would not have to establish the locus of the crime, if it were proved that the criminal was a national of the forum state; as little as it would have to establish the locus of the crime and the nationality of the criminal, if it were proved that the victim was a national of the forum state or the forum state itself was affected (as defined in the protective principle), etc. In the overwhelming majority of all cases, however, subject matter jurisdiction would lie on grounds of territoriality.[107]

When it is said that the jurisdictional principles "govern" international criminal law, it is merely suggested that the principles, international in character, hold certain restrictions.[108] They lay down borderlines that may not be transgressed. Within these lines, the state may move freely. In other words, the jurisdictional principles constitute permissive rules — not obligatory rules — of international law, with the implicit supplementary rule that what is not permitted is prohibited.

Are we thus to understand that all intraterritorial exercise of jurisdiction with respect to crimes is prohibited, unless expressly permitted by international law, and that consequently the presumption is against the freedom of states in this area of law.[109] This is so if, for instance, we proceed from the notion of a general principle governing international criminal law, a principle restricting the excercise of jurisdiction intraterritorially to crimes committed within the territory (the territorial principle), and if we regard the other — permissive — principles as exceptions from the general principle. The all-embracing principle of international law expressing the substance of the jurisdictional principles listed would then be: A state is prohibited from exercising jurisdiction intraterritorially with respect to acts committed (commenced and completed) outside its territory, unless com-

mitted by or against nationals of the state, against the state itself, or unless the act falls into a certain category of acts. This is also, it would seem at first sight, how the court in the *Lotus*-case conceived the scope of criminal jurisdiction under international law when it recognized that:

"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 offences committed outside the territory of the State which adopts them... The territoriality of criminal law, therefore, is not an absolute principle of international law...".[110]

Yet the court did not have to take a definite stand on the issue; its examination was strictly confined to the specific situation in the case. For, even if it were assumed, the court reasoned, that the intraterritorial exercise of criminal jurisdiction with respect to acts committed outside the law-state was prohibited under international law, the prohibition would not apply, since in the case at hand the act was committed within the territory of the exercising state.[111]

Another approach is to proceed from the principle of personality (nationality) and regard that principle as basic and the others as exceptions. This would give the all-embracing international law principle the following content: A state is prohibited from exercising criminal jurisdiction intraterritorially with respect to acts committed by foreigners, unless the act is committed within the territory of the law-state, against its nationals or against the state itself, or unless the act is of a certain nature.[112] While the former approach has the locus of the act as a starting-point, the latter proceeds from the status of the criminal.

Whether one chooses one starting-point or the other, it will hardly affect the substance of the international law; the choice is rather linked to one's fundamental views of international law as a legal order and the concept of sovereignty.[113] As we have seen, state sovereignty today is territorially oriented and it has, therefore, been only natural to take that perception as a point of departure when discussing the criminal jurisdiction of states under international law. In the struggle between territorial sovereignty and personal sovereignty, the former has prevailed.[114] This fact has been penetrative with the result that, since according to a general principle of international law a state may not exercise jurisdiction in the territory of another state,[115] a state's jurisdiction over its nationals is territorially restricted (intraterritorial exercise of jurisdiction). But even as regards such intraterritorial exercise of jurisdiction over nationals some restriction is prescribed in consideration of the territorial sovereignty of other states, as we shall see below.[116]

Attempts have been made through the years to relinquish entirely the system of jurisdictional principles with respect to criminal law, but, at first, without success. *Hegler,* for instance, tried in the beginning of this century to introduce a system which he described as an ellipse with two foci,[117] one symbolizing the state interest in protecting everything worth protecting in the state ("der objektiven Schutz-Seite"), the other the connection between the state and the actor, the criminal ("der subjektiven Bindungs-Seite"). His main stumbling-block was, it seems, his inability to satisfactorily define "state interest", even when using qualifiers such as state interest *immediately* or *directly* harmed.[118] Moreover, Hegler was primarily concerned with the delimitation of German criminal law from a municipal law perspective, although he did discuss the possibility of international law restrictions (the "dürfen" of criminal jurisdiction), restrictions, however, which he denied the existence of.[119]

Yet there is another approach, which has recently emerged and is gaining ground. Rather than to give preference to any of the enumerated principles to which the others constitute exceptions, the advocates of this approach seek a general principle underlying them all. All that international law requires, the theory is, is that there be some genuine connection or link (substantial and bona fide connection, "sinnvolle Anknüpfung", reasonable relation, etc.) between the alleged crime and the state exercising jurisdiction,[120] the "normative core" of the jurisdictional principles of international criminal law, as *Meessen* remarks.[121] It is not a question, *nota bene,* of altering the substance of international law, but merely of choosing a different angle from which to attack the jurisdictional problems. As noticed by *F.A. Mann:* "To treat them [the principle of personality, of passive personality, of universality and the protective principle] as exceptions to territoriality rather than as distinct aspects of a much wider principle is probably theoretically wrong, but does no harm."[122] In this system territoriality is just another connecting factor which together with the other factors (personality, nationality of victim, etc.), constitutes the genuine link on which criminal jurisdiction may rest under international law. With this approach, the all-embracing principle of international law governing criminal jurisdiction would presumably read as follows: A state is prohibited from exercising criminal jurisdiction intraterritorially with respect to an act (or omission), unless there can be proved to exist a genuine link between the act and the state in question.[123]

The genuine link-theory is a typical Conflict of Laws approach and, as such, applies not only to criminal law but to all other fields of law as well. Indeed, the theory is an abstraction of all Conflict of Law rules, whether in

private or public law, whether *bilateral* or *unilateral.* It prescibes that whatever Conflict of Law rule is introduced in a specific field of law, or section thereof, the connecting factors chosen must constitute a genuine link between the facts covered and the state exercising jurisdiction. It is but saying that the municipal Conflict of Law rules, in order to conform with international law, must be built on substantial connections; on some real concern and interest — some legitimate interest — of the state in the matter to which its laws shall apply.

If, for the moment, we restrict ourselves to the criminal law field, the genuine link-theory thus implies that in order for the municipal unilateral Conflict of Law rules to be compatible with international law, they must be founded on a genuine link — a substantial connection — existing between the state exercising intraterritorial criminal jurisdiction and the criminal act or behaviour. And since the theory, as we have seen, in no way is an attempt to affect the substance of international law in the field of international criminal law, we may safely assume that the principles of territoriality, personality, passive personality, state protection and universality, all rest on the basis of genuine links, with a certain reservation for the principle of passive personality. Hence, whatever approach is chosen, if we assume that the jurisdictional principles of international criminal law also govern international antitrust law, the question naturally arises, whether the conflict of law rules applied in this field of law are in conformity with the jurisdictional principles.

Nevertheless, the question to be answered before proceeding thus far is whether we *should* assume that these principles are controlling? Are the principles relevant at all? Are they transferrable to the field of antitrust?

4.2. The relevance of the jurisdictional principles governing international criminal law

Whether the jurisdictional principles governing international criminal law extend to international antitrust law is an issue raised only recently. One of the first to bring it into light was *Meessen,* lately followed by *Rehbinder.*[124] (But it also underlies *Mann's* analysis.[125]) The doctrine of international antitrust law, Meessen notes, has thus far been primarily concerned with the construction, restriction and refinement of the principles of international law governing international criminal law, but it is surprising that the question whether the principles are applicable at all has nowhere been extensively examined.[126]

Meessen then attempts to unravel the question and consequently reaches

the conclusion that the principles are not applicable in the sphere of international antitrust law. His reasoning warrants a closer study.

In contrast to criminal law, Meessen argues,[127] the antitrust laws of the various states in the world, seen in a comparative perspective, differ significantly from one another. This is also true of the criminal provisions of the antitrust laws, as these are merely appendices to the substantive prohibitions and obligations of these laws. The differences lie in the legal-technical design of the antitrust rules, in the divergent application of the many general (omnibus) clauses, in the formulation of the competition policies and in the basic socio-political ideas and values. The range of the antitrust law systems covers everything from the compulsory cartels in the centralized economy to the uncompromisingly enforced free market economy.

These differences, Meessen reasons, are essential to an evaluation of whether the jurisdictional principles governing international criminal law can be extended to international antitrust law. They imply, for instance, that the sentiment of solidarity ("Solidaritätsgedanke") implicit in some of the jurisdictional principles (*e.g.*, the principles of personality) cannot be transferred to the antitrust area.[128] By reason of the divergent competition policies, no state can rest assured of, or place trust in, the enforcement measures undertaken by other states in this field, even if these are better equipped and are in a better position to carry through such measures (*e.g.*, because of the *situs* of the companies involved in anticompetitive practices).

A state whose antitrust policies are restrictive must, therefore, rely entirely on itself so far as the protection and implementation of its competition policy is concerned; a policy threatened not only by the companies, but also by those states which are on the verge of becoming regular cartel-oases. The leading object of the competition policy must continually be defended against external attacks. Under such circumstances, the notion of (state?) security appears in a stronger light that that of the idea of justice for the individual. Against this background, Meessen denies the pertinence of the principle of territoriality and for the following reasons:

"Die blosse Anknüpfung an das Tatortrecht, die nicht zulätzt im Interesse des Täters liegt, lässt sich wirtschaftspolitisch schwer verantworten. Allerdings erkennt das internationale Strafrecht das Schutzprinzip als eine Abweichung vom Territorilatitätsprinzip an. Hier, ins besondere beim strafrechtlichen Institutionenschutz, zeigen sich Übergänge. Mit der Hervorhebung gegenüber dem Territorialitätsprinzip verliert aber die Übertragung der Grundsätze des internationalen Strafrechts auf das internationale

Karteilrecht ihre Aussagekraft. Man könnte mit dem Hinweis auf das strafrechtliche Schutzprinzip das Anknüpfungssystem des internationalen Strafrechts in der Weise, wie es Rehbinder getan hat, auf das internationale Kartellstrafrecht und wohl auch auf das sonstige Kartellrecht übertragen. Das Territorialitätsprinzip wäre damit als Grundpfeiler des Systems aufgegeben."[129]

The principle of personality (nationality), Meessen continues, is disqualified, first on grounds of practicality: The nationality of enterprises is an element which the actors in the international market can manipulate too easily; the multinational enterprises can easily shift their centre of activity from one state to another. Secondly, in contrast to natural persons connected to a state by citizenship, a state cannot in the same way expect or require loyalty from an enterprise situated in the territory of another state. Thirdly, the idea of solidarity between states in international criminal law underlying the principle of personality, has no validity in international antitrust law.[130]

Having disqualified the international law principles governing international criminal law, Meessen goes on to establish the "normative core" of these principles, which he finds in the theory of a genuine link — the abstraction of the jurisdictional principles. And on the basis of this theory, Meessen proposes, new and independent jurisdictional principles can be developed, principles more in line with the needs of international antitrust law.[131]

A prima vista, Meessen's reasoning seems somewhat tenuous. The jurisdictional principles of international criminal law appear to be too easily discarded. Though it is true that antitrust law, in the comparative perspective, shows greater variations than criminal law, there remains the question, whether this disqualifies these jurisdictional principles? What is it that compels the conclusion that variations in the municipal law system make the jurisdictional principles in international criminal law *less* applicable? Furthermore, does the fact that states are less inclined to take action against home enterprises on grounds of solidarity[132] really render the principles inapplicable? Even if some of the principles — *e.g.,* the principles of personality and universality — may be explained by the notion of solidarity, does that necessarily imply that the principles *must* be founded on solidarity? Why, again, should the fact that the protective principle is a deviation from the principle of territoriality have a disqualifying effect on the latter? And why, finally, should the impracticability of the principle of personality, in some instances, lead to its automatic disqualification *de lege lata?*

The questions are *legio,* none, however, sufficiently elaborated. This is

all the more surprising considering that Meessen claims to be keeping within the bounds of *existing* international law.[133] It seems that the jurisdictional principles should have warranted an exhaustive analysis before being disposed of. While Meessen's discussion in this context centres in the basic rationale of the individual jurisdictional principles (the notion of solidarity and self-protection), as revealed by the doctrine of international criminal law,[134] Meessen fails to put his finger on the real issue: What is the rationale for imposing international law restrictions on the national exercise of criminal jurisdiction at all? What is the reason for going no further than the principles formulated and the formulations given? If, in the field of international criminal law, certain circumstances generate principles that hold back the expansion of municipal jurisdiction, why is it, if the same circumstances exist, that the same principles do not apply in international antitrust law? What we are looking for is thus the underlying rationale for jurisdictional restrictions in international criminal law.

In the *Lotus* case,[135] an indication was given. Having established that, with respect to *law in general,* the states were left with a wide measure of discretion in exercising intraterritorial jurisdiction, a freedom only in exceptional instances limited by international law, the Court pointed out:

"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.*"[136]

The Court here mentions two circumstances which constitute the rationale for jurisdictional limitations in criminal law, if such exist:

1) the fact that an unlimited extension of the intraterritorial exercise of criminal jurisdiction in one state may affect the sovereignty of other states, that it may involve an intervention in the affairs of the other states in this field; and

2) the fact that an unlimited extension of the intraterritorial exercise of criminal jurisdiction also may imply that injustices are inflicted on the individual.

These two circumstances pervade the whole history of international criminal law, and appear — sometimes in combination, one dominating the other, sometimes one without the other — wherever limitations on criminal jurisdiction are discussed. Thus, the idea of individual justice seems to have been the cardinal ingredient in the territoriality of early Eng-

lish criminal law and its close connection with the jury system.[137] *Bartolus* saw the need for jurisdictional limitations partly out of consideration for individual justice — knowledge of the law was held essential.[138] *Hobbes* seems to have stressed the aspect of sovereignty, as did the representatives of the Dutch school.[139] During the Period of Enlightenment, the idea of individual justice again came to the fore,[140] only to yield to the aspect of sovereighty in the nineteenth century.[141] In our age, there seems to be room for both circumstances, as is also indicated by the *Lotus*-court. All discussions today on jurisdictional restrictions in the field of criminal law seem to revolve around these two circumstances. If there must be restrictions, it is because complete freedom would affect sovereignty or individual justice, or both. These two circumstances constitute the lode-stars in this area of law. The question of the relevance of the jurisdictional principles governing international criminal law in the field of international antitrust law should, consequently, be a question of whether these circumstances manifest themselves with the same vigor in that field as they do in international criminal law. For if they do, a disqualification of the established jurisdictional principles in international antitrust law can certainly not be justified on such slight reasons as those advanced by Meessen. Let us therefore examine the circumstances mentioned more closely.

4.3. The circumstances constituting the rationale for jurisdictional restrictions in international criminal law

What concerns us here is thus the rationale for restricting criminal jurisdiction, as seen from an international law point of view. As we have noted, excessive jurisdiction by one state may affect the sovereignty of other states and it may affect the question of justice for the individual. Involved in the former case is the possibility of the states affected to independently control and govern human behaviour within their territories. Involved in the latter is the legal security of the individual, his possibilities to gain knowledge of the laws that affect him, to foresee the consequences of his conduct, and the dilemma he may be caught in when affected by the conflicting laws of different states. It is *not* a question of — as tentatively suggested, but subsequently denied by *Glatzel*[142] — a delimitation in two respects: 1) the zone of freedom of a state under international law from that of other states, and 2) the zone of freedom of a state from the zone of freedom of individuals (nationals or foreigners). Though the status of the individual under international law still is open to debate,[143] we are here concerned only with delimitations of state jurisdiction *vis-à-vis* other states. Any rights that may

arise from such delimitations are state rights. The individual may be the inducement for a rule or principle and the object of a such, and thus the indirect beneficiary. *Directly* benefitting from, at least this segment of international law, is the state alone.[144]

The circumstance that an unrestricted criminal jurisdiction gives rise to problems of sovereignty — causes clashes between sovereign states — is the amalgamating factor in the jurisdictional debate. Thus, for instance, the discussion as to whether the principle of passive personality and the principle of (active) personality in the most extreme versions conform with international law is based partly on this aspect of sovereignty. The controlling principle of international law here, says *H. Mayer,* is the reciprocal respect for territorial sovereignty.[145] Foreign sovereignty, he continues, will however be impaired, when the state exercising jurisdiction requires compliance with its laws by its own nationals and foreign nationals residing on foreign territory, and punishes non-compliance. A state can criminalize conduct committed in a foreign state only on the condition that the conduct is a crime also under the laws of the latter.

Another order would enable a state to organize a "state in the state" on foreign territory, Mayer asserts,[146] having in mind, *inter alia,* the experiences of the German legal system in the 1930es and 1940es.

Rosswog elaborates further on the same theme.[147] He distinguishes the following four cases of conflicts between the law of the state exercising jurisdiction (state A below) and either the law of the state where its nationals momentarily reside (state B below), or the law of the state in which the criminal act was committed (state C below).

1) State A imposes an obligation or a prohibition upon its nationals in conflict with an obligation or a prohibition in state B;

2) State A imposes an obligation or a prohibition upon its nationals either in conflict with a permission or concerning an unregulated matter in state B;

3) State A imposes an obligation or a prohibition upon foreigners, for the protection of its nationals, in conflict with an obligation or a prohibition in state C;

4) State A imposes an obligation or a prohibition upon foreigners, for the protection of its nationals, either in conflict with a permission or concerning an unregulated matter in state C.

In cases 1—2, state A practises the principle of (active) personality, in cases 3—4, the principle of passive personality is applied. In these conflict situations, Rosswog concludes, the law of state A ought to yield to the law of state B or C in all cases but that referred to under 2,[148] and this by virtue

of international law. Interesting is Rosswog's reasoning with regard to case 1. Were the law of state A to prevail, there would be at least an indirect intervention in the internal affairs of state B at hand, since that state would have to subordinate its own law to the law of state A, insofar as its own nationals are involved (as victims, it is presumed). It would further imply that the nationals of state A were given incitement to disobey the law of state B wherein they reside. This result is incompatible with the primary function of the state, as recognized by international law, which is to maintain order and control over its territory and over the persons residing there. The interest of state B in developing its own legal system is encroached upon to an unacceptable degree.

With respect to cases 3 and 4, the same reasoning applies, says Rosswog, but in an accentuated form. Here the nationals of state B would be induced by state B to disobey its own laws. The subordination would be even more pronounced. And Rosswog quotes *Jennings:* "In this case it is obvious that the local law must be preferred; not to do so would be to permit one State to interfere in the affairs of another, for it would be to subordinate the municipal law to an external municipal system. Moreover, a concurrent jurisdiction which is actually contrary to the local law must trench upon the claim to territorial jurisdiction itself."[149]

The views of Mayer, Rosswog and Jennings may not be representative of the international law doctrine so far as the *results* are concerned — other publicists have reached deviating results — the *reasoning,* however, no doubt is.[150] Infringed upon in every instance of excessive criminal jurisdiction is the state sovereignty, its possibility of self-determination, its possibility of developing laws independently and of governing and controlling persons and their activities within the national territory.

An unrestricted criminal jurisdiction would leave the greater nations a considerable freedom to influence the criminal policy of the smaller nations, which might be a significant step towards influencing the general policies of these, ultimately towards control.

From the point of view of individual justice — the second circumstance constituting the rationale for jurisdictional restrictions — there is, again, a general agreement among writers as to the consequences of an extensive jurisdiction, although the significance ascribed to these varies. *Oehler,* in particular, has brought this aspect to the forefront. In discussing the protective principle and the principle of passive personality, he strongly emphasizes the legal security aspect.[151] It is vital that the foreign actor is in a position to know that his acts are criminalized, he remarks, otherwise the foreign law will hit him like a *deus ex machina.* Did the actor not conceive,

Oehler reasons — and should he not have — that, for instance, his supplial of information concerned the official secrets of a foreign state, it should be impossible for that state to take action against him for treason. It is not the principle *nullum crimen sine lege* that compels this result, Oehler concludes, but rather the modern notion of a state governed by law, the notion that if the actor is to be punished, he must have been in a position to perceive that his act was prohibited by criminal law. No purpose of the criminal law could otherwise justify the punishment.[152] The principle of passive personality could further be justified only if the actor knew, or, at least, should have known, that the person against whom his acts (or omissions) were directed was of foreign origin.[153]

As regards the principle of (active) personality and the territoriality principle, however, the application of the law of the individual's home state and the law of the state in which he resides does not come as a complete surprise to the actor since this is something which he must have taken into account.[154] Although one may entertain doubt about whether, as Oehler seems to think, one jurisdictional principle (such as the principle of active personality) comes more naturally to the mind of the actor than others (such as the principle of passive personality) — what then makes it more natural? — the gist of Oehler's reasoning remains true: An unlimited criminal jurisdiction brings with it problems of legal security and of justice with regard to the individual.

This is certainly also one of the reasons why the *Restatement (2d) of Foreign Relations Law* did not accept the passive personality principle as a basis for jurisdiction.[155] Seemingly on similar grounds, Article 7 concerning the protective principle in the *Harvard Draft Convention* received the following formulation:

"A state has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence of that State, provided that the act or omission which constitutes the crime was not committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed."[156]

The limitation here inserted, that respect shall be paid to liberties guaranteed by the *lex loci,* is the result of a compromise commented upon as follows: "To require that the act or omission be denounced as an offense by the *lex loci* would obviously defeat the legitimate purpose of protective jurisdiction. To permit the act or omission to be prosecuted and punished, notwithstanding the guarantee of the *lex loci,* would victimize the individual for something for which the State where the act was done should be responsible if responsibility is to be imposed."[157] In order to ensure that the

individual should not be victimized, that he should not suffer, but that jurisdiction should be based on a conception of justice and fairness, the principle of *non bis in idem* was incorporated into Article 13 and Article 14 and given the following wording:

"In exercising jurisdiction under this Convention, no State shall prosecute or punish an alien for an act or omission which was required of that alien by the law of the place where the alien was at the time of the act or omission."[158]

Continuously recurring in the jurisdictional debate are, in this context, the principles expressed in Articles 13 and 14: the principle of *non bis in idem* and the principle of the identical norm ("das Prinzip der identischen Norm"), the latter being a variation of the maxim *nullum crimen, nulla poena sine praevia lege poenali.* These are principles on which, no doubt, the criminal laws of the majority of states are founded. Whether they have the character of international law principles, is a question still under dispute.[159] That the principles have to some extent been embodied in the United Nations' and European declarations and conventions on human rights,[160] is evident, but it is hardly conclusive of the content of international law with respect to criminal jurisdiction. But we shall not pause at this moment for the sake of finding the correct answer. In this context, it was essenstial only to establish the fact that justice for the individual constitutes one of the circumstances motivating jurisdictional restrictions. That this is so, the foregoing exposition was meant to demonstrate.[161]

4.4. Circumstances speaking for an unlimited or an extensive criminal jurisdiction

The picture is not complete if the circumstances speaking against restrictions on criminal jurisdiction — or at least for as few restrictions as possible — are not mentioned, that is, the forces that struggle in the opposite direction. There is, of course, the interest of the state in having the criminal prosecuted and punished, the interest in protecting the state — its integrity, security and independence — and its nationals, and the interest of maintaining order within its territory; in other words, all the interests which the state exercising jurisdiction may have in extending its jurisdiction. The parties involved are thus at least three: The state exercising jurisdiction, the state affected by the jurisdiction exercised, and the individual effected by the jurisdiction exercised. (A possible fourth party is the victim of the criminal act or omission). Any restriction imposed by international law

upon criminal law jurisdiction obviously operates in two directions: it protects those states which exercise a moderate criminal jurisdiction and the individual, on the one hand, but it restricts the freedom of those states which endeavour to extend their jurisdictional sphere.

4.5. The relevance of these circumstances in the field of international antitrust law

That the circumstances constituting the rationale for jurisdictional restrictions and the circumstance speaking against such restrictions, as outlined above, are relevant also in the field of international antitrust law can, of course, not be doubted. It is rather a significant feature of all Conflict of Law cases that the jurisdiction exercised by one state more or less affects other states as well as the individuals. The difference in this respect between civil law jurisdiction and criminal jurisdiction is one of degree only. So far as civil law jurisdiction is concerned, the circumstances are less pronounced. But what is the situation in the international antitrust law? The different criminal laws of the states in the world community today have many common features. Criminalized are by and large the same acts. The states have a common interest in prosecuting and punishing crimes that are generally defined as such. The principle of universality is one manifestation of that fact. International cooperation through international organizations, in the form of extraditions and otherwise is, furthermore, a matter of routine. The more the different criminal laws are harmonized, the more cooperation can be expected and the *less accentuated will the problems of state sovereignty and individual justice be.* The interests of all states can be united against a common enemy, the criminal, without endangering his right to fairness and justice. The problem in international criminal law, as *Brewster* (287) puts it, is *who* should punish, and not *whether* the conduct shall be punished at all.

Excepted from this reasoning (which lies in the nature of things) are acts generally covered by the protective principle, acts against state security, integrity, independence, etc. With respect to such acts, one cannot expect cooperation — not, at least, to the same extent. Here the states do not stand on common ground. By definition, there is no crime that is common to two states. Here the home state of the actor has a far greater interest in protecting its national. Solidarity will surely remain a rare commodity. The interests of the state exercising jurisdiction, on the one side, and the state and the individual affected by that exercise, on the other, are still sharply opposed. The circumstances constituting the rationale for jurisdictional re-

strictions (that of state sovereignty and of individual justice) are particularly pronounced.

The incidence of *international antitrust law* in this regard is similar. The antitrust laws of the many states around the world differ widely from one another. It is not only that the attitude towards anticompetitive practices varies from the very strict to total slackness, but also that among the cartel-hostile states there is no common standard. Although the states having a developed antitrust legislation are growing in number, this type of law is still very much a phenomena of the Western world.[162] But even among the Western countries the parochial nature of the antitrust laws is significant. This lies foremostly in the fact that this type of legislation is not seldom one of the main — if not the main — instruments for the designing of an economic policy, and sometimes even more than so: the overall policy. In consequence, antitrust laws are principally self-centred; they are there to protect the market of the enacting state — whether the market of foreign state is affected is only exceptionally of pertinence. Each state protects its own economic policies and interests.[163] And although these policies and interests in some cases coalesce, they more often seem to clash: what is good for one country is bad for another.

Against this background, international cooperation is slow to flourish. Self-interest and self-protection overshadow the notion of solidarity.[164] There is basically no common ground, no common enemy. The circumstances constituting the rationale for jurisdictional restrictions in international criminal law — the fact that state sovereignty is affected, that individual justice is in danger — have consequently a specific relevance in international antitrust law: for the protection of state sovereignty and for safeguarding of fairness and justice for the individual, jurisdictional restrictions seem at first sight at least as necessary in international antitrust law as in international criminal law. When exclusively regarding the circumstance of state sovereignty, it seems that the wide differences in laws, the diverging objects, the clashes of interests and the absence of solidarity would necessitate even stricter jurisdictional principles than those governing international criminal law.[165]

But then, of course, a conclusion as to the necessity of jurisdictional restrictions in international antitrust law as compared to international criminal law, cannot be reached without examining the character of the antitrust laws, *i.e.,* whether they should be characterized as penal or non-penal. If justice is graded, it would seem that the amount of injustice done to an individual is greater when he is stricken by antitrust laws carrying criminal penalties than when stricken by antitrust laws carrying adminstrative or

civil remedies. Indirectly, the degree of sovereignty affected may also be contingent upon the character of the antitrust laws: the more severe the remedy, the readier are the companies in the affected state to comply with the foreign law.

4.6. The character of the antitrust laws

The analysis of the American foreign commerce case law in the first section of this study has shown that at those rare moments when the U.S. courts have discussed the character of the U.S. antitrust laws, they have approached the question strictly from a municipal law angle.[166] The analysis has also shown that the courts have not considered the question material for the purpose of subject matter jurisdiction; the jurisdictional rule invoked has been formulated independently of the character of the substantive provisions applied. (This is also true of the case law relating to the securities' trade). That the U.S. antitrust laws hold — from a municipal law viewpoint — a wide spectrum of remedies, criminal (fines and imprisonment), administrative or regulatory (dissolution, divorcement, consent decree, etc.) as well as civil (damages), is apparently of no consequence so far as the jurisdictional scope of these laws is concerned.[167] There has, furthermore, been little reason to characterize the particular suit from the standpoint of the court.

From a municipal law point of view, the character of the suit has generally been contingent upon the type of remedy sought: when the government seeks imprisonment or fines, it prosecutes, and the action is criminal. When an individual enterprise seeks damages, the action is civil. But even the single remedy sought may be difficult to characterize, these clear cases excepted. An attempt is made by *Zwarensteyn,* who reaches the following result:[168]

A *criminal* remedy is such that is available only for the government and that aims at punishment of the offender. As examples he mentions imprisonment, fine, civil money penalty and forfeiture. A *regulatory* (administrative) remedy is one that is available only to the Government, the primary purpose of which, however, is not to punish the offender but to correct or regulate a situation. Examples are: dissolution, divestiture, divorcement, consent judgments, decrees and orders and cease-and-desist orders. A *civil* remedy, finally, is one that is available to private parties as well as to the Government, for example, damages and injunctions.

At the same time, Zwarensteyn recognizes that the characterization is arbitrary. First, a sharp distinction cannot be made, and secondly, some of

the remedies characterized as civil (*e.g.*, injunctions) may just as well be characterized as regulatory; just as some of the criminal remedies (*e.g.*, civil penalty) very well may be characterized as civil.[169] It is not even certain, one may add, that the remedies should be divided into three classes; why not simply two (criminal and civil)? Or why not settle for a single class? It is, of course, all a question of which criteria are chosen for the characterization. Zwarensteyn regards the following two as decisive: 1) to whom the remedy is available, the private litigants or the Government; 2) whether the remedy aims at punishment, or not. (On the other hand, if a remedy is available to a private party, this fact apparently suffices to make it a civil remedy; Zwarensteyn does not seek to establish whether it aims at punishment or not).

Zwarensteyn does not, however, propose criteria for the determination of what is punishment and what is not. From this tripartite system of remedies, Zwarensteyn draws conclusions: "[A] ny *a priori* attempt to classify the American antitrust laws within one of the existing categories (such as private law, public law, criminal law, administrative law, market regulatory law) is doomed to fail, because the law contains elements of all of these."[170] And further: "[T] he antitrust laws should be viewed as a separate area of the law, to which the existing principles of international law cannot be applied."[171]

Rehbinder draws similar conclusions with respect to the antitrust laws in general, and the German antitrust law in particular: The Gesetz gegen Wettbewerbsbeschränkungen is a combination of criminal, administrative and civil law.[172]

Zwarensteyn and Rehbinder represent the general trend in the modern doctrine of international antitrust law *against* characterizing the antitrust laws as exclusively criminal law or exclusively administrative law (that these laws are exclusively civil in character cannot seriously be suggested).[173] From a municipal law standpoint, this view is, no doubt, correct: Most antitrust law systems in the world today — partly modelled after the U.S. system — contain criminal, administrative as well as civil elements much in accordance with the scheme presented by Zwarensteyn.[174] There are criminal elements inasmuch as the systems carry the classical criminal penalties, imprisonment and fine; there are administrative elements in that the antitrust authorities may take measures to directly correct or regulate certain practices; and there are, finally, civil elements in that private parties may take action, usually by seeking damages.

With this pattern of law, there would not be much room for the jurisdictional principles governing international criminal law. The application of

these principles would have to be confined to the provisions characterized as criminal, or, as Zwarensteyn suggests, new principles of international law would have to be developed since this peculiar body of antitrust law does not fall under the existing principles of international law.[175] But the question whether the jurisdictional principles governing international criminal law apply to this area of law cannot be approached from a municipal law standpoint. Such questions concern international law and their solution must be founded on international law prerequisites. In the words of *Jennings:* "The question ... is not whether the matter is properly called criminal in the municipal law, but whether it is penal for the purposes of international law; and this is a question not merely of procedure but of substance."[176]

The controlling criteria again must be the cricumstances constituting the rationale for jurisdictional restrictions in the field of international criminal law, that is, the need to protect state sovereignty and to safeguard individual justice. As regards the aspect of state sovereignty, we have already reached the conclusion that the antitrust laws, probably more than the criminal laws, affect sovereignty, if they are allowed unlimited reach. Thus, as regards this aspect, there seems to be no ground for deviation from the established jurisdictional principles. This is apparently acknowledged by *Schwartz* when he submits:

"Vom Standpunkt der Völkerrechts kann es keinen Unterschied machen, ob das vom Gesetz geforderte Verhalten durch zivilrechtliche, strafrechtliche oder verwaltungsrechtliche Sanktionen oder durch ihre Kumulierung herbeigeführt werden soll. Es kann für die völkerrechtlichen Grenzen der Jurisdiktion nicht auf die unterschiedlichen rechtstechnischen Mittel und die Art des Verfahrens ankommen."[177]

Krumbein is, in principle, of the same opinion. Proceeding from the standpoint of international law, he finds himself unable to distinguish administrative law from criminal law so far as the jurisdictional issues are concerned. The administrative law, he remarks, is in all its expressions a massive manifestation of state power.[178] The civil remedies in the antitrust laws are mere reflections of the administrative (criminal) provisions; they are there to further the essentially market-regulatory purposes of the antitrust laws.[179] In accord is *Hermanns,* who refers to the fact, *inter alia,* that no distinction is made in the international law doctrine between criminal and administrative laws in this respect.[180]

Much more difficult is the characterization from the viewpoint of individual justice. To be inquired is whether the intraterritorial exercise of jurisdiction in antitrust matters may cause any hardships for the individual in

terms of injustice or unfairness, in other words, whether the individual may be "victimized" by reason of the jurisdictional extension (as he is under unlimited criminal jurisdiction), caught between contradicting laws and subject to laws of which he was not in a position to acquire knowledge. With respect to the classical criminal penalties in the antitrust laws — imprisonment and fine — no differentiation can possibly be made.[181] Here the jurisdictional principles governing international criminal law should apply without qualification. Against this one cannot argue that in the field of antitrust law the actor is by legal construction an economic unit, an enterprise, not comparable to the "victimized" private person. There simply seems to be no reasonable ground for distinguishing one from the other, unless, of course, one believes that it is easier in principle for an enterprise to pay a fine or to know the laws which affect it (which is nothing more than extra-legal reasoning).[182] What has been said so far is also true of forfeitures and confiscations.[183]

Moreover, from the point of view of international law, there is no ground for distinguishing the quasi-penal sanctions, such as civil money penalties, administrative fines and the like, from the classical criminal fine.[184] More problematic are the regulatory or corrective measures, such as divestitures, dissolutions, divorcements, cease and desist orders, injunctions and consent decrees. *Hermanns* is merely begging the question when he states: "Eine Feststellung wird man unbedenklich treffen dürfen: Verwaltungsmassnahmen ohne Strafcharacter greifen weniger schwerwiegend in die Rechte des oder der Betroffenen ein als strafrechtliche Sanktionen."[185] The issue is exactly, when is a "Verwaltungsmassnahme ohne Strafcharacter"? Even if Hermanns is alluding to the classical criminal penalties — imprisonment and fine — there is still a puzzle: Why is the regulatory measure less of an interference than the criminal sanctions? Seen from the standpoint of the individual enterprise, a divestiture, an injunction or a cease and desist order may be just as "victimizing" as any penalty of a fine. An aggravating factor is that the regulatory measures have a particularly strong effect upon the sovereignty of the state in which the addressees of such measures are seated. These two circumstances in combination make the jurisdictional principles governing the international criminal law equally applicable to antitrust laws of a "regulatory" character.[186]

There is, finally, the question of "civil" proceedings, *e.g.*, when a private party seeks damages for an antitrust violation; is there any cause for jurisdictional restrictions? Section 4 of the Clayton Act gives any person injured in his business or property by reason of anything forbidden in the antitrust laws a right to recover, *inter alia,* threefold the damages by him

sustained,[187] usually termed "treble damages". Though it is true that the Supreme Court of the United States, in one much-cited early case, considered this provision to be remedial rather than penal,[188] it obviously has a "punitive" character. The treble damages are in essence punitive damages, of which the following is said: "Unlike compensatory or actual damages, punitive or exemplary damages are based upon an entirely different public policy consideration — that of punishing the defendant or of setting an example for similar wrongdoers".[189] Here, *Prosser* finds, "the ideas underlying the criminal law have invaded the field of torts."[190] The thought of a criminal fine is close at hand. As regards the amount of damages awarded, it is clear that they may — and usually do — by far exceed any criminal fine.[191] The question has, quite naturally, emphatically been put in the American literature of the law of torts and administrative law, whether or not the proceedings involving punitive damages, civil money penalties, etc., should be surrounded by the same constitutional safeguards as the criminal proceedings.[192] The distinction between criminal penalties and civil penalties (or punishment and civil remedy) is blurred. The term quasi-criminal sanctions has therefore been coined. Punishment, as defined by *H.L.A. Hart* and *H. Packer,* is the imposition of burdens, for purposes of retribution or deterrence, upon people who have violated legal norms,[193] a definition which no doubt covers treble damages.

Hence, the provision regarding treble damages most certainly has a punitive character, if seen from the point of view of the individual. In addition, the remedy of treble damages is a vital instrument for the enforcement of the U.S. antitrust policies. In this sense *Krumbein* is right when he regards the "civil" remedies as mere adjuncts to the government enforcement.[194] For the purposes of international law a distinction between treble damages and a criminal fine is not warranted.[195]

The result reached would probably be different if all that could awarded were *compensatory* damages. Although in the historical perspective crimes and torts are intimately linked as legal concepts, torts are treated differently in the field of Conflict of Laws. "Bilateral" choice of law rules have been developed[196] in contrast to the unilateral rules in international criminal law, and the law of torts has not been included in the jurisdictional discussion on the reach of criminal law in the international law literature.[197] On the ground that torts follow different jurisdictional principles, it has been suggested that the jurisdictional principles of international law applicable to antitrust law should vary according to the proceedings instituted in the particular case.[198] Adhering to this method, *Akehurst,* for instance, separates the case where the plaintiff seeks damages in a tort action for

losses caused by anticompetitive practices from other types of proceedings, and with respect to tort actions, he claims, "there are normally no limits to the extraterritorial reach of the forum's antitrust law".[199] Yet, immediately thereafter Akehurst acknowledges such a limit — in cases where the application of the antitrust law of the forum would thwart the economic policy of the state in which the events occured. Thus, even with respect to the law of torts there ought to be some jurisdictional restrictions. The matter is not wholly left to the discretion of the states.[200] Whether the question of liability for tort as a matter of international law should be subject to *lex loci delicti,* as *F.A. Mann* has proposed,[201] to the *lex domicilii* of the tortfeasor, or a combination of these, or to the law of the state with which the tort has the closest connection, is a matter of some controversy, but need not detain us here. (Mann stated in 1964 that the majority of states have adopted the principle that *lex loci delicti* should govern).

There is an anomaly, however. The courts in the different states do not, as far as can be ascertained, apply the antitrust laws of other states, even in civil proceedings. There are only two possibilities: either the court applies *lex fori* or else it finds it inapplicable and yields jurisdiction.[202] Even here, consequently, the antitrust laws are governed by *unilateral* conflict of law rules. Hence, whatever the character of the proceedings, there is always a unilateral rule of conflict of laws that determines the reach of the antitrust laws. This fact is well substantiated by the case law analyzed in the preceding sections.

Nevertheless, it is possible that the jurisdictional principles of international law governing international antitrust law in civil proceedings differ from those applicable otherwise. That the courts of the United States — or other courts — have not taken this possibility into consideration, is not a conclusive argument contra: By establishing the jurisdictional rule operative in a few municipal legal systems, which we know does not vary with the form of the proceedings — at least as regards American law — one cannot make inferences as to international law restrictions.[203]

In conclusion: The character of the antitrust laws is such that they ought to be covered by the rationale underlying the jurisdictional principles of international law governing international criminal law, with one possible exception: civil proceedings by a private party for the recovery of compensatory damages (or similar proceedings involving remedies that do not have the character of punishment, or the character of an injunction).

This conclusion rests on international law criteria. It is based on the belief that the rationale for limiting the reach of criminal laws applies also to antitrust laws. While it is willingly conceded that the result reached is not

perfectly patent, nobody, it seems, has yet presented a good argument for not giving the antitrust laws such a character.

4.7 The exclusiveness of the jurisdictional principles governing international criminal law

The foregoing analysis was intended to demonstrate that the circumstances constituting the rationale for jurisdictional restrictions in the field of international criminal law also exist within the ambit of international antitrust law. In other words, the reasons for limiting state jurisdiction in both areas of law are identical. Whether one prefers to view the antitrust law as criminal-, regulatory- or civil law, the character of the law in an international law perspective is such as to motivate jurisdictional restrictions on identical grounds. To what extent the circumstances mentioned — protection of state sovereignty and individual justice — necessitates jurisdictional restrictions in international antitrust law, however, is not entirely clear. All that can be said is that the great diversity of antitrust laws and policies, and their self-centred character, seem to provide even more justification for jurisdictional restrictions here than in international criminal law.

However, we have not yet answered the question whether the jurisdictional principles themselves are applicable in international antitrust law. Considering that they are princples of international law, developed through international practice, and considering further that there are at least as strong reasons for jurisdictional restrictions in international antitrust law as in international criminal law, what else could render them inapplicable?

Rehbinder, Homburger, Jenny, Haymann, among others, regard the jurisdictional principles governing international criminal law to be applicable, but not exclusively. They can therefore be deviated from. Other principles may be controlling. If the municipal jurisdictional rule does not conform to the former principles it nevertheless may be compatible with the latter. Since *Rehbinder* seems to be setting the tone, a closer look at his reasoning is in order.

The legality of the municipal jurisdictional rule under international law, says Rehbinder, depends not on whether the rule is permitted but on whether it is prohibited.[204] The jurisdictional principles governing international criminal law do not constitute such a prohibition, whether the municipal rule conforms to these principles, or not.[205] Rehbinder obviously does not perceive the criminal law jurisdictional principles as a closed system (the principle of territoriality as the general rule and the other prin-

ciples as exceptions to this) but rather as exemplifying — in no way exhaustive — guidelines as to how genuine the link must be between the state exercising jurisdiction and the subject matter at issue in order not to constitute an abuse of rights. The abuse of rights theory is the only standard by which jurisdictional rules may be measured.

This conception of the international law of jurisdiction, Rehbinder claims, is supported by the *Lotus* case.[206] But surely it cannot be. Rehbinder here misreads the *Lotus* case. True, with respect to jurisdiction in general (intraterritorially exercised but with extraterritorial effects) the Court's opinion is clear: there is no general prohibition; state jurisdiction is limited-only in certain cases by prohibitive rules, in other cases the state remains free to adopt the principles which it regards as most suitable.[207] This is all in line with Rehbinder's conception of the limits of jurisdiction. Still, it must be asked whether criminal jurisdiction is governed by a different principle. The question was asked by the Court, but, *nota bene,* it was left unanswered, for, as it said: "[T]he Court feels obliged in the first place to recall that its examination is strictly confined to the specific situation in the present case".[208] Whether criminal jurisdiction is governed by a general prohibition with a few exceptions, or, on the contrary, a general freedom with a few prohibitions in specific cases, the Court did not decide.

Rehbinder is correct insofar as he states that the Court inquired not about permissions in international law, but about prohibitions. If the jurisdiction exercised by Turkey were to be deemed a violation of international law, the existence of a prohibition would have to be demonstrated, and would be so whichever of the two systems described were adopted.[209] But he is incorrect when he claims that the Court rejected either of the two systems.

What the Court really said was the following. *If* there is a general prohibition against exercising jurisdiction intraterritorially over foreign acts, as the first system suggests, it certainly does not cover the situation in question; since here Turkey had exercised jurisdiction over an act which should be regarded as committed within its own territory.[210] This is surely not a statement as to the validity of either of the two systems. It is quite another thing that the Court did not consider the territoriality of criminal law to be an *absolute* principle of international law. The system that includes a general prohibition does not postulate absoluteness; it allows exceptions.

Rehbinder, therefore, can extract no support for his view from the *Lotus* case.[211] While an adoption of either of the two systems was neither vital nor necessary for the purposes of the case, it was, no doubt crucial to the purposes of international criminal law in general. If one adopts the system

including a general prohibition from which certain exceptions are made, one conceives the international criminal law as a closed system. By adopting the system of general freedom, as does Rehbinder, the jurisdictional principles governing international criminal law are reduced to permissive principles, or rather guidelines, which include no prohibitive elements as such. No wonder then that Rehbinder resorts to the theory of abuse of rights, an alleged "general principle of law", for once we remove the prohibitive veil from the principle of territoriality, no prohibitive rule of international custom is likely to either exist or arise. In other words, with the system, of a general prohibition in international criminal law, everything not permitted is prohibited; with a system of general freedom, everything not prohibited (and nothing seems to be) is permitted. With the former system exceptions have been developed, and many more may be, by international custom. If a municipal jurisdictional rule is not covered by any of these exceptions, the general prohibibion applies. With the latter system, the jurisdictional principles developed by custom would be of little consequence. Admittedly, they would gurarantee legality if conformed with, but they would have nothing to convey as to the legality of other jurisdictional bases. The question may, indeed, be properly asked whether the principles, in this perspective, have any function at all in the field of international criminal law. Without the general prohibition, as defined in the principle of territoriality, the whole system of jurisdictional principles is thrown overboard, and is superseded by the abuse of rights theory as an ultimate standard, as *Sandrock,* for instance, concludes.[212]

The crucial issue, in determining whether the jurisdictional principles governing international criminal law have an exclusive character or not, is really how the international practice, upon which they are supposed to rest, is to be understood. If it is true that in all systems of law the principle of the territorial character of criminal law is fundamental,[213] does the adoption of this principle in the municipal systems imply the establishment of a *general prohibition* against the intraterritorial exercise of jurisdiction with extraterritorial effects, except as otherwise permitted? In other words, can the fact that all states principally base their criminal jurisdiction on territorial grounds be restated in the negative form, *i.e.,* that jurisdiction on other grounds is prohibited?[214] If all states — or at least most states — had limited their jurisdiction to territory, it might have been possible to claim that this basis of jurisdiction was exclusive. Since nearly all states do exercise jurisdiction on other grounds, it calls for demonstration that the states in fact regard those other grounds as exceptions to the general prohibition and not as independent bases for jurisdiction.

It must seriously be doubted whether such a demonstration can ever be satisfactorily given.[215] The decisive question instead becomes the following. If the jurisdictional principles governing international criminal law merely constitute independent *permissible* grounds for the exercise of criminal jurisdiction developed through state practice, do they implicitly carry a prohibition of the exercise of jurisdiction on other grounds? To what extent is the state practice binding? Do states limit their exercise of criminal jurisdiction because they believe that they are obliged to do so under international law, or on some other ground? Emerging here is clearly a question of international custom, requiring some elaboration.

5. The binding character of the jurisdictional principles governing international criminal law

That rules and principles of international law may grow out of international custom is indisputable; the customary behaviour of states (*i.e.*, their representatives, organs, etc.) may become customary law, binding on the states. The traditional view, shared by most publicists, is that customary law is the product of the existence and interaction of two circumstances; 1) a general concordant and continuos practice of states manifested over a longer period of time — *usus* — the objective or quantitative element; and 2) a recognition or conviction of a certain practice as obligatory, required by, or consistent with, prevailing international law — *opinio juris sive necessitatis,* the subjective or qualitative element.[216] The fact that the states generally act — or omit to act — in a certain way is, in itself, not sufficient. In addition, the state must be aware of — recognize, be convinced — that what it is doing is an act qualified as legal by a rule of international law, whether permissive, prohibitive or obligatory. State practice without an accompanying *opinio juris* is not customary international law, but, at the most, acts of courtesy or comity; *opinio juris* is an ingredient *sine qua non.*

A minority of writers is contra. *Kelsen,* for instance, does not acknowledge the significance of the *opinio juris.* For him, this element has the character of a fiction, whose function is primarily to disquise that court decisions as to the existence of customary law include an element of law-

creation.[217] *Guggenheim* regards the element of *opinio juris* as superfluous: courts and other organs of international law never inquire into or require proof of its existence.[218] *Ross* is not prepared to disregard the necessity of an *opinio juris,* but ascribes to it a limited significance: proof of it will seldom be required; as a rule, the subjective background of a custom will be sufficiently reflected in the objective situation.[219]

The requirement of an *opinio juris* has also been criticized as illogical. How is it possible that the *opinio juris* is a prerequisite for the occurence of changes in customary law, when the requisite itself involves a recognition or conviction of already existing law?[220] The escape route out of this circle proposed by *Cheng,*[221] that during the process of formation the states acted in error — *i.e.,* misunderstood the legal situation (*communis error facit jus*) — has not generally been availed of. Nor has the proposition that the *opinio juris* relates to the recognition not of positive international law, but of extra-legal norms.[222] *Thirlway* carefully suggests that "the requirement of *opinio juris* is equivalent merely to the need for the practice in question to have been accompanied by either a sense of conforming with the law, or the view that the practice was potentially law, as suited to the needs of the international community, and not a mere matter of convenience or courtesy... Only if the view that the custom *should* be law has the effect of making it law... can subsequent practice be coupled with the correct view that the custom *is* law... The psychological element would thus also include the view that if the practice in question was not required by the law, it was in the process of becoming so."[223]

Whatever may be the solution of the dilemma, it seems impossible to reach it from the viewpoint of strict positivism, since obviously at some point before the custom becomes law it carries an element of restraint; at least the state representatives *believe* it to be binding, rightly or wrongly. Whether the binding character of custom is due to mutual expectations, to international pressure, to uncertainty as to whether if and when custom has developed into law, to the interest of a state in establishing law, or some other factor[224] — in combination or independently; varying from state to state and from time to time — cannot be ascertained, and perhaps need not be. It is essential only that the states, in fact, consider it binding; a fact that may be — if need be — proved by circumstantial evidence, as subjective factors usually are.

The traditional concept of custom in international law has recently been challenged by *D'Amato.*[225] The inconsistency and vagueness of the traditional concept, D'Amato argues, call for a reformulation of both the subjective (qualitative) and the objective (quantitative) elements. The

essence of the former should, he claims, lie in the promulgative articulation preceding or accompanying the act constituting the quantitative element of custom. "The articulation of a rule of international law — whether it be a new rule or a departure from and modification of an existing rule — in advance of or concurrently with a positive act (or omission) of a state gives a state notice that its action or decision will have legal implications."[226] By the articulation — whether provided by the state organs or representatives, by writers on international law, by international organizations, by courts or otherwise — notice will be given that what the state is doing it does by virtue of international law.[227]

The constituents of the second (quantitative) element are, according to D'Amato, state acts, abstentions ad commitments to act. Not defined as acts in this sense are state claims and unilateral declarations. Claims (and probably unilateral declarations) may articulate a legal norm, but cannot constitute the material component of custom. As to the number of acts required, there is no certain rule; one instance may suffice. In the end, the question whether there is customary law or not is, as regards both the qualitative and quantitative element, a matter of relative persuasion — the persuasiveness of the arguments advanced for either view.[228]

It would be an overstatement to say that D'Amato here abandons the traditional concept of custom; "refines" would be a more accurate description. This is particularly true of his theories respecting the subjective element of custom, for which he also — quite understandably — has been less criticized. After all, the difference between having to prove the existence of an *opinio juris* via circumstantial evidence, on the one side, and merely having to prove the facts which constitute that circumstantial evidence, on the other, seems to have no practical significance.

The major criticism directed against D'Amato relates to his definition of the state acts which constitute the objective element,[229] and especially his denial of claims and unilateral declarations the status of state acts. In this criticism one can only acquiesce. The definition of a state act is certainly too narrow. There seems to be no logical reason for denying the claims or the unilateral declaration the status of state acts. When, for instance, state A sends troops to some distant and isolated islands claimed by A to be under the territorial sovereignty of A and by state B to be under the territorial sovereignty of B, at what point in time do the "acts" (in the broad sense) by B become state acts as defined by D'Amato? When B launches protests through diplomatic channels? When it protests in international organizations and claims its territorial sovereignty over the islands? When it threatens to use force if A does not withdraw its troups? When it (unilaterally)

declares that the territorial waters surrounding the island constitute a war zone? When it dispatches troops to the distant islands with the expressed object of expelling the troops of state A from the islands? When its troops have reached their destination, but the war is still "verbal"? When the physical war begins, as a few servicemen are killed? When thousands of servicemen are killed on both sides, or when a regular war breaks out between state A and state B?

Certainly, the first claims and unilateral declarations would not qualify as state acts in D'Amato's terminology. But would the subsequent acts? What exactly is D'Amato's criterion for a state act? The little information that he supplies seems to lie in the following lines: "[A] state has not done anything when it makes a claim; until it takes enforcement action, the claim has little value as a prediction of what the state will actually do."[230] But is there really in international law a generally accepted definition of "enforcement action" and, if so, does that exclude claims and protests? And further, when has an "enforcement action", in D'Amato's terms, "value as a prediction of what the state will actually do" next? Has the killing of one enemy soldier sufficient "value" as a prediction that the state will continue its activities until it has succeeded in its efforts?[231] Moreover, what if state B does not succeed in its efforts, in spite of an intense struggle? D'Amato's answer apparently lies in the following: "When state A does something that affects state B, and state B allows state A to do it, then B's non-interference is just as significant for the formation of custom as A's act. For if B had *successfully* interfered, A would have been unable to complete the act, and thus the quantitative element would not have been perfected."[232] Unsuccessful interference, in other words, would perfect the quantitative element.

D'Amato's theories invite far more comments and it is tempting to proceed. Yet, the time and space here do not allow of it.[233] Suffice it to conclude that his conception of what constitutes a state act is far too narrow and, what is also important, not very well-founded. This is not to suggest that *all* claims shall be considered as state acts; but that *some* claims emanating from the state (its officials, organs, representatives, etc.) doubtlessly must be, insofar as they are considered representative of the state (a suggestion which, of course, also is slightly vague).[234]

D'Amato's unwillingness to accept claims as expressions of state acts, seems to be rooted in a failure or unwillingness to recognize that claims may hold elements of both objectivity and subjectivity. In his corresponding endeavour to keep the concept of articultion apart from the objective (quantitative) element, D'Amato apparently thinks it necessary to classify

claims as one or the other, but not both. Better, then, to adhere to the teachings of *Ross*: the objective situation is a reflection of the subjective background.[235]

With this slight modification of the traditional concept we proceed further and ask whether the jurisdictional principles governing international criminal law constitute customary law and, if so, in what way it is binding. When examining whether there is sufficient state practice to fulfil the requirements of the objective element of customary law, the question immediately arises whether municipal law qualifies as a state act. D'Amato would probably hold that the mere existence of law, without enforcement measures attached thereto, at least in the form of court proceedings, would not suffice. And, in *Thirlway's* view, the legislative act would presumably be a "mere assertion *in abstracto* of the existence of a legal right or legal rule", and as such it could be "relied on as *supplementary* evidence" of state practice, but it would not be an act of state practice constituting the material element of custom.[236] *Berber* takes apparently the same view when maintaining that municipal law (and court decisions)

"können zweifellos ein wichtiges Mittel zum Nachweis des Vorhandenseins von internationalem Gewohnheitsrechts sein, wenngleich sie auch als solche nur mit grosser Vorsicht zu verwenden sind, sie sind also u.U. wichtige Erkenntnismittel für das Dasein von Völkerrecht, es ist aber irrig, sie als Elemente der Entstehung von Völkerrecht, als 'Präzedenzien, aus denen völkerrechtliches Gewohnheitsrecht entsteht', darzustellen.

Die einzigen Akte, die konstitutiv für die Entstehung von internationalem Gewohnheitsrecht sein können, sind vielmehr Akte der internationalen Staatenpraxis, d.h. Akte von Staaten oder unter gewissen Voraussetzungen von internationalen organizationen, die unmittelbar auf die internationalen Beziehungen Bezug haben und diese, nicht aber interne Staatliche Vorgänge, zu gestalten intendieren."[237]

Thus, in order for municipal law to be considered as a state act it must directly relate to the international affairs of the state. But it must also be actually applied within the realm of international relations ("tatsächlich in zwischenstaatlichen Beziehungen angewandt"), Berber adds.[238] The mere existence of municipal law conveys nothing as to state practice. With a different view, customary law would be difficult to distinguish from the "general principles of law recognized by civilized nations" referred to in Art. 38 (1) (c) in the International Court's Statute.[239] In this, Berber certainly has a point.

Yet the municipal jurisdictional rules of international criminal law do seem to "directly relate" to international affairs and they are applied; whether they are applied within the realm of international relations is not clear. In Berber's opinion, municipal court practice is probably inadequate.

But he does not offer a reason for believing so. That the court practice on the ground of municipal law does not, as such, constitute customary international law is quite another matter; for this the requirements of the subjective element must be met.[240]

Berber's view of what may constitute a state act seems somewhat rigid and categorical. Another — and probably the prevailing — view takes a more flexible approach. *Brownlie,* for instance, regards state legislation and national judicial decisions as one of the many material sources of custom .[241] *Akehurst* refers to the fact that the International Law Commission and other bodies engaged in the codification of international law always regard municipal laws as "primary evidence" of state practice,[242] and considers the mere enactment of a law to be a form of state practice. And while, according to *Gihl,* municipal laws and court decisions are mere facts from an international law standpoint, it is precisely in the capacity of facts that they contribute to the development of international custom.[243] Then, of course, the weight of the law as evidence of a state act may vary according to the clarity of the law, the frequency of its application, its particular prerequisites, etc.,[244] as is presumably the case with all other activities related to the state; whether a certain activity shall be qualified as a state act cannot be determined solely on the basis of the type of activity or the character of the actor — *all* the circumstances must be considered.

Let us assume, for the sake of the argument, in accordance with the latter view, that municipal laws *can* be considered as state acts within the meaning of the objective element, that municipal jurisdictional rules of international criminal law thus constitute state acts and are evidence of international custom. It may next be asked whether there is sufficient generality, continuity, concordance, repetition, etc. An answer to this question requires, of course, a broad analysis of municipal criminal law, which cannot be undertaken here, and, as we shall see, need not be. In one of the most extensive analyses in this field of law, the *Harvard Research* on criminal jurisdiction, published in 1935, the following general conclusions were reached: "[The territorial principle] is everywhere regarded as of primary importance and of fundamental character. [The active personality principle] is universally accepted... [The protective principle] is claimed by most states... [The universality principle] is widely though by no means universally accepted... except for the offense of piracy...".[245] As to the passive personality principle, the state practice was divided.[246] Today, almost fifty years after, the situation has probably not changed.[247] The first four principles are generally accepted, the fifth, however, is still a subject of some controversy.[248] Controversial is also, as has been noted,[249] the pre-

cise understanding, especially as to the extent, of these principles. But assuming, again, that there exists sufficient generality continuity, concordance, repetition, etc., to meet the requirements of the objective element, what about the subjective side? How shall the *opinio juris* be interpreted? In what way are the jurisdictional principles binding? This seems to be the crucial question.

Returning to the *Harvard Research* for a moment, the Draft Convention, according to its authors, "recognizes that States *may* exercise, if they choose, all the penal jurisdiction which its provisions approve", but it "*excludes* the exercise of any penal jurisdiction which might conceivably be asserted outside the limits defined".[250] Whether this is a statement of *lex lata* or *de lege ferenda* is not entirely clear. The following excerpt from the comment on Article 2 seems to indicate the former: "The present Convention contains a comprehensive statement of the competence of States to prosecute and punish for crime."[251] The fact that a convention is required, seems, on the other hand, to point to the latter. But the matter is not elaborated upon. The problem is, does a state, by limiting its criminal jurisdiction, do so because it "feels" obliged to do so with regard to international law, or because it considers an extension to be impracticable, or because it is uninterested in extending its criminal jurisdiction further, or for other reasons. Only in the first situation could we speak of an *opinio juris sive necessitatis.* In other words, how shall we interpret the *abstention* of a state to extend its jurisdiction? (The argument that the principle of territoriality is an established principle of customary law, is defeated by the sole fact that the states *do* extend their intraterritorial jurisdiction beyond the territory).[252]

Once again the *Lotus* case is instructive. There the French Government, as a third argument, alleged that a customary rule had developed according to which criminal proceedings regarding collision cases come exclusively within the jurisdiction of the State whose flag was flown. The Court replied:

"Even if the rarity of the judicial decision to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged... it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being consciuos of having a duty to abstain would it be possible to speak of an international custom."[253]

But this the Court held, was not the situation in the case at hand.

Likewise, when in the *North Sea Continental Shelf Cases,* Denmark and

the Netherlands contended that the equidistance principle had become a rule of customary international law, the Court reasoned:

"Not only must the acts concerned (the numerous instances in which the equidistance principle had been applied) amount to settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. The need for such a belief, *i.e.,* the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis.* The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even the habitual character, of the acts is not itself enough."[254]

With respect to the particular case, the Court found no evidence to show that the states applied the equidistance principle because they felt legally compelled to so or by virtue of a rule of customary law obliging them to do so.[255] Under such circumstances, another method of delimitation, answering to the requirements of justice and good faith (in accordance with equitable principles), would be permissible under international law. In other words, the fact that the equidistance principle was applied, did not exclude other methods of delimitation.

The view expressed in these two court opinions is in accord with that of international law writers.[256] Particularly interesting — in this context is the Court's opinion in the *North Sea Continental Shelf Cases.* Transferring the reasoning and the result of that case to the field of international criminal law, the following can be concluded: in order to establish the existence of the subjective element, it is necessary to demonstrate not only that the states limit their criminal jurisdiction in accordance with the jurisdictional principles because there exists an obligation to that effect, but also that the states within those limits must — provided they choose, to extend their jurisdiction that far — model their jurisdictional rules exactly on the prescribed jurisdictional principles. This, it is believed, has not been done, and it must seriously be doubted whether it ever can be.[257]

For even if the *travaux préparatoires* of the various criminal laws were to contain some statement to the effect that there existed an obligation, it would hardly be possible to ascertain the understanding of that obligation and whether the statements still are relevant. What is it, further, that compels the state to choose exactly those connecting factors as a basis for their jurisdictional rules which the jurisdictional principles provide? Or, in the words of the Court in the *North Sea* cases, to choose exactly that *method* of delimination which the equidistance principle prescribes? In that case, it was not the method which constituted the obligatory rule, but

rather the underlying rationale for applying the method. *Any* method of delimination would do, the Court apparently suggested, provided it was "consonant with certain basic legal notions" which:

"from the beginning (have) reflected the *opinio juris* in the matter of delimitation; those principles being that delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles. On a foundation of very general precepts of justice and good faith, actual rules of law are here involved which govern the delimitation of adjacent continental shelves — that is so say, rules binding upon States for all delimitations; — in short, it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal régime of the continental shelf in this field".[258]

The Court then continued to specify those "basic legal notions" which underlay that field of law.

Hence, while the equidistance principle was not binding upon the states, the basic legal notions underlying that principle and all methods of delimitation in this field — as reflected in the *opinio juris* — were. From where did that binding force come? There was no treaty alluded to, and no "general principles of law recognized by civilized nations" were mentioned. It is submitted that the source of the binding force was found in the state practice coupled with the *opinio juris* explicitly referred to by the Court — in other words, in international customary law. The basic legal notions were thus, although the Court did not so directly state, nothing but customary law — very general indeed, but still law. The Truman Proclamation of 28 September 1945, which contained the basic ingredients of that law, initiated the growth of the law, secured a "general following", and eventually the crystallization of the law was completed.[259]

It is this particular way of reasoning by the Court in the *North Sea* cases which we believe can be transferred to the field of international criminal law. (Not, however, the specific rules or principles actually invoked, nor the way in which they were applied).[260] By so reasoning, the Court was not really developing the existing law, much less creating entirely new law. It was merely establishing the fact that there does exist a state practice which corresponds to an *opinio juris,* an international custom binding on states — *i.e.,* customary law.[261]

It may be that the most accurate description of the Court's reasoning is that it seeks to establish the *normative content* of the different methods of delimitation.[262] And likewise: *What is binding on the States in the field of*

international criminal law is, if not the jurisdictional principles themselves as methods of limiting criminal jurisdiction, then at least the normative content of these principles. That the methods of limiting jurisdiction, insofar as the simple choice of connecting factors is concerned, cannot easily be proved to be customary law, we have already noted. Speaking against the fact that they, as such, are binding are, furthermore, the following factors: the connecting factors chosen vary from state to state, and the jurisdictional rules vary correspondingly. When some states protect their citizens against crimes committed by foreigners abroad (*cf.* the passive personality principle) by laying down a corresponding jurisdictional rule,[263] other states have only very exceptionally[264] lodged protests against the choice of the connecting factor as such. The few international controversies that have arisen as a result of the *application* of such a jurisdictional rule, such as the *Cutting* case and the *Costa Rica-Packet* case, contain very specific facts and the views expressed by the protesting countries therein (the United States and Great Britain) are hardly representative of their views today.[265] Similarly, the choice of nationality as a connecting factor is generally accepted, yet the application of the jurisdictional rule based on that factor in the specific case may, no doubt, be a seed of controversy.[266] And though the United States practice in the international antitrust field has stirred many state protests,[267] it is not the effect-principle as such that the protesting states refute — many of the protesting states have themselves chosen a similar connecting factor — but the application of it in particular cases.

The focus has rightly been on the basic legal notions underlying the choice of the jurisdictional principles. This normative content we find in the circumstances constituting the rationale for jurisdictional restrictions in this field — the protection of state sovereignty and the protection of the individual — and the circumstances speaking against such restrictions — the state interest in regulating the subject matter at issue and in enforcing the regulations.[268]

Hence, the material question from the viewpoint of international law is not so much the connecting factor chosen, as that the jurisdictional rule based thereon is moulded and applied in conformity with those basic requirements.[269] It is, therefore, not correct to declare that the principle of effects, when found to be based on a non-traditional connecting factor, is incompatible with international law, without examining whether it in fact meets those requirements. What should be scrutinized in the light of international law is not just the simple formula of "subsantial or direct effects" (or the like), but all those circumstances under which a United States court

secures subject matter jurisdiction, as well as other circumstances which either mitigate or aggravate the effects of the fact that jurisdiction is secured.

Next we shall examine the normative content of the jurisdictional principles governing international criminal law — the basic legal requirements. But first, some words on methodology.

6. In search of the basic legal notions (normative content) — a choice of method

The basic legal notions underlying the jurisdictional principles governing international criminal law must, as we have seen, concern the protection of state sovereignty and the protection of the individual, on the one hand, and the interest of the state exercising jurisdiction, on the other. These basic legal notions may be said to constitute a minimum standard for the exercise of intraterritorial jurisdiction in the criminal law field (including the international antitrust field). The components of the basic legal notions — rules and principles of international law — are applicable in this field not *proprio vigore,* but because there is a rule of customary law that so requires.[270]

Invoked frequently as a minimum standard for the exercise of intraterritorial jurisdiction in general, is the abuse of rights theory. This theory has also, as noted above, gained ground in the doctrine of international criminal law and international antitrust law.[271] The advocates of this theory argue that, since there are no limits on jurisdiction fixed by international customary law (or by treaties), one must look for such limits among the "general principles of law recognized by civilized nations". And among these general principles they find the abuse of rights theory.[272] On its face, the theory seems to connote that the state generally has the right to exercise jurisdiction, but it may under some circumstances abuse that right and thereby violate international law.[273]

Most of the writers who espouse the abuse of rights theory regard that theory and the genuine link theory — the theory that there must be a genuine link between the state exercising jurisdiction and the subject matter regulated — as inseparably connected with each another. For a state to exercise jurisdiction, there must be a genuine link, or otherwise the exercise will constitute an abuse of rights. "It must be possible", says *F.A. Mann,* for instance, "to point to a reasonable relation — that is to say, to the ab-

sence of rights or of arbitrariness."[274] A few writers who repudiate the abuse of rights theory, either because it is too vague or because it does not exist, still regard the genuine link theory as controlling.[275] *Meessen's* reasons against the view that the two theories are equal, are primarily methodological. The abuse of rights theory, Meessen argues, presupposes the existence of a general right, or even a total right, to exercise jurisdiction which somehow, in some instances, is abused. Such a postulation, however, denies the existence of an international jurisdictional order, he claims; it deprives international law of its main functions,[276] and cannot be reconciled with the genuine link theory as a theory concerning the basis for jurisdiction.[277]

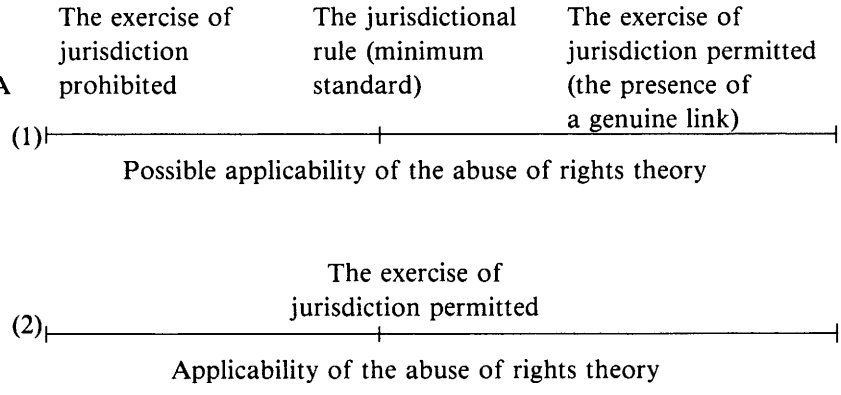
Meessen's view has its root in the distinction which he makes between the *basis* for jurisdiction and the *exercise* of jurisdiction.[278] As in the realm of the municipal system with respect to courts, administrative authorities, governmental institutions, etc., one must in international relations, ask (1) whether the state *has* any jurisdiction to take action, and (2) inquire whether the jurisdiction has been properly exercised.[279] The former legal issue is governed by *general* rules of international law, applying generally to all states. These general jurisdictional rules together constitute the jurisdictional order. The latter legal issue is governed by other rules.[280]

In this divided jurisdictional system, the abuse of rights theory may have a function when determining the second issue; when determining the first, it can have none. The reason for this, Meessen apparently argues, is that the theory does not generate general rules, but is rather applicable on an *ad hoc* basis — a corrective measure for the particular case. As soon as the theory is said to generate general rules — for instance, to the effect that jurisdiction may not be exercised in one class of cases — a contradiction will arise. For how can there be an abuse of rights, when there really never was a right?[281] By way of illustration we may assume that a European state enacts a statute which prohibits bigamy under heavy penalties wherever the act of bigamy takes place, and that the courts of that state punish Saudi Arabians for violations of that statute for something they have done at home. According to Meessen's divided system, the European state would probably not have jurisdiction in the first place to regulate the acts of Saudi Arabians in their own countries. A genuine link between the regulating state and the subject matter — the acts of the Saudi Arabians — would not exist. There is no legitimate interest. According to the abuse of rights theory, on the other hand, jurisdiction would lie, but the state exercising jurisdiction would probably be abusing its right (the question is *when*: by enacting the statute or by punishing the Saudi Arabians?) for exatctly the

same reason — for the lack of a genuine link or a legitimate interest.

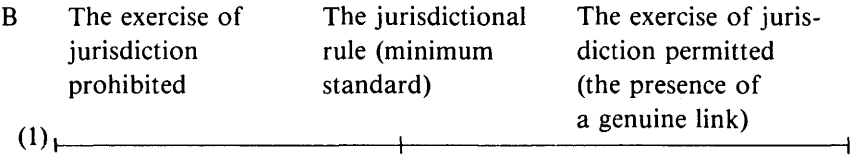
In the former case, general rules of jurisdiction decide the issue. In the latter, the abuse of rights theory is controlling. What is the difference? It may be most unsatisfactory that international law permits a state to have such a broad jurisdiction as in the example under the doctrine of abuse of rights. But, on the other hand, even though the state may have jurisdiction, it cannot exercise it, and perhaps cannot even enact the statute. Thus there is no sense in having the jurisdiction in the first place. What the state "has", it has merely in theory. Moreover, while it may be said that the abuse of rights theory is case-oriented, it also would probably have to rest on a more general foundation — rules and principles of international law — for otherwise the application of the theory might itself constitute an abuse of rights, a case of arbitrariness. This "generality" would be provided by the requirement of a genuine link, and ultimately by the requirement of the weighing of state interests.[282] As a matter of international law substance, there need be no difference, after all, between Meessen's system and the abuse of rights doctrine.

Graphically, the juxtaposition of Meessen's divided jurisdictional system (1) and the abuse of rights theory (2) in Meessen's view would probably appear as follows:

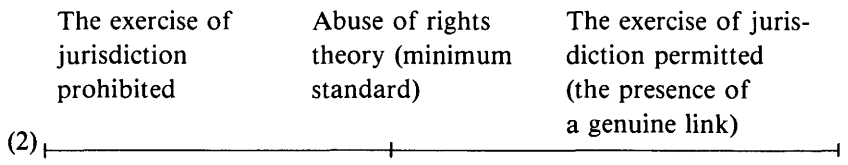


One problem is to arrange the genuine link theory under (2), especially since Meessen denies the equivalence of the abuse of rights and the genuine link theories. The advocates of the abuse of rights theory, however, recognize the equivalence. The difference in views leads to the result that, in Meessen's system, the abuse of rights theory is invoked when there is a genuine link, and in the other system when there is no such link.

On the other hand, as we have seen, the following parallelism may be argued:



Possible applicability of the abuse of rights theory



However, as noted by Meessen, and others before him,[283] system B (2) suffers from a terminological deficiency, which cannot be overlooked.[284] There cannot be an abuse of a right which did not exist in the first place. The abuse of rights theory cannot function as a general jurisdictional rule. Its function is to be a corrective measure in the (exceptional) particular case. The abuse of rights theory limits not the extent of rights, but the *exercise* of them in the specific case[285] (if at all). As eloquently put by Meessen:

"Die Bedeutung des Rechtsmissbrauchsverbots liegt darin, dass der Massstab der Missbräuchlichkeit nicht weiter präzisiert ist. Auf diese Weise kann im untypischen Einzelfall eine von der normalen rechtlichen Beurteilung abweichende gerechte Lösung erzielt werden. Sobald sich der Missbrauchsmaßstab zu einer das ursprüngliche Recht einschränkenden neuen Rechtsnorm verdichtet, verwandelt sich der Missbrauch des ursprünglichen Rechts in die 'Verletzung' der neuen Rechtsnorm."[286]

Any state act within the "prohibitory zone" is a violation of a prohibitory rule or principle defining that "zone", and not an abuse of rights. And if we claim that cases of abuse falling within the "prohibitory zone" are so hetrogeneous and specific that they cannot be summarized in rules or principles of jurisdiction, then we are really arguing again for system A (2). Terminologically and systematically, B (2) cannot be upheld. As Meessen correctly observes, the choice therefore is between A (1) and A (2). Let us study the two alternatives more closely.

6.1 Meessen's jurisdictional system

Meessen, we have seen, conceives the jurisdictional system as divided. First, there is the question of whether the state has jurisdiction or not and, secondly, the question of whether the jurisdiction has been properly exercised, or not. The first question is determined by the general jurisdictional rule which reflects the genuine link theory: The state has jurisdiction when there is a genuine link connecting the state with the subject matter. As criteria for determining the "genuineness" of the link, Meessen proposes the state interest in regulating the matter ("Regelungsinteresse"), and the state interest in reciprocity or mutuality and in conflict-avoidance in international relations — what reactions and counteractions can be expected from other states *in general* (how one or a few states may react is immaterial) in this field of law. In this way, the interests of other states will be indirectly considered.[287] The protection of the individual is promoted only to the extent that it serves the interest of the regulating state; thus indirectly. Having examined the various possible connecting factors in light of these criteria and, in addition, the case-law of the municipal courts in various countries, Meessen reaches the following conclusion: according to the international law principle of the genuine link, a state has jurisdiction in antitrust matters only — but also always — when the anticompetitive conduct to be regulated produces substantial, direct and foreseeable effects within the state.

As a basis for determining whether the exercise of jurisdiction is proper or not, Meessen invokes the protection of the sovereignty of the state and of the individual affected by the exercise.[288] The exercise of jurisdiction is primarily governed by the international principle of non-interference and the minimum standard for the protection of aliens. When the exercise of jurisdiction — whether by government legislation or court decisions — substantially disturbs another state's exercise of its functions, claims Meessen, we have an interference in the affairs of another state. The interference is prohibited where the interest of the state, affected by the interference, in non-interference outweighs the interest of the exercising state in exercising jurisdiction. A weighing of state interests is thus prescribed. In restricting the exercise of jurisdiction, the abuse of rights theory is more suited for application in exceptional cases on an *ad hoc* basis, than for the construction of abstract rules.

The protection of the individual involves, *inter alia,* the avoidance of conflicting laws, the consideration of earlier punishments according to the principle *ne bis in idem* and the maintenance of a due process. Meessen's analysis in this field is tentative. The abuse of rights theory is still not to be considered.

6.2. The abuse of rights theory

The abuse of rights theory, when originally — as alleged — introduced into the doctrine of international law by *Politis,*[289] was intended to be an ultimate corrective remedy against the states' discretionary exercise of their sovereign powers. Through the years the theory has met much endorsement, but also a significant dose of scepticism. *Berber*[290] has doubted whether the theory has the status of a general principle of law "recognized by civilized nations";[291] *Cavaglieri* whether it has binding force, even as a general principle.[292] *Roulet* holds it to be terminologically illogical, and others with him.[293] Most sceptics find the theory too vague.[294] *Brownlie* seeks to restrict its field of application.[295] Nevertheless, the prevailing view today is that the abuse of rights theory does exist as a principle of international law, by virtue of its being one of the "general principles of law recognized by civilized nations". The majority of publicists endorses it and it has been frequently alluded to in the case law of international courts, although not in decisive contexts.[296]

For the purpose of delimiting the extraterritorial effects of the intraterritorial exercise of jurisdiction in the field of international antitrust law and kindred fields of law (international criminal law, international taxation, etc.), the doctrine of abuse of rights has been adopted by numerous writers.[297] The idea is that states are free to exercise jurisdiction intraterritorially at their discretion. There are no treaty rules and no rules of customary international law. The abuse of rights doctrine sets limits where other limits do not exist.[298] It constitutes the last resort for the promotion of international relations. But it should be invoked in exceptional cases only; there is a strong presumption against its applicability in the specific case.[299]

The basic ingredient of the abuse of rights doctrine is the process of weighing state interests. The interest of the state exercising jurisdiction is measured by the genuineness of the link existing between the state and the matter with respect to which jurisdiction is exercised. The interest of the affected state or states is measured by the damage or injury inflicted by the specific exercise of the jurisdiction. On the one hand, there is the question: how interested is the exercising state in regulating the matter (how genuine is the link)? On the other hand, the question is asked: in how great a disproportion must the interests involved stand for an abuse of rights to lie? A broad variety of suggestions is offered. The interests of the exercising state shall be "legitimate", "achtbar" (considerable), "relevant", "genuine", "berechtiges" (justified), "sufficiently strong", "reasonable", "real", "real and close", "legally and clearly defined", "besonders wichtiges"

(particularly important), etc.[300] A difference in terminology does not, of course, necessarily imply a difference in substance. As regards the question of proportions, *Dahm,* for instance, suggest that the interests of the exercising state should weigh lightly as against the affected state whose interests are severely damaged, if the abuse of rights doctrine is to apply.[301] For *Rosswog,*seemingly, it suffices that the interests of the affected state are the "höher bewertete",[302] and for *Kiss*, that they are "sensiblement plus grands" than the advantages of the exercising state.[303] *Akehurst* proposes that "if the legislation [of the exercising state] is designed to produce mischief in another country without advancing any legitimate interest", or "if legislation is aimed at advancing the interests of the legislating State illegitimately at the expense of other States", there will be an abuse of rights.[304] *Bär,* again, would require that the disadvantages of the affected state stand in a "horrender Disproportion" to the interests of the exercising state,[305] while *Meessen* considers "extreme disproportion" to be the correct description.[306]

The intrests to be weighed in particular are, on the one side, of course, the interest of the exercising state in effectively enforcing its laws (without diminishing too much the legal security) and, on the other side, the interest of the affected state in having its laws effectively enforced and complied with, in protecting its market, its security, its nationals, in maintaing order, etc.[307]

That the abuse of rights doctrine is a very broad and inexact standard for setting limits to state jurisdiction, its advocates do not deny.[308] The doctrine provides some general guidelines which require further elaboration. But, at the same time, no other standard is available, they claim. The principle of non-intervention (or non-interference) is either not considered, or considered but rejected.[309]

The interests of the individual affected have significance only indirectly within the framework of the weighing-of-interests process, insofar as they are relevant to the affected state. These issues, however, are only sporadically discussed.[310]

When examining the municipal jurisdictional rule as developed in international antitrust law — the effects principle — in light of the abuse of rights doctrine, it is generally concluded that the rule does not constitute an abuse of rights, provided it is qualified in some respects. That jurisdiction may be exercised when the effects are direct and substantial, is generally agreed upon. Some writers add the requisite of foreseeability.[311]

6.3. The two methods in comparison and conclusions

On the basis of both of the methods here described, general guidelines may be established in the form of a weighing-of-state interests process for the restriction of state jurisdiction. Whether these guidelines coincide in substance, we shall discuss in another context.[312] Suffice it to say that the "minimum" apparently has been set higher in *Meessen's* standard (the abuse of rights theory is an corrective instrument for exceptional, or even extreme, situations) and that the interests of the individual, in Meessen's system, have a more independent significance. While Meessen seeks support primarily in the principle of non-interference and the minimum standard regarding aliens, the defenders of the other system apply the abuse of rights theory alone. Yet the crucial methodological difference is that Meessen, in contradistinction to the others, construes a general jurisdictional principle, determining wheher a state *has* jurisdiction or not; this, he claims, is a principle of international law origin.[313] Surprisingly, Meessen, by considering primarily only the interest of the exercising state, reaches the same result — as to what constitutes a genuine link — as many of those who weigh the interests of all states concerned in accordance with the abuse of rights doctrine: the formula concerning direct, substantial and forseeable effects.

Meessen's method, however, cannot be justified. It has too many weak links. First, the genuine link theory as applied by Meessen is not, as he claims, the normative core of the jurisdictional principles governing international criminal law. While the genuineness of the link, according to Meessen, is to be determined exclusively from the viewpoint of the regulative interests of states — the interests of other states and individuals affected being considered only indirectly — an abstraction of the jurisdictional principles governing international criminal law reveals that consideration shall be paid to the interests of all parties involved.[314]

What other rule or principle of international law (or "völkerrechtlicher Grundsatz") is there that prescribes a jurisdictional order based on the regulative interests of states? That there is as yet no rule of customary international law that compels the conclusion which Meessen reaches, he himself recognizes.[315] For this, the necessary state practice and *opinio juris* is lacking.[316] The international law principle, on which Meessen relies, simply does not exist. And yet he is not making proposals *de lege ferenda*.[317]

Secondly, Meessen's distinction between the basis for jurisdiction and the exercise of jurisdiction is artificial. True, the distinction serves a purpose within the municipal law system as regards the distribution of govern-

mental and court functions, but what independent purpose does it serve in the international law field? The sovereign state exercises all functions and the type of subject matter it may regulate is in no way limited. The only limit is territorial; the functions may not be exercised outside the territory.[318] In this Meessen also concurs,[319] but he immediately adds: In order for the state to exercise its functions within its territory, there must be a basis for it, a genuine link, a regulative interest; in the absence of such link, the state is prohibited from exercising jurisdiction.[320] But when does a state violate this prohibition? When exercising the jurisdiction which it does not have, that is, when it enacts laws, when it allows its courts and administrative authorities to act, etc., without a jurisdictional basis. Until the state so acts, there cannot, of course, be a violation. It is by exercising its jurisdiction that the state reveals what basis it has for the exercise. But do we learn enough about the basis by examining the laws and statutes alone and can we decide that a state bases its jurisdiction on direct, substantial and foreseeable effects simply because it has issued some (often general) legislative formulations? When is a state justified in accusing another state of exercising a jurisdiction which it did not have, and thus of breaking international law? Should we not wait until the courts and other relevant authoritieshave been given the chance to interpret the legal provisions, and until the courts have given their decisions based on all the specific facts present in the cases?

Moreover, of what use is the jurisdictional principle, that Meessen claims to exist, to the state exercising jurisdiction? Even if the state "knows" it has jurisdiction, the exercise of it may still violate international law. Meessen's jurisdictional system really includes two "prohibitory zones": 1) jurisdiction exercised without a basis and 2) the improper exercise of jurisdiction. Why not define the exercise of jurisdiction without a basis as an improper exercise of jurisdiction and thus integrate the two "prohibitory zones". There seems to be no reasonable ground for establishing independent rules or principles of international law concerning the basis for jurisdiction when every aspect of it is covered by the exercise of jurisdiction. If there are, or should be, any jurisdictional rules of international law, their target should be the exercise of jurisdiction.[321]

It is notable that the principles of international law, which, according to Meessen, exist both as regards the basis for jurisdiction and the exercise of it, overlap to the degree of fusion. The process of weighing state interests, within the framework of the principle of non-interference, also encompasses the interests of the exercising state (and the regulative interests "Regelungsinteresse"). When constructing the basis for jurisdiction (the

genuine link), on the other hand, attention must be paid not only to the regulative interests, but also, although indirectly, to the interests of other states and individuals within the notion of reciprocity. The interests of the individual, again, are also covered by the minimum standard for the protection of aliens governing the exercise of jurisdiction. Moreover, the genuine link formula which Meessen proposes — direct, substantial and foreseeable effects — also holds element for the protection of state sovereignty and for the protection of the individual, although Meessen does not entirely so admit. Meessen's reason for establishing separate rules with respect to the basis for jurisdiction is that a jurisdictional order is required — the world community needs a jurisdictional order. The abuse of rights theory, which prescribes nothing as to the basis of jurisdiction (such a basis is presupposed), implies, according to Meessen, a denial of a jurisdictional order.

But it is not so. The import of the abuse of rights theory is that it restricts the exercise of jurisdiction. What more is needed for a minimum of a jurisdictional order?

The conclusion that the *only* basis for jurisdiction in the international antitrust field is the presence of direct, substantial and foreseeable effects,[322] does not seem to answer to realities. This conclusion implies that a state has no jurisdiction to regulate the anticompetitive conduct of the export companies seated within its territory affecting foreign markets, which must seriously be doubted.[323] Or is it too naive to think that states may also have an interest in regulating such conduct on grounds of reciprocity.

Finally, why does not nationality suffice as a genuine link? It is not perfect. It allows of manipulation. But the important thing, apparently, is not to establish the *most* genuine link, but merely *a* genuine link.

Thus it may be said in conclusion that Meessen's divided jurisdictional system cannot be accepted as a method. It has no legal basis and can be entirely dispensed with from an international law viewpoint. Moreover, the results it leads to are questionable. This is not, however, the same as rejecting the substance of Meessen's theories. The limits on the exercise of state jurisdiction, the principle of non-interference and the minimum standard for the protection of aliens, are yet to be discussed. Nor does this necessarily imply adherence to the abuse of rights theory. We must next examine the principles of international law concerning the protection of state sovereignty and the protection of the individual (minimum standard for aliens), that is, the elements that constitute the rationale for jurisdictional restrictions.[324]

Notes, chapter XV

[1] See *e.g.*, Kelsen, Principles of International Law, at 235, n. 23: " 'Extraterritorial' jurisdiction means the jurisdiction exercised by a state outside its territory, on the territory of another state."

[2] See *e.g.*, Vogel, at 1 f., 14 f., especially at 14, n. 7.

[3] Fugate, Foreign Commerce and the Antitrust Laws (1st ed.), at 20 f.

[4] See, however, the works of Francisco Suarez, discussed by Vogel, at 60 ff.; Bertrand D'Argentré, see Vogel, at 69 ff.; Gutzwiller, at 89 ff.; H. Müller, at 50 ff.; Gihl, Den internationella privaträttens historia, at 111 ff. Also see the works of Bartolus and Baldus mentioned and discussed in e.g. Gutzwiller, at 29 ff.; Gihl, *id.*, at 53 ff.; H. Müller, at 10 ff.

[5] Hobbes, Leviathan (reprint, Oxford, 1952), at 171.

[6] Vogel, at 77. This is an example of what Vogel terms "das transitiv-negative Territorialprinzip". (See further Vogel, at 14 f.).

[7] See Vogel at 77, where he notes: "Dieser ganze Gedankengang wird bei Hobbes freilich nicht im einzelnen entfaltet, sondern ist in seinem System *nur der Anlage nach* enthalten."

[8] Hobbes, Leviathan, at 231. *Cf.* the following lines: "If a Subject be taken prisoner in war; or his person, or his means of life be within the Guards of the enemy, and hath his life and corporall Libertie given him, on condition to be Subject to the Victor, he hath Libertie to accept the condition; and having accepted it, is the subject of him that took him; because he had no other way to preserve himself. The case is the same, if he be deteined on the same termes, in a foreign country. But if a man be held in prison, or bonds, or is not trusted with the libertie of his bodie; he cannot be understood to be bound by Covenant to subjection; and therefore may, if he can, make his escape by any means whatsoever."

[9] *Id.*, at 236.

[10] *Cf.* Oehler, at 57 ff.

[11] The work forms a part of Praelectiones juris Romani et hodierni (1689).

[12] Lorenzen, Selected Articles (13 Ill. L. Rev. 375 (1919)), at 136.

[13a] See the translation in Lorenzen, *supra* n. 12, at 164. For another translation, see e.g. Mann, Studies, at 18 f.

[13b] On Huber's perception of international law, see e.g. H. Müller, at 113 ff.

[14] See e.g. Mann, Studies, at 18 f., 30; Niederer, Einfürung, at 51 ff.; K. H. Etter, Vom Einfluss des Souveränitätsgedankens auf das Internationale Privatrecht (Zürich, 1959), at 19 ff.; Gutzwiller, at 155 ff.; Cheshire, at 22 f.; Kollewijn, Geschiedenis van de nederlandsche wetenschap van het internationaal privaatrecht, in Geschiedenis der nederlandsche rechtswetenschap, Vol. I (Amsterdam, 1937), at 142; H. Müller, at 102 ff., 114; Niboyet, Traité de droit international privé français, Vol. III, at 85 f.

However, Mann (*id.*), Etter (*id.*) and Niederer (*id.*) are somewhat equivocal. Also Lorenzen, *supra* n. 12, at 137 ff. is equivocal. In another of his articles — Story's Commentaries on the Conflict of Laws — One Hundred Years After (48 Harv. L. Rev. 15 (1934) — Lorenzen finds (at 34) that "Story follows the general maxims formulated by Huber". This, in light of the fact that Lorenzen understands Story to have suggested that laws can have no extraterritorial effect even if intraterritorially applied, would imply that Huber is understood in the same sense. Also see Lorenzen, Territoriality, Public Policy and the Conflict of Laws, 33 Yale L. J. 736 (1923—24).

[15] Gihl, Studier, at 336 ff.; Vogel, at 28 ff., 68 f.

[16] See Gihl, Den internationella privaträttens historia, at 154.

[17] Gihl, Studier, at 336.

[18] *Id.* This interpretation of Huber is not given in Gihl, Den internationella privaträttens historia (see 145 ff.) where Huber's works also are discussed.

[19] Vogel, at 28 ff, 68 f. As to the terminology, see Vogel, at 14 f.

[20] Vogel, at 34 f.

[21] *Cf.* Lorenzen, *supra* n. 12, at 156; Rolin, Principes du droit international privé, Vol. I (Paris, 1897), at 79.

[22] *Lex loci contractus* does not control the situation, further, where the contract concerns a sale of goods to be delivered in a state where a such sale is prohibited, provided the suit is brought there.

[23] Huber, at Section 12 f. See Lorenzen, *supra* n. 12, at 176 f.

[24] *Id.* Section 13, *in fine*.

[25] *Id.* Section 7.

[26] *Id.* Section 2. The translation by Lorenzen, *supra* n. 12.

[27] See Lorenzen, *supra* n. 12, at 138 ff. See further Gutzwiller, at 81 ff.; Gihl, Den internationella privaträttens historia, at 93 ff.; H. Müller, at 45 ff.

[28] Huber, Section 8, *in fine,* and Section 13.

[29] *Id.*, Section 15.

[30] *Id.*, Section 9.

[31] *Id.*, Section 15.

[32] See e.g. Gihl, Den internationella privaträttens historia, at 145 ff.

[33] Huber, at Section 2. See Lorenzen, *supra* n. 12, at 164 f.

[34] See Vogel, at 35, n. 42. *Cf.* Oehler, at 102; Lorenzen, *supra* n. 12, at 154.

[35] Huber, De jure civitatis, bk. 3. s. 4, c. I, n. 41 f.; Beginselen der Rechtskunde gebruikelijk in Frielandt (Leeuwarden, 1684), bk. 6, ch. 40, s. 23.

[36] Huber, De Conflictu Legum, Section 10.

[37] See as to Rodenburg, Paul and Jan Voet, in Gutzwiller, at 130 ff.; H. Müller, at 63 ff.; Gihl, Den internationella privaträttens historia, at 139 ff.

See further as to Bartolus, Baldus, D'Argentré, Dumoulin, Boullenois, etc. in Gutzwiller, at 29 ff., 81 ff.; Gihl, *id.*, at 53 ff., 102 ff.; H. Müller, at 10 ff., 45 ff.

The difference in opinion between the Dutch school, on the one hand, and the Italian and the French, on the other, lies partly, it seems, in the fact that the former school principally dealt with Conflict of Law problems of an interstate nature, whereas the latter was basically concerned with the problems arising between municipalities and provinces within a single state.

[38] Story, Commentaries in the Conflict of Laws, at 31.

[39] *Id.*, at 21.

[40] See *supra* p. 474 f.

[41] Story, Commentaries, at 8 f.

[42] *Id.*, at 8.

[43] *Id.*, at 9 (footnotes omitted, emphasis added).

[44] *Id.*, at 21 f.

[45] *Id.*, at 22.

[46] *Id.*,

[47] *Id.*, at 23.

[48] *Id.*, at 24 (emphasis added).

[49] *Id.*, (emphasis added). Immediately following these lines is the Latin phrase: Statuta suo clauduntur territorio, nec ultra territorium disponunt". *Cf.* Huber's first maxim with respect to "nec ultra". Also see Vogel, at 32 ff.

[50] *Id.*, at 25.

[51] *Id.*, at 22.

[52] *Id.*, at 25. (Reference is made to Huber in a footnote). Story continues: "A state may prohibit the operation of all foreign laws, and the rights growing out of them, within its own territories". But it cannot, one might add, prohibit the operation of a state's laws within its territory.

Cf. the reasoning of Story, at 757.

This is admittedly not the way in which Story is understood by, for instance, Vogel, at 40 f., 90, 110 f.; Rudolf, 11 f.; Mann, Studies, at 19 ff.; Cook, The Logical and the Legal Bases of the Conflict of Laws, at 48; Lorenzen, Story's Commentaries, at 17 ff.

[53] The third maxim rests on comity, see Story, at 34 ff. As the third maxim is of less interest in the present context, its presentation as such will suffice.

[54] See Story, at 840 ff.

[55] See Story, at 843 f., in particular at 844, n. 2. *Cf.* the editor's notes at 841 and 844.

[56] Wächter, Über die Collision der Privatrechtsgesetze verschiedener Staaten, XXIV Archiv für die civilistische Praxis, at 230 ff. Also see Vol. XXV of the same series, at 1 ff. and 169 ff.

[57] Savigny, System des heutigen Römischen Rechts, Vol. VIII, at 19 ff.

[58] Foelix, Traité du droit international privé (ou du conflit des lois de différentes nations) (3d ed. Paris, 1856), at 19 ff.

[59] The concept of comity in this context involves the question why states apply the laws of other states, a question not directly concerning us in the present study. An extensive, and seemingly convincing, analysis of this question is given, *inter alia*, by H. Müller, at 113 ff. and 157 ff. (with respect to Huber's and Story's understanding of the concept).

[60] See *supra* p. 474 f. and 479.

[61] Since this proposition, it seems, is universally accepted by jurists and publicists, it makes

little sense in giving extensive references to the point. A few examples will be afforded. See Kelsen, Principles of International Law, at 209 ff. and 235 ff.; Dahm, at 250 ff.; Vogel, at 102 ff.; Bär, at 325; Berber, at 305 ff.; Mann, Studies, at 27 ff.; Ross, at 213 ff.; Verdross, Völkerrecht, at 266 ff.; Wengler, at 933 ff.; Gihl, Staters immunitet vid främmande domstolar, SvJT 1944, at 283 ff.; Gihl, Studier, at 338 f.; Brownlie, at 291 ff.; Scwartz, at 250 ff.; Rudolf, at 18 f.; Glatzel, at 118 and 139 ff.; Guggenheim, at 332 f.; Schlochauer, at 44 ff.; Reu, at 51 ff.; Oppenheim-Lauterpacht, at 293 f. For further references see Vogel, at 103, n. 72. Also see the Restatement (2d) of Foreign Relations Law, §§ 17 ff.

[62] *S. S. Lotus,* P.C.I.J., 1927, Series A, No. 9, at 19. (Emphasis added).

[63] See Jennings, The Limits of State Jurisdiction, 32 Nord. Tidskrift f. Int. R. 209 (1962); Extraterritorial Jurisdiction and the United States Antitrust Laws, 33 B.Y. Int. L. 146 (1957). Also see General Course of International Law, 1968 Proceedings of the Hague Academy of International Law, at 519 f. and ILA 1964, Extra-Territorial Application of Restrictive Trade Legislation, 304 at 310; The International Law Governing Anti-Trust Jurisdiction, ILA 1964, at 354; Haight, International Law and Extraterritorial Application of the Antitrust Laws, 63 Yale L.J. 639 (1954); ILA 1964, at 340 and ILA 1972, at 112 (here also referring to the majority view of the Committee on Extraterritorial Application of Restrictive Trade Legislation of the American Branch of the International Law Association). Also see Haight, Extraterritorial Effects of Market Regulation, 111 U.Pa.L. Rev. 1117 (1962—63); Antitrust Laws and the Territorial Principle, 11 Vand. L. Rev. 27 (1957); Verzijl, The Controversy Regarding So-Called Extra-territorial Effect of the American Antitrust Laws, 8 N.T.I.R. 3 (1961.

See further Ellis, J., Extraterritorial Application of Antitrust Legislation, 17 N.T.I.R. 51 (1970); Comment, 111 U.Pa. L. Rev. 1129 (1962—63); The Extraterritorial Application of Restrictive Trade Legislation: Recent Developments, ILA 1970, at 178; ILA 1964, at 323; ILA 1966, at 42; ILA 1970, at 157; Rahl, at 364 ff.; Smit, H, International Aspects of American and Netherlands Antitrust Legislation, 5 N.T.I.R. 274 (1958); Whitney, Sources of Conflict Between International Law and the Antitrust Laws, 63 Yale L.J. 655 (1954); Riedweg, The Extra-Territorial Application of Restrictive Trade Legislation — Jurisdiction and International Law, ILA 1964, at 357 ff., especially at 362; Kahn-Freund, ABA Section of International and Comparative Law — Proceedings 1957, at 33 and 39 ff.; Shawcross, ABA Antitrust Law Section Report, 11 (1957), at 111 and 113 ff. *Cf.* Hermanns, at 25 ff.; P. Müller, at 111 ff. Also see Final Report of European Advisory Committee on Tentative Draft No. 2 Restatement of the Foreign Relations Law of the United States (Jurisdiction) (1961) at 15 ff. and 35 (see ILA 1964, at 543); Report to the Consultative Assembly of the Council of Europe by the Legal Committee (deGrailly, Rapporteur), The Extra-Territorial Application of Anti-Trust Legislation, Doc. 2023 (Jan. 25, 1966); Contributions to the discussion at ILA 1964 by Freymond, at 321, Ellis, at 232, Martin, at 332, Weiss-Tessbach, at 338.

[64] *S.S. Lotus,* P.C.I.J. 1927, Series A, No. 9.

[65] See e.g. the Restatement (2d) of Foreign Relations Law, Section 18; ILA Resolution, Extra-Territorial Application of Anti-Trust Legislation, Articles 3 and 5 (see ILA 1972, at XIX f.); Fugate, at 31 ff.; Brewster (somewhat hesitating), at 288, 301, 446 ff.; Timberg, Extraterritorial Jurisdiction under the Sherman Act, The Record of the Association of the Bar of the City of New York, 11 (1956), at 101; Antitrust and Foreign Trade, 48 Nw. U.L. Rev. 411 (1953); J.T. Miller, Extraterritorial Effects of Trade Regulation, 111 U. Pa. L. Rev. 1092 (1962—63); Katzenbach, at 1151; Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), at 135 ff.; Barack, at 392 ff. Also see contributions to ILA discussion: Olmstead, ILA 1964, at 325; Dorsey, ILA 1972, at 133.

A few writers regard the protective principle as controlling, see e.g. W. Hug, Die Anwendbarheit der kartellrechtlichen Bestimmungen des Montanvertrages und des Vertrages über die Europäische Wirtschaftsgemeinschaft auf in Nichtmitgliedstaaten veranlasste Beschränk-

ungen des Wettbewerbs im Gemeinsamen Markt, in Kartelle und Monopole in modernen Recht, Vol. II, at 603 (Karlsruhe 1961); Brewster (hesitating), at 295 ff.; Timberg, Remarks on Extraterritorial Enforcement of the Sherman Act, in ABA Section of International and Comparative Law, Proceedings 1957, at 51; C. Edwards, The Internationality of Economic Interests, 111 U.Pa. L. Rev. 283 (1962—63). *Cf.* Schwartz, at 262 f.; Rehbinder, at 82 ff. Also see Jaenicke, contributions to ILA discussion, ILA 1964, at 319, ILA 1972, at 115.

[66] Hermanns, at 19 ff. and 35; Krumbein, at 85.

[67] Hermanns, at 37 ff.

[68] *Id.*

[69] Krumbein, at 121 ff. *Cf.* Schwartz, at 252 ff.

[70] Schlochauer, at 53 f.

[71] *Id.*, at 44 ff. and 54 f.

[72] Akehurst, Jurisdiction, at 190 f. and 196.

[73] *Id.*, at 206.

[74] *Id.*, at 188 ff.

[75] Rehbinder, at 47 ff. Closely following Rehbinder here is Stoephasius, at 88 ff.

[76] Rehbinder, at 89 f.

[77] Rehbinder, at 68, 78 f., 82, 86, 89.

[78] *Id.*, at 82 ff. *Cf.* Rehbinder in Immenga/Mestmäcker, Kommentar zum GWB, at 1878 ff.

[79] Homburger/Jenny, at 50 ff.

[80] *Id.*, at 54 f.

[81] Haymann, at 279 ff.

[82] *Id.*, at 293 f.

[83] *Id.*, at 282.

[84] *Id.*, at 290 f.

[85] *Id.*, at 309 and 313.

[86] *Id.*, at 314.

[87] *Id.*, at 317 f.

[88] Mann, Studies, at 39.

[89] *Id.*, at 37.

[90] *Id.*, at 86 ff.

[91] Bär, at 320 ff. *Cf.* Vogel, at 350. Vogel, however, has primarily a municipal law approach and the viewpoints of international law are merely incidental, see Vogel, at 4 and 350. Also see Sandrock, Neuere Entwicklungen im Internationalen Verwaltungs-, insbesondere im Internationalen Kartellrecht, 69 Zeitschrift für vergleichende Rechtswissenschaft 1 (1968).

[92] Meessen, at 87 ff. Meessen is followed by Stürmer and to some extent recently by Rehbinder in Immenga/Mestmäcker, Kommentar zum GWB, at 1878 ff.

[93] Meessen, at 94 ff.

[94] *Id.*, at 106 ff.

[95] *Id.*, at 152 ff.

[96] *Id.*, at 173 ff.

[97] *Id.*, at 233 ff.

[98] *Id.*, at 104 f.

[99] *Id.*, at 205 f.

[100] See e.g. Fugate, at 31 ff.; Rahl, at 370 ff.; Brewster, at 290 ff.; Trautman in Brewster, at 309 ff.; Brownlie, at 292 ff.; Barack, at 15 ff. and 380 ff.; Stoephasius, at 93 ff.; Haymann, at 290 ff.; Schwartz, at 250 ff.; Schlochauer, at 46 ff.; Hermanns, at 19 ff.; Heidemann, at 38 ff.; Rehbinder, at 60 ff. and 67 ff.; Mann, Studies, at 82 ff.; Krumbein, 45 ff. and 84 ff. Also see the Restatement (2d) of Foreign Relations Law, §§ 17 ff. See further *supra* n. 63 and 65.

[101] As to the terminology, see e.g. Oehler, at 1 ff,; Kohler, at 1; Rosswog, at 23 f.; Per Falk, at 23 f.; Bassiouni & Nanda, Vol. I, at 8 f.

[102] See *supra* p. 317 ff.

[103] See *supra* p. 316 and 325.

[104] Foreign criminal laws are, however, not wholly ignored. Even if they are seldom directly applied, they are to a certain extent taken notice of. See e.g. Heiz, at 47 ff. and 85 ff.; F. Staubach, Die Anwendung ausländischen Strafrechts durch den inländischen Richter (Bonn, 1964); K. Cornils, Die Fremdrechtsanwendung im Strafrecht insbesondere bei der Auslegung rechtlich-normativer Tatbestandsmerkmale (Diss., Berlin, 1977).

[105] See e.g. Bassoouni & Nanda, Vol. II, at 17 ff.; Oehler, at 127 ff.; G. Mueller and E. Wise, International Criminal Law (New York, 1965); Brownlie, at 292 ff.; Harvard Research and Draft Convention, at 466 ff.; Schwartzenberger, A Manual of International Law, at 72 ff.; Restatement (2d) of Foreign Relations Law, §§ 17 ff.

Highly interesting contributions to the international discussion concerning terrorism, piracy, hi-jacking and related issues are presented by J. Sundberg in Lawful and Unlawful Seizure of Aircraft, I Terrorism: An International Journal 423 (1978) (also in SvJT 1978, p. 241: Laga och olaga tagande av luftfartyg); Unlawful Seizure of Aircraft, 6 Arkiv for Luftrett 1—78 (1978-79) (also in Revue internationale de droit pénal 1976, p. 315: La Capture Illicite d'Aéronefs). In the Swedish language, see further Tre kapare och deras bidrag till den allmänna rättsläran, Tidsskrift for rettsvitenskap (TfR) 1973, p. 395; Den ryska klockan, Om krigsfångar och deras straffrättsliga ansvar i ljuset av de finska räfsterna och de sovjetiska dissenserna i Nürnberg, Tidskrift i sjöväsendet 1973, p. 69 (Institutet för offentlig och internationell rätt, No. 37, Stockholm 1973).

[106] As to the principle of passive personality, see e.g. the Restatement (2d) of Foreign Relations Law, Section 30 (2); Harvard Research and Draft Convention, at 579; Mann, Studies, at 78 f.

[107] The first principle, which thus is territorially oriented, would if broadly interpreted wholly eliminate the necessity of the fourth: After all, the fourth principle (the protective principle)

concerns crimes of a certain nature that are directed against the state itself and consequently affect the state in some way (its security, honour, stability, etc.), effects that occur within the territory of the state. Even the fifth principle (the universality principle) may be said to be territorially oriented, provided the concept of territoriality is broadly construed: The universality principle concerns the interest of a state in having certain serious crimes proceeded against, and that interest can be localized to the territory of the state. (In this way, the second and third principle, both based on personal allegiance, may also be considered as affecting territorial interests — the interest of the state to rule and protect its nationals). *Cf.* Hegler, at 31 ff.; Heumann, at 129 f. But this is surely not the way the territorial principle is to be construed. The principle concerns crimes committed within the territory of the state, and even if it is at times an arduous task to localize the crime — where it is commenced, where completed or consummated — it can hardly be suggested that the crime shall be localized to the state which has an interest in having the criminal punished. That would be but saying — provided legislative measures reflect state interest — that as soon as a state has regulated the matter in law, the crime can be localized to that state irrespective of the connecting factor chosen, in other words, that all connecting factors, that are such by law, will pass the international law test.

A prerequisite for the maintenance of the whole system of principles in this field, would therefore be that the territorial principle is not too broadly construed.

[108] *Cf.* Rudolf, at 17 f.; Kaiser, at 12.

[109] See the discussion *supra* chapter X.

[110] *S.S. Lotus,* P.C.I.J. 1927, Series A, No. 9, at 20.

[111] *Id.,* at 22 f. Judge Moore, dissenting (*id.,* at 68 f.), took a firm stand however: "It is a admitted principle of international law that a nation possesses and exercises within its own territory an absolute and exclusive jurisdiction, and that any exception to this right must be traced to the consent of the nation, either express or implied". (*Id.,* at 68). *Cf.* Moore in A Digest of International Law, Vol. II, at 225 ff. (§ 200) (Washington, 1906); Westlake, International Law, at 260 ff. and 273 ff. (2d ed. Oxford, 1924); Lawrence, The Principles of International Law, at 199 and 221 f. (§§ 93 and 104) (7th ed., London, 1927)

See further Brierly, The "Lotus" Case, 44 L. Q. Rev. 154, at 155 (1928); Haight, International Law and Extraterritorial Application of the Antitrust Laws, 63 Yale L.J. 639 (1954); Wendt, at 54 ff.; Mann, Studies, at 71 ff.; Rebbe, at 40 ff.; Oehler, at 130 and 151; Kohler, at 92 ff. and 109; v. Bar, at 210; Kelsen, Principles of International Law, at 210 f.; v. Martens, at 362 ff.; Drost, Völkerrechtliche Grenzen, at 113 ff.

[112] See e.g. Bruns, Völkerrecht als Rechtsordnung. See further Mann, Studies, at 75 ff.

[113] See *supra* chapter XI.

[114] *Cf.* Ross, at 213, 215 ff. and 240 ff.; Berber, at 181 and 185; Wengler, at 933 ff.; Verdross, Völkerrecht, at 266 ff. and 316 ff.; Brownlie, at 109 and 291 ff.; Vogel 112 f.; Oehler, at 151 f.; Koehler, 15 and 89; Rosswog, 173; Kelsen, Principles of International Law, at 210; Wegner, at 109 ff. and 117.

[115] See *supra* chapter XIV.

[116] See *infra* chapter XVI.

[117] Hegler, at 34.

[118] *Id.,* at 44 f. *Cf. supra* n. 107.

[119] *Id.,* at 175 f.

[120] See e.g. Meessen, at 101; Mann, Studies, at 36 and 74 f.; Wengler, at 933 ff.; Bär, at 327 ff; Verdross, Völkerrecht, at 319 f.; Brownlie, at 291 and 302; Dahm, at 256; Rudolf, at 7 and 44; Jennings/Mann, The International Jurisdiction of States, ILA 1966, at 109.

[121] Meessen, at 101.

[122] Mann, Studies, at 74.

[123] *Cf.* Meessen, at 104.

[124] Meessen, at 94 ff., in particular at 98 ff.; Rehbinder in Immenga/Mestmäcker, Kommentar zum GWB, at 1880 (sections 24—26).

[125] Mann, Studies, at 34 ff. and 82 ff.

[126] Meessen, at 98. *Cf.* Rehbinder, *supra* n. 124, at 1880 (section 24).

[127] Meessen, at 98.

[128] The sentiment of solidarity is by Oehler (at 144), among others (*cf.* Drost, Völkerrechtliche Grenzen, at 114 f.), the rationale (foundation) of the principle of active personality. Since most states, according to Oehler, do not extradite their own nationals to other states for crimes committed abroad, they themselves take action against the criminal on grounds of international solidarity.

[129] Meessen, at 99 (footnote omitted). Meessen is here referring to Rehbinder, Extraterritoriale Wirkungen des deutschen Kartellrechts, at 47 ff., particularly at 79 ff.

[130] Meessen, at 99 f. With respect to the concepts "loyalty" and "solidarity", reference is made, *inter alia,* to Oehler, at 143.

[131] Meessen, at 101. *Cf. supra* on Meessen's "Rechtsfindungsmethode" p. 401 ff.

[132] See *supra* n. 128.

[133] See Meessen, at 65.

[134] See e.g. Oehler, at 133 ff.

[135] *S.S. Lotus,* P.C.I.J. 1927, Series A, No. 9.

[136] *Id.,* at 20 (emphasis added).

[137] See Oehler, at 57 ff. and 59 f. (with further references).

[138] *Id.,* at 66 and 72.

[139] See *supra* p. 467 ff.

[140] See further Oehler, at 113 ff.

[141] See further Oehler, at 120 ff.

[142] Glatzel, at 13 ff.

[143] See e.g. Brownlie, at 69 f.; Kelsen, das Problem der Souveränität, at 130 f.; Wengler, at 36 ff.

[144] See Glatzel, at 16.

[145] Mayer, Völkerrecht und internationales Strafrecht, 20 Juristenzeitung 609, at 610 (1952).

[146] *Id., Cf.* Kohler, at 90 f., 94 ff. and 97.; Jeschek, Zur Reform der Vorschriften des STGB über das internationale Strafrecht, Int. Recht und Diplomatie (1956), at 75 ff.

[147] Rosswog, at 172 ff.

[148] Jescheck, *supra* n. 146, would go further and have the law of state A to yield to the law of state B in case 2: "Aber selbst ein Verhalten, das im Ausland lediglich erlaubt ist, kann den Angehörigen eines fremden Staates, sobald sie den Boden jenes Landes betreten (abgesehen von den Fällen des Schutzprinzips) schwerlich unter Strafdrohung verboten werden, denn dies würde einen Eingriff in die fremde Souveränität insofern bedeuten, als jeder Staat darauf bedacht sein muss, sicherzustellen, dass sich auf seniem Gebiet Jedermann der gegebenen Rechte und Freiheiten bedienen kann." (*id.*, at 84).

[149] Rosswog, at 181, quoting Jennings, Extraterritorial Jurisdiction and the United States Antitrust Laws, 33 B.Y. Int. L. 146, at 151 (1957).

[150] See e.g. Oehler, at 415 ff. and 461 ff.; Akehurst, Jurisdiction, at 156 and 168 f.; Wendt, at 98 ff.; Glatzel, at 151 ff.; Restatement (2d) of Foreign Relations Law, §§ 37—40; Moore, at §§ 200 ff.; Dahm, Völkerstrafrecht, at 25 ff.; Wengler, at 941 ff.; Donnedieu de Vabres, Traité de Droit criminel (3d ed., 1947), at § 1614; Verdross, Völkerrecht, at 24.

[151] Oehler, at 134 ff. and 384 f.

[153] *Id.*, at 138 and 415 f.

[154] *Id.*, at 136 and 144. Also see *id.*, at 133 and 135.

[155] Section 30(2). See particularly Illustration 5. *Cf.* Harvard Research and Draft Convention, at 579.

[156] Harvard Research and Draft Convention, at 543.

[157] *Id.*, at 557.

[158] *Id.*, at 616.

[159] See e.g. Rosswog, at 149 ff.; Glatzel, at 143 ff.; Wendt, at 98 ff.; Oehler, at 425 ff., 458 ff., 486 ff. and 551 ff.; Dahm, Völkerstrafrecht, at 63 f.; Jescheck, Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht, at 231 ff. (Bonn, 1952). See further *infra* chapter XVI.

[160] See further e.g. Wendt, at 105 f.; Meessen, at 235.

[161] *Cf.* Rehbinder, at 67; Schlochauer, at 46; Brewster, at 299; Seidl-Hohenveldern, Völkerrechtliche Grenzen bei der Anwendung des Kartellrechts, Aussenwirtschaftsdienst des Betriebsberaters, (1971), at 56; Katzenbach, at 1145 ff.; Dahm, at 260.

[162] See e.g. Riedweg, The Extra-Territorial Application of Restrictive Trade Legislation — Jurisdiction and International Law, ILA 1964, at 357, especially at 385 (The Parochial Character of Restrictive Trade Legislation).

[163] As an example of a tendency in the opposite direction, see e.g. Note, The Capacity of a Foreign Government to Bring an Action for Treble Damages Under the Federal Antitrust Laws, 44 Geo. Wash. L. Rev. 287 (1975—76).

[164] *Cf.* Meessen, at 98; Haymann, at 298 f.; Hermanns, at 24 f.; Krumbein, at 111; Rahl, at 404 f.; Brewster, at 287; Jennings, Nord. Tids. I.R., at 209 ff.; Mann, Studies, at 83 and 97; Rehbinder, at 78 f,; Barnard, at 102. See as to international cooperation, *infra* chapter XVII.

[165] See e.g. Haymann (at 299) to whom the thought occurs that the principle of territoriality

should be strictly construed as not to allow an objective application; a thought, however, which he subsequently abandons.

[166] See *supra* p. 132 ff.

[167] *Cf.* Krumbein, at 83 f.; Schwartz, at 239; Petitpierre, at 43 ff.; Haymann, at 57.

[168] See Zwarensteyn, at 46 ff.

[169] *Id.*, at 347 ff. *Cf.* Fugate (at 31), who stresses that the antitrust laws are criminal laws, but carry civil liabilities. Also see Fugate, at 42. Brewster (at 287) considers the antitrust laws to be embodied in a criminal statute. See further Smit, at 276 ff.; Haight, Antitrust Laws and the Territoriality Principle, 11 Vand. L. Rev. 27, at 30 (1957—58); Hale/Hale, at 502; Homburger, Rechtsgrundlagen der amerikanischen Gerichtsbarkeit über ausländische Gesellschaften in Antitrust-Prozessen, 18 Wirtschaft und Recht 269 (1956); Zur extraterritorialen Anwendung der Amerikanischen Antitrustgesetze, 54 Schweizerische Juristen-Zeitung (SJZ) 97, at 99 (1958). Also see *supra* n. 100, The Common Market competition law is generally regarded to be administrative in nature; see e.g. Kruithof, at 71 f.; Hug, The Applicability of the Provisions of the European Community Treaties Against Restraints of Competition to Restraints of Competition Caused in Non-Member States, But Affecting the Common Market, in Cartel and Monopoly in Modern Law, Vol. II, at 655 ff. (Karlsruhe, 1961).

[170] Zwarensteyn, at 67.

[171] *Id.*, at 77.

[172] Rehbinder, at 57: "Wie fast alles Wirtschaftsrecht lässt sich das Gesetz gegen Wettbewerbsbeschränkungen als ganzes weder dem Verwaltungsrecht, noch dem Privatrecht, noch dem Strafrecht zuordnen. Es inthält vielmehr Elemente aller drei Rechtsgebiete." Also see the following page.

[173] *Cf.* G. van Hecke, Le droit anti-trust: Aspects comparatifs et internationaux, 106 Recueil des Cours 257 (1962 II); Schlochauer, at 43 ff. *But* see e.g. H. Kronstein, Crisis of "Conflict of Laws, 37 Geo. L.J. 483, at 483 ff. (1948—49); Neue amerikanische Lehren zum internationalen Privatrechts im Lichte des amerikanisch-europäischen Kartellkonflikts, Festschrift für Martin Wolff, at 225 (Tübingen, 1952); Conflicts Resulting from the Extraterritorial Effects of the Antitrust Legislation of Different Countries, 20th Century Comparative and Conflicts Law, Legal Essays in Honor of Hessel E. Yntema, 432, at 438 (Leyden, 1961); H. Katz, Extraterritorial Effect of Injunctions in Antitrust Cases with Respect to the Federal Republic of Germany, ABA Section of Intrnational and Comparative Law, Proceedings 1957, at 24 ff. Both Kronstein and Katz seem to regard antitrust law primarily as *private* law.

[174] This can easily be controlled by examining, for instance, Kalinowski, World Law of Competition (Matthew & Bender).

[175] Zwarensteyn, at 77.

[176] Jennings, Extraterritorial Jurisdiction and the United States Antitrust Laws, 33 B.Y. Int. L. 146, at 147 (1957). *Cf.* Haight, International Law and Extraterritorial Application of the Antitrust Laws, 63 Yale L.J. 639, at 640 (1954): "The territorial principle is applicable to Sherman Act prosecutions because these proceedings are penal. The distinctions which prevail in the United States between criminal and civil proceedings under the Sherman Act... are not relevant in determining whether the proceedings are penal in the international law sense." (Footnote omitted); Mann, Studies, at 82.

[177] Schwartz, at 268 (footnote omitted).

[178] Krumbein, at 80.

[179] *Id.*, at 83 f.

[180] Hermanns, at 53 f: "Auf der anderen Seite werden auch Verwaltungsakte in Ausübung der aus der Souveränität folgenden Rechte erlassen. In ihrem Ursprung unterscheiden sich also strafgerichtliche Massnahmen nicht von denen der Verwaltung. Es wird deshalb in der Literatur oftmals nicht Zwischen Verwaltungsrecht und Strafrecht unterschieden." (Footnote omitted). *Cf.* in result Haymann, at 284; Meessen, at 166 ff.; Die New Yorker Resolution der International Law Association zu den völkerrechtlichen Grundsätzen des internationalen Kartellrechts, Aussenwirtschaftsdienst des Betriebsberaters (1972) 560, at 563; Kahn-Freund, ABA Section of International and Comparative Law, Proceedings 1957, at 37. Also see Wengler, at 936 ff.; Dahm, at 261 ff.; Verdross, Völkerrecht, at 319.

[181] See e.g. Schwartz, Applicability of National Law on Restraints of Competition to International Restraints of Competition, in Cartel and Monopoly in Modern Law, Vol. II, at 701 ff. and especially at 707 (Karlsruhe, 1961).

[182] Yet, for the reason that the "Ordnungswidrigkeiten", as defined in the German antitrust law, imply a mere loss of capital and the imposition of a corrective measure, Rehbinder (at 87 f.) excludes these from the ambit of the jurisdictional principles of criminal law, explaining: "Jedoch dürfte es auch für die völkerrechtliche Beurteilung einen Unterschied machen, ob ein Staat sein Kartellrecht mit Kriminalstafen und in Grenzfällen sogar mit Freiheitsstrafen durchsetzt, oder ob er eine Form der Sanktion wählt, die lediglich zu einem Vermögensverlust führt und der Täter im übrigen nur zur Ordnung ruft. Gerade wenn man als Begründung für schärfere völkerrechtliche Anforderungen auf dem Gebiete des internationalen Strafrechtes das Wesen der Strafe als eines Schwerwiegendes Eingriffes in die persönliche Sphäre des Betroffenen anführt — und eine andere Begründung lässt sich wohl kaum finden — so erscheint es wenig folgerichtig, das Wesen der Geldbusse als *schwächere* Reaktion des Staates auf *geringeres* Unrecht zu ignorieren oder als konstruiert abzutun." (Footnote omitted). *Cf.* Schlochauer, at 54 f.

[183] *Cf.* Akehurst, Jurisdiction, at 190 f.

[184] See e.g. Kruithof, at 71 f.

[185] Hermanns, at 52.

[186] *Cf.* Akehurst, Jurisdiction, at 191. Akehurst, however, makes a reservation with regard to injunctions sought by a private party, by reason only of the fact that it is sought by a *private* party. This again is a misconception. From the viewpoint of international law, it is wholly immaterial *who* seeks the remedy; it is the *effect* of the remedy that matters. *Cf.* Haight, *supra* n. 176, at 640 f.

[187] 15 U.S.C.A. § 15 (1976).

[188] *Chattanooga Foundry & Pipe Works v. City of Atlanta,* 203 U.S. 390, at 396 f. (1906).

[189] Black's Law Dictionary (5th ed.), "Damages".

[190] Prosser, Law of Torts (4th ed., St Paul, Minn., 1971), at 9.

[191] See damages sought in the *Westinghouse Uranium Litigation, supra* p. 129 ff. (2 billion dollars, trebled).

[192] See Prosser, *supra* n. 190, at 11, with further references (n. 85—86). See further J.M. Clark, Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis, 60 Minn. L. Rev. 379 (1976); H. Goldschmid, An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies, Nov. 17,

1972, reprinted in 2 Administrative Conference of United States, Recommendations and Reports 896 (1972); Charney, The Need for Constitutional Protections for Defendants in Civil Penalty Cases, 59 Corn. L. Rev. 478 (1974); C.P. Murphy, Money Penalties — An Administrative Sword of Damocles, 2 Santa Clara Lawyer 113 (1962). Also see M. Waline, Traité Elémentaire de Droit Administrarif (Paris, 1959), at 512 ff. Treble damages were considered penalties in *Rogers v. Douglas Tobacco Bd. of Trade,* 244 f. 2d 471, at 483 (5th Cir. 1957) and in *Haskell v. Perkins,* 28 F. 2d 222 (D.N.J. 1928).

[193] See H.L.A. Hart, Punishment and Responsibility, at 4 f. (1968); H. Packer, The Limits of the Criminal Sanction, at 31 (1968). Also see Jessup, at 36 ff.

[194] Krumbein, at 83 f. *Cf.* 1. Hunter, Specific Application to Anti-Trust Matters of General Principles of International Law Governing the Assumption and Exercise of Jurisdiction, ILA 1970, at 221 f. Swarensteyn's very formal reasoning is not to be followed; see Swarensteyn, at 50: "The fact that the remedy referred to consists of damages (be they treble or actual), signifies that we are dealing with a *tort action.* The significance of this will become clear when we are dealing with the foreign aspects of antitrust enforcement, because torts belong to the area of private law." (Footnote omitted).

[195] See, however, Harvard Research and Draft Convention, at 468 f.: "'Punish' includes both the execution of sentence and the remission of penalty. The concept of punishment does not include those forms of coercion, such as punitive damages or imprisonment for debt, which are provided primarily to facilitate civil reparation to injured individuals." Still the question is whether treble damages in antitrust law are punitive damages "primarily" intended to "facilitate" civil reparation. Also see Akehurst, Jurisdiction, at 191.

[196] As regards the terminology, see *supra* chapter VI.

[197] See Harvard Research and Draft Convention, at 469. "[The term crime] never includes mere civil wrongs which may be expiated by restitution or reparation to the injured individual."

[198] See e.g. Akehurst, Jurisdiction, at 190; van Hecke, *supra* n. 173 at 302 f. Against is Krumbein, at 81.

[199] Akehurst, at 191.

[200] See e.g. Dahm, at 255; Wengler, at 935; Neumeyer IV, at 436; Niederer, at 105 ff.; Neuhaus, at 32; Wolff, at 8 ff.

[201] Mann, Studies, at 47. Also see *id.,* at 48, n. 4.

[202] Bär (Kartellrecht und Internationales Privatrecht) advocates the thesis, however, that municipal law courts should apply foreign antitrust laws. *Cf.* van Hecke, *supra* n. 173, at 337; Heidemann, at 85; Zweigert, at 134; Habscheid, at 62; B. Goldman, Les champs d'application territoriale des lois sur la concurrence, 128 Recueil des Cours 631, at 722, 726 (1969 III); H-J. Mertens, Ausländisches Kartellrecht im deutschen internationalen privatrecht, 31 Rabels Zeitschrift für ausländisches und internationales Privatrecht 385, at 409 (1967). *But* see Meessen, at 33 f.; Sandrock, at 33; Mann, Conflict of Laws and Public Law, 132 Recueil des Cours 107, at 157 ff. (1971 I).

[203] *But* see the Restatement (2d) of Foreign Relations Law, Section 18, which prescribes a jurisdictional rule applicable to both crimes and torts without differentiation. *Cf.* Rehbinder, at 89 f.; Jessup, at 65. See further, *supra* n. 63, 180 and 194 with references to authorities who regard the antitrust laws as a homogeneous body of law.

[204] Rehbinder, at 67 f., 81 f. and 89.

[205] *Id.*, at 81 f. and 89.

[206] *Id.*, at 67 ff.

[207] *S.S. Lotus,* P.C.I.J. 1927, Series A, No. 9, at 19.

[208] *Id.*, at 22. *Cf. supra* p. 490, n. 111.

[209] *Id.*, at 21.

[210] Haymann (at 297, also see at 279 ff.) is wrong when he claims that the Court in the *Lotus* case denied that criminal jurisdiction was governed by a different principle.

[211] Nor can Rehbinder find support, as he claims (at 68, n. 7) in the teachings of Verdross — see Verdross, Völkerrecht, at 319 — or in those of Jessup, at 41 ff.

[212] See Sandrock, at 6 ff.

[213] *Cf. S.S. Lotus, supra* n. 415, at 20.

[214] *Cf.* Jennings, Extraterritorial Jurisdiction and the United States Antitrust Laws, 33 B.Y. Int. L. 146, at 148 (1957).

[215] See e.g. Vogel, at 144 ff.

[216] See e.g. Brownlie, at 4 ff.; Ross, at 103 ff.; Berber, at 40 ff.; Dahm, at 28 ff.; Verdross, Völkerrecht, at 137 ff.; O'Connell, at 15 ff.; Wengler, at 174 ff.; Brierly, The Law of Nations, at 59 ff.; O. Bring, at 82 ff.; Greig, at 17 f.; Gihl, Huviddragen, at 22 f. and 28; Schwarzenberger, A Manual, at 26 f.; Akehurst, Custom, at 14 ff. For further references, see Berber, at 40 ff.

[217] See Kelsen, Théorie du droit international coutumier, Revue intern. de la théorie du droit (1939), at 253 f.; Principles of International Law, at 307 ff. *Cf.* Kopelmanas, Custom as a Means of the Creation of International Law, 18 B.Y.Int. L. 151 (1937); Guggenheim, at 46; Traité de Droit International Public, Vol. I, at 103 ff. (2d ed. Geneve, 1967). *But* see Kelsen, General Theory of Law and State, at 114 (1945). See further Akehurst, Custom, at 32 ff.

[218] See *supra* n. 217.

[219] Ross, at 105.

[220] See e.g. D'Amato, at 66; Thirlway, at 47; Kelsen, Théorie, *supra* n. 217; General Theory of Law and State, at 114.

[221] Cheng, United Nations Resolution on Outer Space: 'Instant' International Customary Law?, 5 Ind. J. Int. L. 23, at 45 (1965). *Cf.* Kelsen, Théorie, *supra* n. 217, at 263.

[222] See this view: Verdross, Völkerrecht, at 138 (but see *infra* n. 223); Ch. De Visscher, La codification du droit international, 6 Recueil des Cours 325, at 349 ff. (1925 I); Tunkin, Coexistence and International Law, 95 Recueil des Cours I, at 16 f. (1958). See further Akehurst, Custom, at 34 f.; D'Amato, at 66 ff.

[223] Thirlway, at 53 ff. (Footnote omitted). *Cf.* Verdross, Entstehungsweisen und Geltungsgrund des universellen völkerrechtlichen Gewohnheitsrechts, 29 Z.a.ö.R.V. 635, at 640 (1969): "Es ist aber durchaus möglich, dass zu einer Übung allmählich die Überzeugung hinzutritt, eine im Werden befindliche Norm zu beobachten, wodurch schliesslich durch ihre wiederholte Anwendung das Bewusstsein entsteht, zu einem solchen Verhalten verpflichtet zu sein, da es nun von den anderen Staaten erwartet wird. Das scheint mir der einzige Ausweg zu sein, um aus der gerade erwähnten Sackgasse herauszukommen, in die sich die herrschende Lehre verirrt hat." (Footnote omitted).

[224] *Cf.* Thirlway, at 47 ff.; Akehurst, Custom, at 36 ff.; Verdross, *supra* n. 223.

[225] D'Amato, The Concept of Custom in International Law.

[226] *Id.*, at 75.

[227] D'Amato gives four specific requisites:
1) There must be a characterization of "legality" in order to distinguish law from none-law.
2) The "legality" must be of international, not domestic, law, *i.e.*, a matter falling within the sphere of international law.
3) In the case of abstentions, the articulation must characterize the abstention as legally required.
4) The acting or abstaining state must have reason to know of the articulation of the legal rule.

[228] D'Amato, at 86 f. and 91 ff.

[229] See e.g. Akehurst, Custom, at 1 ff.; O. Bring, at 84 ff. and 88 f.; in some respect Thirlway, at 49 ff.; M. Bos, at 27 ff.

[230] D'Amato, at 88.

[231] See C. Parry, The Sources and Evidences of International Law, at 65 (1965); Lissitzyn, International Law Today and Tomorrow, at 35 ff. (New York, 1965); McGibbon, Customary International Law and Acquiescence, 33 B.Y. Int. L. 115 (1957). See further Akehurst, Custom, at 3 f. Also see Simma, at 45 ff.

[232] D'Amato, at 89.

[233] See further Akehurst, Custom, at I ff.; O. Bring, at 86 ff.

[234] See e.g. O. Bring, at 88 f.

[235] See Ross, at 105.

[236] Thirlway, at 57 f.

[237] Berber, at 45. *Cf.* P. Müller, at 40 ff.

[238] Berber, at 50.

[239] *Id.*, at 50 f. *Cf.* Kunz, The Nature of Customary International Law, 47 Am.J. Int. L. 662, at 668 (1953).

[240] "Man kann die Existenz von Völkergewohnheitsrecht also niemals unter Berufung auf die Existenz von Landesrecht beweisen, sondern immer nur durch den Nachweis konstanter zwischenstaatlicher Anwendung plus 'opinio necessitatis'. Es mag für den völkerrechtlichen Rechtshistoriker interessant sein herauszufinden daß sie ursprünglich als Regeln galten; für die praktische Anwendung des Völkerrechts ist dies ohne Bedeutung." Berber, at 50 (footnote omitted). *Cf.* Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals, at 23 f. (London, 1953); Simma, at 50 ff.

[241] Brownlie, at 5.

[242] Akehurst, Custom, at 9 (see references in n. 8).

[243] Gihl, The Legal Character and Sources of International Law, 1 Scandinavian Studies in Law 1, at 79 (1957). Also see Ross, at 103 f.; Wengler, at 175 f.; Fenwick, at 75 f.; Greig, at 24; Rosswog, at 59; O. Bring, at 87 ff.; Schwarzenberger, A Manual, at 26; Rousseau, Principes de droit international public, 93 Recueil des Cours 369, at 482 (1958 I); Lauterpacht,

Règles générales du droit de la paix, 62 Recueil des Cours 95, at 160 (1937 IV); Soerensen, Les Sources du droit international, at 90 ff. (Copenhagen, 1946); Makarov, Allgemeine Lehren des Staatsangehörigkeitsrechts, at 93 (Stuttgart, 1962); Anzilotti, Lehrbuch des Völkerrechts, at 54 (Berlin, 1929); Kopelmanas, *supra* n. 217, at 147; Kunz, *supra* n. 239; Vogel, at 146, who writes: "Eine übereinstimmende innerstaatliche Gesetzgebungspraxis kann zwar sowohl als *Beweismittel* für die *Existenz* eines entspechenden Völkergewohnheitsrechtes als auch als Grundlage für die Entstehung neuen Völkergewohnheitsrechts dienen".

[244] See e.g. Brownlie, at 5: "Obviously the value of these sources varies and much depends on the circumstances. Moreover, internal law sources require careful handling. A statute may create powers which are not exercised to their greatest extent in actual practice." *Cf.* Akehurst, Custom, at 8 ff. (with further references).

[245] Harvard Research and Draft Convention, at 445.

[246] *Id.*

[247] See generally Oehler, at 127 ff.; Bassiouni & Nanda, Vol II, at 17 ff.

[248] *But* see Wengler, at 941.

[249] See *supra* p. 488 ff.

[250] Harvard Research and Draft Convention, at 446 (emphasis added).

[251] *Id.*, at 475.

[252] The first part of this study should have so demonstrated.

[253] *S.S. Lotus,* P.C.I.J., 1927, Series A, No. 9, at 28.

[254] *North Sea Continental Shelf Cases,* I.C.J. Reports 1969, p. 3, at 45. (Here the Court quoted the *Lotus* case, see *supra* n. 253).

[255] *Id.*, at 45 f.

[256] See e.g. Brownlie, at 7 ff. (concurring in principle); O'Connell, at 17 f.; Akehurst, Custom, at 10; Dahm, at 32; Gihl, *supra* n. 243, at 79 ff.; Ross, at 104 f.; Greig, at 25 ff.; Schwarzenberger, A Manual, at 26; Vogel, at 145 (with further references); Tunkin, Theory of International Law, at 116 f. (1974); McGibbon, Customary International Law and Acquiescence, 33 B.Y. Int. L. 115, at 127 f. (1957); Fitzmaurice, General Principles and Sources of Law, 30 B.Y. Int. L., at 68 (1953). It is believed that D'Amato too would concur, in principle, within the scope of his theory of articulation, see D'Amato, at 75 (*in fine*), 82 (first paragraph) and 84.

[257] *Cf.* Vogel, at 145 f.

[258] *North Sea Continental Shelf Cases,* I.C.J. Reports, 1969, p. 3, at 47 f. *Cf. id.*, section 55.

[259] See *id.* sections 47—56 and 100.

[260] With respect to these specific matters, the case has been criticized, see e.g. Friedmann, The North Sea Continental Shelf Cases, 64 Am.J. Int. L. 229 (1970); K. Marek, Le problème des sources du droit international dans l'arrêt sur le plateau continental de la mer du nord, Revue belge de droit international (1970), at 44.

[261] *But* see Meessen (at 65 ff.) who describes the reasoning and result as a "Fortentwicklung" of law and a "rechtsschöpferische Prozess". *Cf. supra* p. 401 ff.

[262] *Cf.* Meessen's expression "der normative Kerm" (normative core), at 101.

[263] See e.g. Oehler, at 407 ff.

[264] Oehler (at 414) mentions one instance from 1852. Also see Wendt, at 88.

[265] See as to the *Cutting* case, Moore, at 228 ff. (§ 201) and the *Costa Rica-Packet,* see further Wendt, at 91 f. For further details see e.g. Rosswog, at 69 ff. and Wendt, at 88 ff.

[266] See e.g. Rosswog, at 172 ff.

[267] See *supra* chapter I, section 7.

[268] See *supra* p. 496 ff.

[269] *Cf.* (in result) Drost, Völkerrechtliche Grenzen, at 139 f. (with further references).

[270] *Cf. North Sea Continental Shelf Cases,* I.C.J. Reports 1969, p. 3, at sec. 83.

[271] See e.g. Rosswog, at 158 ff.; Dahm, at 194 ff. and 260 f.; Stoephasius, at 91 and 106 ff.; Rehbinder, at 82 and in Immenga/Mestmäcker, Kommentar zum GWB, at 1881; Hermanns, at 37 ff. but see *infra* n. 273; Bär, at 327 ff.; Vogel, at 350; Homburger and Jenny, at 54; Mann, Studies, at 37; Jennings, Extraterritorial Jurisdiction and the United States Antitrust Laws, 33 B.Y. Int. L. 146, at 153 (1957); Haymann, at 314 ff.; Oppermann, Berichte 1973, at 94 f. (contribution to discussion); Scheuner, *id.,* at 97 f.; Akehurst, Jurisdiction, at 188 ff.; Sandrock, at 6 ff.; *But* see P. Müller, at 78 ff.; Rudolf, at 19 ff.; Wengler, at 392 ff.; Berber, Die Rechtsquellen des internationalen Wassernutzungsrechts, at 138 (1955); Schwarzenberger, The Fundamental Principles of International Law, 87 Recueil des Cours 305 (1955 I).

[272] Typical is the reasoning of Rehbinder (at 82): "Findet sich die Begrenzung der staatlichen Strafkompentenz nicht im Völkergewohnheitsrecht, so wird man sie allein in allgemeinen Rechtsgrundsätzen, namentlich im Verbot des Missbrauches der Staatsgewalt, zu suchen haben. Sämtliche Autoren, die mit der vorliegenden Untersuchung eine völkergewohnheitsrechtliche Gebundenheit der staatlichen Strafkompetenz verneinen, haben zu der von ihnen aus dem Gesichtspunkt der internationalen Ordnung für erfordelich gehaltenen Begrenzung diesen allgemeinen Rechtsgrundsatz herangezogen." (Footnote omitted). *Cf.* Dahm, at 260.

[273] See Hermanns, however, who perceives limits on jurisdiction and invokes the abuse of rights theory with respect to abuses within the set limits; see Hermanns, at 37 ff. Somewhat in the same direction, Akehurst, Jurisdiction, at 188 ff.

[247] Mann, Studies, at 37 (footnote omitted). *Cf.* Dahm, at 260; Haymann, at 314 f.; Rehbinder, at 82; Bär, at 327 f.; Homburger and Jenny, at 54 f.; Sandrock, at 8 ff.; Mosler, Berichte 1973, at 87 (contribution to discussion). Jennings, *supra* n. 271, at 153, Akehurst, Jurisdiction, at 189 and Stoephasius, at 106 speak of "legitimate interest" or "berechtiges Interesse".

[275] See e.g. Rudolf, at 19 ff. P. Müller (at 78 ff.) denies the existence of an abuse of rights theory in this field of law and, instead, derives the genuine link theory from the "generally accepted" principle of *bona fides* (see at 79 f.). See further *supra* n. 271 under "*but* see". Also see Kiss, Berichte 1973, at 98 ff. (contribution to discussion) and Rudolf, *id.,* at 112 f.

[276] See Meessen, at 104 f., 108 and 199 f. *Cf.* Mosler (slightly in the same direction), Berichte 1973, at 86 f. (contribution to discussion).

[277] The abuse of rights theory, on the other hand, concerns the actual exercise of jurisdiction, which the stats basically have a right to.

[278] *Cf.* the Restatement (2d) of Foreign Relations Law, §§ 8, 18 and 40.

[279] See Meessen, at 87 f., entirely followed by Stürmer.

[280] Meessen, at 88 f.

[281] Meessen, 199 f. and 206. *Cf.* J-D. Roulet, Le caractère artificiel de la théorie de l'abus de droit en droit international public, at 56 (Neuchâtel, 1958); B.O. Iluyomade, The Scope and Content of a Complaint of Abuse of Right in International Law, 16 Harv. Int. L.J. 47, at 48 f. (1975).

[282] See e.g. Rosswog, at 164; Dahm, at 197. This lies also in the term "legitimate interest"; see Jennings, *supra* n. 271, at 153; Mann, Studies, at 36 f. *Cf.* Stoephasius, at 106 ("berechtiges Interesse") Bär, at 329 ("achtbares Interesse").

[283] See *supra* n. 281.

[284] Rosswog's argument (at 161) is not convincing in this context.

[285] See the French case referred to by Iluyomade, *supra* n. 281, at 48 (Gleyses c. Berges, [1906] D. P. II 105, at 107 (Trib. Civ. Toulouse, 1905), where it was said (Iluyomade's translation): "Rights are limited not only in their extent, but also in their exercise, which is permitted only for certain purposes. There is, therefore, abuse of right if it is exercised with the intention of injuring another, and perhaps also if it is exercised without an interest or without lawful motives. Thus, there is a duty not to use one's rights in all their rigour when it is possible to protect one's interest without going to such an extremity."

Cf. Mosler, Berichte 1973, at 86 f. ("Selbstverständlich gewinnt es [the abuse of rights theory] erst Leben in der Anwendung auf den konkreten Fall". Contribution to discussion, at 87); Iluyomade, *supra* n. 281, at 74; Lauterpacht, Function, at 298 ff. and 304 ff.; The Development of International Law by the International Court, at 164.

[286] Meessen, at 199 (footnote omitted).

[287] *Id.*, at 106 ff.

[288] *Id.*, at 199 f. and 205 f.

[289] N. Politis, Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux, 6 Recueil des Cours I, at 77 ff. (1925 I). Also see G. Leibholz, Das Verbot der Willkür und des Ermessensmissbrauches im völkerrechtlichen Verkehr der Staaten, 1 Z.a.ö.R.V. 77 (1929).

[290] Berber, *supra* n. 271, at 141 ff.

[291] Art. 38(I)(c) in the Statute of the International Court of Justice.

[292] See Berber, *supra* n. 290; A. Cavaglieri, Règles générales du droit de la paix, 26 Recueil des Cours 311, at 543 f. (1929 I); Berber, at 72; Roulet, *supra* n. 281, at 106, 109 ff. (also see 14 ff. and 29 ff.); Schwarzenberger, *supra* n. 271, at 314 ff.

[293] Roulet, *supra* n. 281, at 56. *Cf.* Iluyomade, *supra* n. 281, at 48 f.; Meessen, at 199 and 206; Wengler, at 392 ff.

[294] See writers referred to, *supra* n. 292—293; Schlochauer, Die Theorie des abus de droit im Völkerrecht, 17 Zeitschrift für Völkerrecht 373, at 380 f., 387 ff. (1933); Schüle, "Rechtsmissbrauch", in Wörterbuch des Völkerrechts (Strupp-Schlochauer), at 69 ff.

[295] Brownlie, at 432. Also see Schwarzenberger, *supra* n. 271, at 308 ff.; Verzijl, Vol I, at 316 ff.; Schlochauer, *supra* n. 294, at 374 ff., 380 f.

[296] See e.g. Lauterpacht, Function, at 286 ff.; The Development of International Law by the International Court, at 162 ff.; Dahm, at 194 ff.; Verdross, at 132; Bin Cheng, General Prin-

ciples of Law as Applied by International Court and Tribunals, at 121 ff. (London, 1953); G. Fitzmaurice, General Principles of International Law Considered from the Standpoint of the Rule of Law, 92 Recueil des Cours I, at 50 and 54 f. (1957 II); Oppenheim-Lauterpacht, at 345 ff.; H. Rolin, Les principes de droit international public, 77 Recueil des Cours 305, at 402 f. (1950 II); Guggenheim, at 145; Spiropoulus, at 35 ff. Also see references made in *supra* n. 289. For case law, see e.g. Dahm, at 194 ff.; Brownlie, at 431. n. 3—6. Also see Rudolf, at 20, n. 21. With regard to the case law, Rudolf however comes to the following conclusion: "Angesichts der Tatsache, dass Ständiger Internationaler Gerichtshof bislang noch keinen einzigen Fall nach dem Rechsmissbrauchverbot entschieden haben und Inhalt und Modalität dieses Verbots kontrovers sind, wird man trotz der zahlreichen bejanden Äusserungen an der Existenz eines solchen völkerrechtlichen Verbots zweifeln müssen." Rudolf, at 21. For treaty provisions, see Iluyomade, *supra* n. 281, at 71 f.

[297] See references made in *supra* n. 271.

[298] See Dahm, at 195.

[299] See e.g. Dahm, at 197; Iluyomade, *supra* n. 281, at 79. See case law references in Hambro-/Rovine, The Case Law of the International Court, Vol. VI—A, at 185 f. (1967-70).

[300] See e.g. Mann, Studies, at 35 ff. (with further examples and references); Stoephasius, at 106; Bär, at 329; Homburger and Jenny, at 54; Haymann, at 314 ff.; Rehbinder 82 and in Immenga/Mestmäcker, Kommentar zum GWB, at 1881; Jennings, *supra* n. 271, at 153; Hermanns, at 38.

[301] Dahm, at 197.

[302] Rosswog, at 164. *Cf.* Politis, *supra* n. 289, at 86 ff.

[303] Kiss, L'abus de droit en droit international, at 185.

[304] Akehurst, Jurisdiction, at 189.

[305] Bär, at 334.

[306] Meessen, at 205. *Cf.* Rehbinder in Immenga/Mestmäcker, Kommentar zum GWB, at 1885.

[307] *Cf.* Dahm at 260 f.; Rehbinder, at 83 ff.; Rosswog, at 169 ff.; Bär, at 327 ff.; Haymann, at 314 ff.

[308] See e.g. Dahm, at 197 and 260; Bär, at 343 f.; Rosswog, at 166 ff.; Mosler, Berichte 1973, at 86 f.; Sandrock, *id.*, at 89: "Bei beiden Prinzipien nämlich handelt es sich zunächst einmal um blosse Richtlinien, die als solche einer unmittelbaren Anwendung überhaupt nicht fähig sind, sondern die, im anwendbar zu werden, vorher in einzelne Sachnormen konkretisiert werden müssen". Oppermann, *id.*, at 94 f.; Kiss, *id.*, at 99. (The four latter authorities are contributions to discussion); Haymann, at 315: "Eine generell-abstrakte Grenzziehung kann anhand dieser Kriterien wohl kaum erreicht werden." (Footnote omitted). And further: "[Z]weifelhaft ist, inwieweit generell-abstrakte Kriterien überhaupt wünschenwert sind, da sich die Frage eines Missbrauchs in jedem besonders gelagerten Einzelfall auf unterschiedliche Weise stellen kann." (Haymann, at 315, n. 6). Also see Rehbinder, at 90 f. and in Immenga/Mestmäcker, Kommentar zun GWB, at 1881.

[309] See e.g. Bär, at 332 ff. and 342 ff.; Rehbinder, in Immenga/Mestmäcker, Kommentar zum GWB, at 1881; Wildhaber, Berichte 1978, at 50 ff.; Mann, Studies, at 38.

[310] See e.g. Haymann, at 318 ff.; Dahm, at 261. *But* see Rosswog, with respect to international criminal law, at 169 ff.

[311] See e.g. Rehbinder, at 90 ff. and in Immenga/Mestmäcker, Kommentar zum GWB, at 1884 ff.; Haymann, at 316; Bär, at 332 ff.; Homburger and Jenny, at 55.

[312] See *infra* chapter XVI.

[313] See Meessen, at 101 ff. and 104 ff.

[314] See *supra* p. 496 ff.

[315] Meessen, at 151.

[316] See e.g. the protests lodged against United States practice, *supra* chapter I, section 7.

[317] See Meessen, at 65 and the following pages.

[318] See *supra* chapter XIV.

[319] Meessen, at 89 ff., especially at 93.

[320] *Id.*, at 104.

[321] That the requirement of a basis for jurisdiction adds little or nothing to conflicts-avoidance, Meessen himself recognizes (at 118 f.).

[322] Meessen, at 171.

[323] See e.g. the Swedish Competition Act of 1983, § 12, which provides that if it is required out of consideration of an international government agreement, action may be taken against restrictive business practices having harmful effects outside the country.

[324] See *supra* p. 496 ff.

Chapter XVI
The international law limits on the intraterritorial exercise of jurisdiction

1. The protection of state sovereignty — — The relevance of the principle of non-intervention (non-interference)

One of the most fundamental principles of intrnational law for the protection of state sovereignty is the principle of non-intervention. The principle connotes that a state is prohibited from intervening in the affairs of any other state. Well-known is the form in which the principle is expressed in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, adopted by the General Assembly of the United Nations on October 24, 1970:

"The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any state, in accordance with the Charter.

No state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements, are in violation of international law ... Every state has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another state."

An almost identical provision, with the exception of the last two lines, is embodied in Article 15 of the Charter of the Organization of the American States.[1]

In the doctrine of international law the principle of non-intervention is generally accepted as such. Widely accepted further is the function of the principle, that of protecting the states' right to independently control mat-

ters within the domestic sphere.[2] Protected here is a state's sovereignty or independence. However, the scope of the principle is controversial, as regards not only the extent of the protected area, but also, and more importantly, the question which state acts qualify as interventions.[3] For the present purpose — that of examining whether the principle has any relevance with respect to the exercise of intraterritorial jurisdiction in international antitrust law — the latter question seems to be the better starting point.

Assuming, as is commonly done, that — as a matter of terminology — all state conduct qualified as an intervention is illegal under international law,[4] the crucial question arises as to what is the minimum for intervention, or what is the maximum for mere (legal) influence? In a world of interdependence, any act of state may have repercussions within the territory of others. A minor politico-economic measure, taken in one state, may have world-wide consequences. The principle of non-intervention, of course, cannot cover every state act that generates effects abroad (which would be no more than an idle gesture). It is only when the degree of influence of a state's act upon other states reaches a certain minimum that international law regulation is called for (and can be effective).

The classical view, and what *Gerlach* in 1967 described as the prevailing[5] view, is that the principle of non-intervention covers only those state acts which influence other states by the threat or the use of force.[6] An expression frequently used among representatives of the classical view in defining "intervention" is "dictatorial interference" or "forcible intervention".[7] "Coercion", "threat of force" and naked "force" are the common elements. Characteristic is the definition supplied by *Lawrence-Winfield:*

"The essence of intervention is force, or the threat of force in case the dictates of the intervening power are disregarded... There can be no intervention without, on the one hand, the presence of force naked or veiled, and on the other hand, the absence of consent ...".[8]

That the use of force or threat of force is what gives a state act the quality of intervention, is also the opinion of *Verdross, Fenwick, Hyde, Stowell, Fawcett, Starke, Sibert, Becker* and *Haedrich,* to name only a few distinguished publicists.[9] The *substance* of this definition of the principle of non-intervention correspond to Article 2(4) of the United Nations' Charter, which provides that:

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state ...".[10]

It is obvious that the principle of non-intervention, as defined in this classically strict manner, has no relevance to the present study, whatever obscurities the definition may include. But the present trend in the international law doctrine points away from this strict definition. An increasing number of writers have broadened the coverage of the principle beyond the "threat or use of force" requisite. And this movement has given rise to the following terminology: "Intervention" is the forcible (dictatorial, coercive, etc.) interference in the classical sense; "interference" ("Einmishung") is also an illegal state act affecting the sovereignty (independence) of another state; "intercession" ("Interzession", "Beeinflussung", "Einflussnahme") is a legal state act of a merely "influential" character.[11] Accordingly, the crucial borderline, for our purposes, runs between the interference and the "intercession".

O'Connell's extension of the classical definition is very cautious. It includes acts impairing the authority of another state, intensive propaganda, the organizing of rebellion and equivalent acts more or less amounting to a direct and immediate threat to the security of the other state.[12] *Oppermann* too seems to recommend restrictivity.[13] *Jessup* goes somewhat further when he includes severe economic and financial measures.[14] And *Friedmann* suggests:

"There are ... many lesser forms of intervention, many of the products of modern technology and psychological warfare: radio propaganda, economic boycott, such as a participation in foreign economic aid. The most serious of these indirect forms of attack is probably the organized attempt by a foreign state to undermine another government by the establishment of power centres or political organizations inside that state designed to overthrow the government.[15]

Substantially in the same spirit, but with further examples (diplomatic action, recognition or non-recognition, granting of political asylum, etc.) are the conclusions reached by *Thomas* and *Thomas*.[16] The views of *Dahm, Wengler* and *Paschos* are also closely akin.[17]

The common fundamental idea seems to be that the principle of non-intervention shall cover not only the threat or use of force but all measures that constitute an equivalent degree of coercion or threat to the sovereignty or independence of the affected state. It emphasizes the effects (result) of a state act more than the particular act itself. In other words, there are many ways, besides the threat or the use of force, to reach the same result.

This is also *Gerlach's* point of departure when he attempts to define the minimum for the borderline "nach unten hin".[18] Subversive methods, diplomatic actions and economic measures may consequently also be re-

garded as interferences.[19] And, with regard to the economic measures, Gerlach argues that the coercive or forcible methods do not include all state acts that affect the independence of a state. There are other forms of interferences, especially the ways in which economic aid programs may be designed.[20] Propaganda may further constitute interference, says Gerlach, if it is very intense and if it causes, or may cause, a change of opinion in its addressees, which is contrary to the interests of the affected state.[21] But again he emphazises that the method has an effect equivalent to that achievable by the threat or the use of force.[22] Indeed, it is the fact that measures and methods other than the threat or the use of force may have equivalent effects which, according to Gerlach, necessitates a redefinition of the classical concept of intervention.

A somewhat more restrictive view has recently been advanced by *Dicke,* who, having analyzed the relevant state practice, reaches the conclusion that the trade embargo is not prohibited by international customary law,[23] nor is the use of economic aid programs prohibited as an instrument of politico-economic policy.[24]

In conclusion, thus, it seems that the classical definition of the principle of non-intervention has been refined to cover not only coercive or forcible interferences but other interferences as well having an equivalent effect — *i.e.,* seriously or immediately threatening the security of the affected state.[25] For the closer determination of the minimum required for interference, *Gerlach* furnishes further criteria. The determination must be based on the facts in the specific case. From there on the concept of "Sozialadäquanz" is decisive, a concept derived from municipal law and alleged by Gerlach to be a "general principle of law".[26] One of the more "concrete" elements in the concept of "Sozialadäquanz" is the examination of the relation between the means used and the end in view.[27] When neither the means nor the end constitute a violation of international law, the means may nevertheless be regarded as a violation, Gerlach says, if, objectively seen, it stands in an obvious disproportion to the goal or end.[28]

Whatever the validity and the concrete applicability of Gerlach's concept of "Sozialadäquanz" as a criterion for determining the minimum of interference, it is clear that neither Gerlach nor any of the other writers noted offer a definition of the principle of non-intervention that is broad enough to apply to international antitrust law. The principle of non-intervention therefore has no relevance to the present study. It is consequently surprising to find that *Meessen* invokes the principle in this field of law.[29] The principle of non-intervention, Meessen suggests, prescribes that a certain proportion shall exist between the intraterritorial exercise of jurisdiction

with extraterritorial effects (the mean) and the endeavour to prevent the occurrence of effects from anticompetitive conduct. This means that a state exercising jurisdiction has a duty to weigh its interests against the interests of the affected state(s), including a duty to take notice of foreign law. The principle of non-intervention is violated when the interests of the affected state outweigh the interests of the exercising state.

The essence of Gerlach's criterion for the determination of the minimum for interference is hereby introduced as a basis for the solution of jurisdictional issues in international antitrust law. At the same time, Meessen guards himself against the argument that the principle of non-intervention has a much too restricted applicability to cover even embargoes or boycotts and therefore must be even less applicable to the exercise of antitrust jurisdiction.[30] Still, the arguments contra are meagre and unconvincing. For even if one regards the exercise of antitrust jurisdiction as a mean that is incommensurate with an embargo or a boycott,[31] the effects of the means remain to be compared. The decisive issues are: what is achieved and what can be achieved by the former method as compared to the latter? It is subsequent to such a comparison that the conclusion inevitably becomes that the principle of non-intervention cannot extend to the intraterritorial exercise of antitrust jurisdiction, except in the most extreme situations.[32] That the principle is overstrained by Meessen, is also observed by *Dicke,* who comments on Meessen's thesis as follows:

"Nicht das Interventionsverbot selbst kann die konkreten Ergebnisse liefern, sondern allein der diesbezügliche Regelungsbereich des Völkerrechts ergibt die Abgrenzung zwischen zulässigen und unzulässigen Maßnahmen. Wo also die 'völkerrechtlichen Grundsätze des internationalen Kartellrechts' versagen, hilft auch das Interventionsverbot nicht. So erwägenswert die Überlegungen von Meessen de lege ferenda sein mögen, de lege lata ist die Basis zu dünn."[33]

Overstrained is also, it seems, Meessen's "Rechtsfindungsmethode" — the concretization and the meticulous development of international law[34] — when the result of its application it that the principle of non-intervention is transferred to international antitrust law.

2. The weighing of interests standard

2.1. A principle of international law?

It is an interesting fact that whatever route the writers in the doctrine of international antitrust law choose to follow, through the international law brushwoods, most of them — in one way or other, and sooner or later — seem to converge at one single point: the weighing-of-interests process.[35] And to this the present study is no exception. The *American Law Institute,* for instance, has incorporated a "balancing of interests" process into Section 40 of the *Restatement (2nd) of Foreign Relations Law,* providing that "each state is required by international law to consider in good faith, moderating the exercise of its enforcement jurisdiction ... 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.

And a Comment to Section 40 adds:

"It is clear that if each state having a basis of jurisdiction were in every case to exercise its jurisdiction without considering the interests of another state also having jurisdiction, disputes between states and hardship to persons would often arise. That such disputes and hardship do not arise more frequently is due to compliance with the principles reflected in the rule stated in this Section."[36]

Inspired, no doubt, by this provision, the *International Law Association,* at its 55th Conference in New York in 1972, adopted the following guideline (Draft Resolution, Article 7):

"In the event of there being concurrent jurisdiction of two or more States so as to create a conflict with respect to the conduct of any person:

(a) no State shall require conduct within the territory of another State which is contrary to the law of the latter, and
(b) each State shall, in applying its own law to conduct in another State, pay due respect to the major interests and economic policies of such other State."[37]

The comments made on this Article at the conference were scanty.[38] *Hunter,* the reporter, observed that "a State which seeks to prescribe rules of conduct to be observed within the territory of a foreign State ... must take into consideration the major interests and economic policies of that State. I follows from our formulation of the rule, however, that identification and evaluation of the various points of contact must be in accordance with the objective standards prescribed by international law. A State does not comply with the requirements of international law merely by establishing that it turned its attention to the various connecting factors and saw no reason to refrain from exercising jurisdiction."[39] Hunter further quoted with approval Judge Kaufman's deliberations in *United States v. First National City Bank,*[40] and described these as a "reference made to the *governing principles of international law.*":[41]

"It is not asking too much, however, to expect that each nation should make an effort to minimize the potential conflict flowing from their joint concern with the prescribed behaviour ... Where as here, the burden of resolution ultimately falls upon the federal courts, the difficulties are manifold because the courts must take care not to impinge upon the prerogatives and responsibilities of the political branches of the government in the extremely sensitive and delicate area of foreign relations ... Mechanical or over-broad rules of thumb are of little value; what is required is a careful balancing of the interests involved and a precise understanding of the facts and circumstances of the particular case."[42]

A similar interest-balancing approach is favoured by the *Restatement (2nd) of Conflicts of Laws* (1971) of the *American Law Institute* — a manifestation of the American trend in this area of law in recent decades.[43] The Restatement on Conflicts suggests that a court confronted with a case holding foreign elements shall, when choosing the applicable law, consider the following seven factors:

(a) the needs of the interstate and international systems;
(b) the relevant policies of the forum;
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;
(d) the protection of justified expectations;
(e) the basic policies underlying the particular field of law;
(f) certainty, predictability and uniformity of result; and
(g) ease in the determination and application of the law to be applied.[44]

These are but a few examples of the authorities that have espoused the weighing-of-state-interests standard. It is notable that these authorities,

with very few exceptions, consider the standard to be binding international law. But the ways in which the weighing-of-interests principle is anchored in international law differ. *Meessen,* as we have seen, extracts this principle from the principle of proportionality, as manifested in the principle of non-intervention.[45] Those advocating the abuse of rights doctrine base the weighing of state interests on that doctrine.[46] *Müller,* in the field of international taxation, finds the principle of *bona fides* controlling.[47] In *Hunter's* view the principle reflects customary international law.[48] The *American Law Institute* regards it simply as "required" by international law.[49] Not all, however, would regard the principle as binding international law. Some regard it as a mere rule of comity.[50] And *Metzger,* commenting on Section 40 of the Restatement of Foreign Relations Law, writes:

"From what source does the Restatement, in section 40, draw the somewhat sonorous imperative that each state 'is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction ...? The entire discussion in this section does not disclose any authority or case supporting the conclusion that the exercise of good judgment and common sense in order to avoid unnecessary conflicts between nations is an international legal requirement ... The writer can testify, from personal experience in the Treasury license cases, that no one in the United States Government (including the lawyers of the principal departments involved) considered that 'legal principles' existed in this area of conflict where each state had a valid jurisdictional base; they were correct then as well as now."[51]

Impressive as these arguments may seem, they have very little substance. The most significant result of the foregoing analysis in the present study is, that there does exist a binding rule or international customary law: The normative content of the jurisdictional principles governing international criminal law is that states have a duty to consider the interests of the affected state(s) and the affected individual(s) when exercising intraterritorial jurisdiction, and all this for the protection of state sovereignty and of the individual.[52] In *this* sense the jurisdictional principles governing international criminal law constitute international customary law. The various jurisdictional rules embedded in those principles, considered as naked connecting factors, are, as we have seen, not binding; they are nothing but concretizations of the normative content — different methods for the achievement of one and the same object.[53]

The weighing of state interests, including the interests of the individual, is thus a process compelled by international customary law. Whether the weighing of state interests standard in and of itself is a rule of international law, is immaterial. As was emphasized in the *North Sea Continental Shelf*

Cases: "[I]t is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal régime of the continental shelf in this field."[54]

It is a mistake to believe that what the states frequently do as a matter of comity, always will remain a mere matter of comity; or that self-imposed restraints in international relations, always retain the character of self-impositions. A such reasoning amounts to an understanding of the international law as a law based on "autolimitation", a theory originating from *Jellinek's* concept of international law ("Selbstbindungstheorie"). What states frequently do eventually becomes binding international law — international law of custom — provided that there is some concordance in, and some form of compulsion behind, their action.[55]

In the field of international criminal law, consequently, and in related fields — having, by international law standards, a "criminal" character — such as international antitrust, international securities, etc., the weighing-of-state-interests process (including a consideration of the interests of the individual) is prescribed by the international law of custom.

Some support for this conclusion can also be found in the separate opinion of Judge Sir Gerald Fitzmaurice in the *Barcelona Traction Case,* where he stated:

"It is true that under present conditions international law does not impose hard and fast rules on states delimiting spheres of national jurisdiction in such matters (and there are of course others, for instance, in the field of shipping, 'antitrust' legislation, etc.) but leaves to states a wide discretion in the matter. It does, however: (a) postulate the *existence* of limits — though in any given case it may be for the tribunal to indicate what these are with regard to the facts of that case; and (b) involve for every state an obligation to exercise moderation and restraint as to the extent of jurisdiction assumed by its courts in cases having a foreign element and to avoid undue encroachment on a jurisdiction more properly pertaining to, or more appropriately exercised by, another state."[56]

It is the failure to recognize that all of the traditional jurisdictional rules inherently carry a weighing-of-interests test, which has led to the conclusion that the weighing of interests is a matter of mere comity, or that, as in *Meessen's* case, it must be derived from some other source.[57] Under the principle of territoriality, the interests of the state in which the crime was committed have been indisputable. The traditional crimes were easy to localize, the actor's interests were regarded as protected (often under the

fiction that he subjected himself to the law of the place) and no other state had any significant interest. Under objective and subjective territoriality, the common interest of the states in not letting the criminal escape from the law altogether has been the decisive *raison d'être*.[58] The protective principle is restricted to certain crimes which substantially affect the security of the state exercising jurisdiction. The principle of active personality, too, is the product of a fine weighing of the interests involved. None of these jurisdictional rules, especially not the latter, are absolute and rigid, but all are sensitive to modifications, according to the weight of the interests involved. Yet they are rules to be applied in the normal case. Very much in line with this traditional approach, Judge Learned Hand attempted to formulate a rule in the *Alcoa* case,[59] also on the basis of a weighing of the conflicting interests at stake. This approach soon became the model for the cases to follow. But the more complex the criminal act, the harder it is to localize the act according to a standard of territoriality, and the more disparate the interests of the states, the more difficult it becomes to construct general jurisdictional rules. One of the very first to realize this was *Kingman Brewster*. In his "Antitrust and American Business Abroad" he notes:

"The transactions with which antitrust deals are so involved, the interests they affect so many and complex, and the degree of conflict generated so hard to predict, that sweeping jurisdictional rules should give way to recognition of the fact that the competing interests are of varying importance depending on the kind of case presented."[60]

"The focus ... should be on conflict and its adjustment, not on absolute jurisdictional powers and limitations. Since the geographical location of commercial relationships and effects is so hard to define and since it may not reflect the balance of national interests at stake, jurisdictional competence might better be allocated according to the degree of conflict involved and the seriousness of the effect in different nations."[61]

Yet Brewster, too, speaks in terms of comity. What he apparently fails to see is, that when one substitutes the weighing-of-interests approach for sweeping jurisdictional rules, what one is really doing is to carve out the normative core of the latter — the abstraction of the jurisdictional rules — the binding element of these rules.

The view held by Metzger, Brewster and others, that the weighing-of-interests process rests on mere comity, is partly rooted in the distinction commonly made between the *basis* of legislative jurisdiction and the *exercise* of enforcement jurisdiction. This is a distinction held to be vital by the authors of the Restatement (2d) of the Foreign Relations Law: in Section 18, the requisites for the jurisdictional basis are specified (primarily, that

there be substantial, direct and foreseeable effects); in Section 40, on the other hand, the requisites for the exercise of enforcement jurisdiction are laid down (the weighing of interests). A similar distinction is made in the Draft Resolution of the International Law Association[62] (compare Articles 3 and 7). The reasoning of Metzger, etc. seems to be, that if there is a sufficient basis for jurisdiction in accordance with international law, there is nothing more that can hinder a state from exercising it to its fullest extent — nothing more than comity.

That the distinction between legislative and enforcement jurisdiction is irrelevant from an international law perspective, we have already concluded.[63] Moreover, the distinction, made between the basis for jurisdiction and the exercise of jurisdiction, we have deemed to be artifical and wholly unnecessary.[64]

The municipal antitrust law may, in the form of a general rule, prescribe that the municipal courts shall not have subject matter jurisdiction in the absence of effects of a certain quality and/or quantity; a rule which controls whether the court in the particular case has jurisdiction to hear the case or not. This is also the normal course of action. The requisites for subject matter jurisdiction may or may not comprehend international law considerations, or they may comprehend only some. The procuring of subject matter jurisdiction may simply require that the state of the forum has sufficient interest in the exercise of jurisdiction, or it may require a weighing of the interests of the states involved. And the rationale for the municipal rule may differ widely from that of the international law rule.

In an interntional law perspective, every exercise of jurisdiction that has extraterritorial effects is relevant, whether implying the enactment of laws, administrative measures, investigation procedures, the ordering of documents, the bringing of a suit by authorities, court decisions, enforcement, or any other act of state.

Notably, the *Tentative Draft No. 2 of the Restatement of Foreign Relations Law (Revised)*[65] avoids the clear-cut distinction between the basis of jurisdiction and the exercise of it. The traditional jurisdictional rules on the principle of territoriality, the principle of personality, the protective principle, etc. are attributed a "guiding" character and the interest-balancing approach a more central role. Section 403 of the Tentative Draft, headed "Limitations on Jurisdiction to Prescribe", reads:

(1) Although one of the bases for jurisdiction under §402 is present, a state may not apply law to the conduct, relations, status, or interests of persons or things having connections with another state or states when the exercise of such jurisdiction is unreasonable.

(2) Whether the exercise of jurisdiction is unreasonable is judged by evaluating all the relevant factors, including:
(a) The extent to which the activity (i) takes place within the regulating state, or (ii) has substantial, direct, and foreseeable effect upon or in the regulating state;
(b) the links such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the law or 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 in question;
(e) the importance of regulation to the international political, legal or economic system;
(f) the extent to which such 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;
(h) the likelihood of conflict with regulation by other states.
(3) An exercise of jurisdiction which is not unreasonable according to the criteria indicated in Subsection (2) may nevertheless be unreasonable if it requires a person to take action that would violate a regulation of another state which is not unreasonable under those criteria. Preference between conflicting exercises of jurisdiction is determined by evaluating the respective interests of the regulating states in light of the factors listed in Subsection (2).
(4) Under the law of the United States:
(a) a statute, regulation or rule is to be construed as exercising jurisdiction and applying law only to the extent permissible under §402 and this section, unless such construction is not fairly possible; but
(b) where Congress has made clear its purpose to exercise jurisdiction which may be beyond the limits permitted by international law, such exercise of jurisdiction, if within the constitutional authority of Congress, is effective as law in the United States.

The key issue in this proposed provision is throughout whether the exercise of jurisdiction is reasonable or not, and this is what the intraterritorial exercise of jurisdiction under international law is all about. Whether there is a basis for jurisdiction is really of no significance; it is an artificial construction of municipal law origin.[66]

The only meaningful question, from the standpoint of international law, is whether a state may exercise (intraterritorial) jurisdiction, or not, in a particular way, or more correctly, whether or not jurisdiction is *properly*

exercised. And this question, it is submitted, shall be determined solely by the international customary rule prescribing a weighing of interests.

In the following we shall examine the elements of the weighing-of-interests process more closely, including the relevant interests, the process of weighing and the question of proportionality.

2.2. The relevant interests and the weighing process — Generally

There are, as we have seen, three classes of interests to be balanced: the interests of the state exercising jurisdiction, the interests of the affected state(s) and the interests of the affected individual(s).[67] The *exercising* state is primarily interested in having its law effectively applied and enforced, in carrying out the purposes of the law to their full extent; which as regards antitrust law, includes, *inter alia*, the protection of its nationals or residents (consumers), protection of the small business, protection of the market structure and the effective implementation of the competition and economic policies. The exercising state is interested in preventing anticompetitive practices from *affecting* this protected area. For these purposes, the principle of effects is the most suitable instrument.[68] A municipal jurisdictional rule based on nationality — even if "nationality" is broadly defined — would not be well suited to cover the conduct of foreign enterprises abroad; nor would a jurisdictional rule based on the place of contract or the place of conduct (provided, of course, that the conduct is not localized to the place where the effects occur).

Effects, as we have seen, may be estimated either in terms of quantity or quality.[69] In the former case, the question is how substantial ans how actual or real are the effects? In the latter case, how direct are the effects and what are the types of effects? Whether the effects are substantial or not, is again a question of the amount of business involved in the restraint, the amount of business affected, the importance of the competition restrained, the amount of damages caused, etc. "Directness" concerns the causal relationship between the anticompetitive conduct and the effects of the conduct felt within the state. Whether, finally, the effects are actual (or real) or not, is a question of whether the effects have actually occurred or whether they are merely potential. The self-evident standard is that the more substantial, the more direct and the more actual the effects, the greater is the interest of the state exercising jurisdiction.

Moreover, the question whether there should be effects on *competition*, effects on *commerce* or economic effects in general (on prices, efficiency, business, etc.) is not material. It seems that the question can be reform-

ulated in terms of the "directness" of effects. And since the effects on competition are more direct than economic effects, the interest of the exercising state is greater in the former case.

The *affected* state is interested in the effective enforcement of its legal system. It has an interest in that the persons, physical or legal, residing within the state comply with the laws thereof and that the policies of the state are pursued. It is, further, interested in protecting its nationals or other persons residing within the state, in upholding the liberties granted and the restrictions imposed. What threatens the affected state, in the context of the present study, is essentially the exercise of jurisdiction with extraterritorial effects.

The interests of the *individual* are related to the concept of legal security, which includes the aspect of foreseeability, hardship in having to comply with conflicting laws, the risk of having to be punished twice for the same conduct (double jeopardy), etc.

Since it is incumbent upon the state exercising jurisdiction to balance the interests against one another, the weighing process shall be examined from that state's standpoint. The exercising state must thus consider its interests in light of the interests of the affected state and the affected individual. An initial question is, whether the substantial or genuine interests of a state in exercising jurisdiction are such as to make a consideration of the affected state's and individual's interests unnecessary. At first sight, the genuine link theory may seem to so suggest. If the exercising state is genuinely linked to the matter at issue, the theory states, it has a basis for jurisdiction. But even those who defend the genuine link theory recognize that in the particular case, the fact of having jurisdiction is secondary — and practically of subordinated significance — to that of exercising jurisdiction; and when jurisdiction is exercised, a balancing of interests is required. This is clearly acknowledged by *Meessen*: "Auch wenn das Völkerrecht generell ein Tätigwerden unter der genannten weiten Voraussetzung [direct, substantial and foreseeable effects] erlaubt, so gestattet es doch nicht, diese Zuständigkeit im Einzelfall ohne Rücksicht auf entgegenstehende Interessen dieses oder jenes Staates auszuüben. Die praktisch bedeutsame völkerrechtliche Grenzziehung liegt also nicht in einer generellen Zuständigkeitsnorm ...".[70]

But there is more to it: It must seriously be questioned whether the genuineness of a link can be at all established without regard to the opposing interests of other states and the interests of the individual. With the exception of the situation where a traditional, easily localized, crime is committed within the territory of the state exercising jurisdiction — terri-

toriality being the genuine link[71] — this does not seem possible. "Genuineness" is thus a relative concept.

The degree of interests involved — the genuineness of the link — on the part of the exercising state is always relative to the interests of the affected state and individual. There is no such thing as a certain level of interest, the reaching of which *per se* rules out the necessity of considering counter-interests.

In what follows we shall study the weighing of interests process and the interests involved somewhat more in detail by proceeding from the exercise of jurisdiction in different situations.

2.2.1 The enactment of a law with extraterritorial effects

The mere enactment of a law, intended to have extraterritorial effects, seldom raises international law problems. From experience we know that antitrust laws are normally worded in general terms and have a general applicability. And, in the absence of a clear declaration to the contrary, they are construed to be in harmony with international law. The situation may be different, however, where the jurisdictional provisions are detailed and unequivocal — that is, where the courts (and other authorities) have little or no room for construction. On the other hand, in the antitrust field, such rules are difficult, if not impossible, to lay down. A jurisdictional rule providing, for instance, that "any person whose anticompetitive practices generate substantial, direct and foreseeable effects within the state, shall be liable," etc., is really a vague and flexible standard. Some unequivocality would be provided for if the rule were to read as follows: "Any peron who by anticompetitive conduct generates any effect within the state, shall be liable", etc. (Here it seems that only the concept of "effect" carries some flexibility).

This form of jurisdictional rules may not doubt, as such, depending, of course, upon the severity of the sanctions attached, directly affect the interests of other states (perhaps to a lesser extent those of individuals). Individuals and enterprises in other states may for several reasons — including the severity of sanctions, convenience, the fact that they have extensive business, or valuable assets (*e.g.*, subsidiaries) in the state exercising jurisdiction — be induced to comply with the substantive prohibitions and obligations of the law, and thereby abstain from certain measures (co-operation, mergers, joint ventures, etc.) which otherwise might have been profitable or rational, not only for the individuals or enterprises involved, but also for the state in which they reside. The compliance may thus run

counter to the competition policies, and the general economic policy, of the affected states. In this way, the mere enactment of a law, without ensuing court decisions, would counteract the interests of other states.

The clash of interests is more pronounced where the enactment is followed by government declarations affirming what appears to be the intention of the legislator. Under these circumstances — where the law is clear and unequivocal, where the courts are left with little or no discretionary power to moderate the effects of the law and where the scope of the law is the broadest possible — it would seem that jurisdiction has been improperly exercised: the state exercising jurisdiction has exclusively considered its own immediate interests in regulating the market conditions.

The situation is similar where the legislator clearly declares that, although jurisdiction can be established only in cases where substantial (and/or direct and foreseeable) effects occur, the jurisdictional issue shall be decided exclusively on grounds of practicability, convenience, interests, etc. from the viewpoint of the forum state — in other words, that a weighing of interests may not be performed.

The excess of jurisdiction is more palpable where the interests of the exercising state in regulating the subject matter are less direct. This is so if, for instance, the jurisdictional rule provides that "any person who violates the provisions of this act shall be liable, etc. ... under the condition that his anticompetitive conduct generates effects in this country or that he is a national of this country." Subject matter jurisdiction can thus be based on either effects or nationality. Should nationality be defined as covering subsidiaries in other states,[72] the law will have the effect of regulating the business of these. The interest of the exercising state in regulating conduct abroad, without the immediate purpose of protecting the home market, is clearly outweighed by the interests of the affected states in independently controlling their own market conditions. Hence, where a state exercises jurisdiction on the basis of nationality alone (as the connecting factor), it has transgressed its jurisdictional powers under international law. This is nothing but an attempt to regulate foreign markets for the sake of regulation — an attempt to control the market conditions in other states through bonds of nationality. *Berber* would even go so far as to speak of an outright interference in the affairs of the other states.[73] And *Meessen* would probably agree.[74] However, the designation "an excessive" or "improper" exercise of jurisdiction seems more appropriate.[75] Only in the extreme case, for instance, where the prime target of the law is the practices of the enterprises in one or a few foreign states, and where the substantive provisions of the law sharply contrast with the competition policies in these

states, would an interference in the proper sense present itself.[76] Where jurisdiction is based on other factors, such as the place of contract or the place of conduct, irrespective of whether the market of the exercising state is affected or not, the interest in regulation again seems insignificant, except in the case where the purpose of the law is to prevent foreign enterprises or individuals from turning the state into a cartel-oasis.[77] Here, again, the courts should possess a certain discretionary power to weigh the interests involved on an *ad hoc* basis. (The interest of the foreign state affected by anticompetitive conduct in the particular case and the availability of remedies in that state, would, for instance, have to be considered).

Where the jurisdiction is based on allegiance — the residence of the individuals or the situs of the enterprises — the exercising state has an interest in controlling the conduct of individuals and enterprises within its territory. In so far as the object of the regulation is to protect the home market, there undoubtedly exists a significant interest. But even where the conduct of these nationals leaves the home market unaffected, the exercising state may feel obliged to regulate the conduct out of consideration to other states, whether on a foundation of reciprocity or mutuality or on other grounds. For these purposes, again, a mechanical jurisdictional rule is a clumsy tool. An *ad hoc* rule is to be preferred.

2.2.2 The omission to change a law with extraterritorial effects

The mere enactment of a law may, as we have seen, under exceptional circumstances constitute an improper exercise of jurisdiction. In general, however, the antitrust provisions lack the precision required for the determination of propriety from an international law viewpoint. Not until the courts of the legislating state have construed and applied the law in the specific cases, will it be possible to determine the substantive scope of the law, and not until then will we know whether the law has extraterritorial effects or not. It is not until the broad and vague provisions have been given a more concrete content that one may be able to speak of extraterritorial effects; by enacting the law the state has certainly exercised jurisdiction but, in doing so, it has hardly affected other states or individuals outside the state. Just as the enactment of law may under certain circumstances be deemed an improper exercise of jurisdiction, so may the omission to change a law that, as developed in the case-law, proves to be too far-reaching. For not only is each individual case handled by courts or administrative authorities an exercise of jurisdiction, but also the acceptance of the concrete (jurisdictional) rules developed in these fora.

2.2.3 Other administrative measures

Decisions made and measures taken by antitrust authorities, or other administrative organs (including public prosecutors, etc.) also constitute forms in which jurisdiction is exercised. Thus, the decision to initiate investigations, to pursue inquiries, to bring an action, to prosecute, and further the decision to issue orders, to serve process or a subpoena, etc., shall be measured by the same standards of international law as any other act of the government or the legislator, or, as we shall see below, a court decision.

2.2.4 Court decisions

From an international law perspective, the municipal courts are state organs.[78] Thus, whenever a court, by making a decision acts within the limits of its functions, it — in the capacity of a state organ — exercises state jurisdiction; that is to say, the state is responsible for the acts of its courts. Accordingly, should the decisions of the courts fail to reflect the weighing-of-interests standard of international law — when appropriate — in other words, should the courts fail to consider the interests of other affected states and of the affected individuals, the state is improperly exercising jurisdiction through its courts.

But then, of course, not all court decisions have international law implications even if, in some sense, they affect a foreign state or individual. Hence while, for instance, the mere service of process, preceded or followed by a court decision to hear the case, may cause inconvenience to a foreign defendant, as also may the subsequent litigation, it would be premature to weigh the interests of the states and individuals involved until, at least, the case has been given a preliminary hearing; a weighing of interests presupposes a minimal knowledge (and preferably a full knowledge) of the facts of the case. And although decisions as to procedure, jurisdiction over the person and over the subject matter, etc., do affect the litigating parties, they have independently no direct relevance to the international law issue, *i.e.* whether or not jurisdiction is properly exercised. Such decisions are rather components of the whole court judgment and it is the court judgment in its entirety that shall be subjected to the scrutiny of international law. Of particular importance are the questions of liability and of the remedies. Before these questions are determined, one cannot establish whether there is an improper exercise of jurisdiction or not. Seen from the viewpoint of a state legislator, there are a number of ways in which the international law weighing-of-interests standard may be met:[79]

1) The legislator may direct the courts to assume subject matter jurisdiction on the basis of an interests-analysis only. In such a case the law prescribes that the courts have no jurisdiction to take a case if, subsequent to a weighing of interests, it is found that the interests of the forum state are too insignificant compared to the interests of other affected states and those of the individuals affected. The legislative directives may imply that the courts shall explicitly weigh the interests in an open manner, or implicitly in accordance with a sweeping formula. An example of the former is the list of interest-analysis' factors proposed by the authors to the Tentative Draft No. 2 of the Restatement of Foreign Relations Law (Revised), Secion 403, as quoted above.[80] An example of the latter is the effect-formula commonly applied, requiring direct, substantial and foreseeable effects for jurisdiction to lie.

2) Another method is to separate the weighing-of-interests process from the question of subject matter jurisdiction. The law may provide, for instance, that the courts have subject matter jurisdiction on the ground of mere effects on the domestic market and prescribe that a weighing of interests analysis shall be performed at a later stage of the process.

3) A third method is to provide for specific substantive rules and/or remedies for the foreign enterprise or individual.

4) A fourth possibility is to combine the first and the third method, or the second and the third.

5) A fifth is to radically circumscribe the jurisdiction of the courts in cases holding foreign elements, and to work out the problems through diplomatic channels, etc.

Thus, it is clear that in order to ascertain whether a state has — through its courts — improperly exercised jurisdiction or not, a final judgment must have been rendered. The one exception is a court order having extraterritorial effects, *e.g.*, for the production of documents located abroad, for the hearing of witnesses residing abroad, while the case is still pending. Such an order requires an independent interest-analysis. The reason for this is that the court order, just as much as the final judgment, may prescribe or prohibit certain conduct by foreign individuals in a foreign country.

We have already[81] described the main elements of the weighing-of-interests process in general terms. A like generality characterized the discussion above on the role of the interests-analysis in the legislative pro-

cess.[82] But the interests-analysis is an instrument best suited to the specific case. All that the legislator can provide is general guidelines for the courts to follow[83] — the rest must be left to the courts' own discretion. The guidelines form the framework for the decision in the individual case. It is in the individual case that the clash of interests displays its sharpest contours: the states affected can be ascertained, they are limited in number, their interests are fairly definable, as are the interests of the affected individuals, etc. Consequently, when we next attempt to define more closely the various elements of the weighing-of-interests process, we primarily have in mind the court exercising state jurisdiction in the specific case.

2.3 The elements (factors) of the weighing-of-interests process

2.3.1 The nationality of the parties

An interests-analysis is not possible without a preceding determination of the nationality of the parties. The plaintiff is generally a national of the state exercising jurisdiction, and often enough it is the state itself acting through one of its organs. But, even if the plaintiff is a private party he is probably most often a national of the forum state. But what if the plaintiff, for instance in an action for damages in an American court, is a foreigner, or what if the plaintiff is an American enterprise having its seat, or being incorporated, in the United States but conducting most of its business abroad or being wholly controlled from abroad? What if the plaintiff seeking damages is a foreign state? How does a such circumstance affect the interest-balancing process? The protection of the plaintiff (letting the plaintiff have his day in court) in his capacity as plaintiff and nothing more, is not an international law issue in this context. It may be argued, of course, that the state exercising jurisdiction has a legitimate interest in giving the plaintiff a possibility to recover damages wherever he comes from, and that this is an interest to be weighed against the interests of the affected states and individuals. Yet, if it is the laws of the forum state that are applied, that exercise of jurisdiction would seem to require a more significant interest. The protection of the plaintiff is itself an insignificant state interest and would hardly alone justify the exercise of jurisdiction with extraterritorial effects. More important, on the other hand, is that the closer the relationship between the plaintiff and the exercising state, the greater the potential for a legitimate state interest in protecting the home market against effects caused by anticompetitive acts.

The nationality of the defendant is a vital factor. It is by determining the

nationality of the defendant that we know which states are affected and whether a protection of the interests of the individual affected is called for from an international law viewpoint. If the defendant is a national of the forum state, of course, there is no international law issue.

But the question is how to determine the nationality or domicile of a person. This is a classical problem in the field of Conflict of Laws as regards enterprises, and it still awaits an ultimate solution.[84] The connecting factors discussed are, *inter alia,* the main seat of the enterprise, the centre of management, the place of incorporation, the place of registration, the place of business and the place from which the enterprise is controlled. The connecting factor also varies from one field of law to another. Thus, the connecting factor for purposes of taxation, for instance, often differs, within the same legal system, from that employed for other legal purposes (as, for instance, in labor law).

Where the defendant in an antitrust suit is incorporated (or registered), has its business and its main seat (its management) in one and the same state and is controlled from that state, there is, again, no problem. But this is often not the case. Rather, the defendant is usually a multinational corporation, controlled from one state, located in another, controlling subsidiaries in several states and doing business all over the world.[85] The multinational corporation has a "mixed" nationality.

Many of the problems in international antitrust law concerning the intraterritorial exercise of jurisdiction with extraterritorial effects could, of course, be eliminated if only it were possible to subject the multinational corporations to a single legal system on the ground of a single connecting factor. But that is a wholly unrealistic approach. From an international law standpoint the defendant in an antitrust suit involving an intraterritorial exercise of jurisdiction with extraterritorial effects *is* a multinational corporation, at least in the sense that it has *contacts* with two or more states. The interests-balancing process should reflect that circumstance. To let a single connecting factor govern the question of the nationality of a multinational corporation would be to screen the real issues with regard to the state interests and the interests of the individuals affected.[86] The only realistic approach is to take the multinational character of the corporation into consideration, that is, to examine all of the contacts which the corporation has with different states, including particularly the place of incorporation (or registration), its main seat (or centre of management), its place of business and the place from which the corporation is controlled — in other words, apply a contact-analysis. In this way, and in this way only, will we obtain a solid platform for an interests-analysis. The contact-

analysis, in some respects, paves the way for an interests-analysis.

In what way do the various points of contact affect the interest-analysis? We have already noted the obvious, that when the defendant in the specific case is entirely linked to the forum state (*i.e.*, has no points of contact with other states), the case presents no interntional law issue for the purposes of the present study. The situation, on the other hand, where the defendant corporation is entirely unconnected with the forum state is merely theoretical; at the minimum, one would think, the alleged restraint should somehow be connected with the forum state (*e.g.*, should affect the market of the forum state); otherwise, because of the total lack of interest,[87] jurisdiction is certainly improperly exercised.

Only very rarely would, further, interests other than those of the state exercising jurisdiction be affected, where the defendant corporation is incorporated, located and doing business in that state, but controlled from another (*i.e.*, controlled by natural or legal persons in another state). The control aspect is here of minor significance. In the reverse situation, again, where the defendant corporation is controlled from the state exercising jurisdiction but is seated, incorporated and doing business in another state, the fact that there is control cannot be given independent significance.[88] It would rather seem that the fact of control has little relevance to the interest-analysis. The interest of the state exercising jurisdiction, for instance, in the exercise should be neither stronger nor weaker on the sole ground that there exists control.[89]

Where the defendant corporation is incorporated and located in the state exercising jurisdiction but does business abroad (an export corporation), or *vice versa*, or where it is located and incorporated in one state and does business both there and abroad, the situation becomes more delicate. The defendant corporation is here strongly connected with both the state exercising jurisdiction and at least one other state. The interests of all of these states must be covered by the weighing-of-interests process. Assuming, for instance, in the classical international antitrust situation, that the defendant corporation is both incorporated and located outside the state exercising jurisdiction, but is doing business both within and without that state. From the standpoints of international law and international antitrust law, the defendant corporation is a true multinational, *i.e.*, is a national of more than one state.[90]

There seems to be no reason to give preference to any of the connecting factors. The most that can be said is that the more business done in the state exercising jurisdiction as compared to the other states, the greater is its interest, fot the simple reason that the substantiality and directness of

the effects generated by anticompetitive practices performed by the corporation grows with the amount of business done.[91]

2.3.2 The effects within the state exercising jurisdiction

As already concluded, the state exercising jurisdiction is primarily interested in protecting its market from the effects of anticompetitive practices. The interest in assisting a foreign state must be considered secondary, as must the interest in protecting a foreign plaintiff.[92]

Effects, we have noted, have both qualitative and quantitative aspects. When ascertaining the quality of effects the question are: How direct are the effects and what is the type of effects in the limited sense, that is, effects on what? And when ascertaining the quantity the questions are: How substantial and how actual or real are the effects? In the following we shall examine these different aspects somewhat more closely.

2.3.2.1 Direct effects

The directness of effects denotes the closeness of the causal connection between the anticompetitive act and the effects of that act within the state exercising jurisdiction. Where the two companies, X and Y, both incorporated, located and doing business in state A, engage in a price-fixing operation which affects the prices of company Z, also incorporated and seated in state A but doing business in state B, the effects are, no doubt, less direct on state B than they would have been if both X and Y had been doing business in state B (or if Z had been incorporated and seated in state B, which is about the same thing). And the effects would be even more direct if both X and Y were incorporated and located in state B.

Or to take an example of a vertical restraint: X is the exclusive retailer of Y. Both companies are incorporated, located and doing business in state A. X sells to Z, which is also incorportated and located in state A, but doing business in state B. The effects in B are surely less direct than they would have been if X had been incorporated and seated in state B and doing business there.

When analyzing the case law of United States courts, we have come across the formula "in or substantially affecting United States commerce". The requisite "in United States' commerce" here too denotes directness, that is, whether a restraint applies directly to United States commerce, or not.[93]

In the two examples given, the restraints would not be "in" United States commerce in their first variant, but they would be in the second.

It has generally been held that "direct effects" is one of the requisites for the foundation of jurisdiction under international law. As for the methodological inaccuracy in distinguishing between the basis of jurisdiction and the exercise of it under international law, we refer to the foregoing analysis.[94] What interests us here particularly is the definition given this requisite.

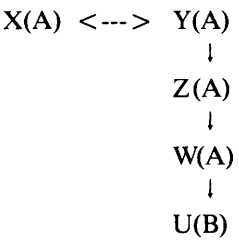
According to the *Restatement,* Section 18, a state has jurisdiction to prescribe with respect to effects within the territory if, *inter alia,* they occur "as a direct and foreseeable result of the conduct outside the territory". (Clause (b)). Except for a short illustration (no. 9), no attempt to define "directness" is made, however. Article 5, in the version ultimately adopted by the *International Law Association* at its 55th Conference in New York, provides that a state has jurisdiction if, *inter alia,* the effects occur "as a direct and primarily intended result of the conduct outside the territory"[95] The few illustrations given of the "direct" requisite essentially coincide with the two examples supplied above.[96] When a restraint is "in" the commerce of a state, it also directly affects the commerce; when the restraint is not "in", the effect is merely indirect.[97] That the effects shall be direct for jurisdiction to lie under international law, is also suggested by several independent legal writers.[98] But in those rare instances when an attempt is made to define the "direct" requisite it inevitably results in total vagueness.[99] To those who regard the requisite as a condition *sine qua non* for state jurisdiction under international law, this circumstance must be a thorn in the flesh. *Meessen,* who recognizes the problem, has therefore suggested that the "direct" requisite shall be understood as a graded guideline ("gradueller Maßstab").[100] *Rehbinder* adds that the less direct the effects are, the sooner one may presume that a state exercising jurisdiction is violating international law.[101] The fact is that the "direct" requisite can have no fixed content. The most that can be said is that effects are more or less direct. And examples may be provided — as we have done — which indicate the degree of directness. In the weighing-of-interests process, advanced in the present study, the standard simply is: the more direct the effects on the state exercising jurisdiction are, the greater the legitimate interest of the state exercising jurisdiction.

The "direct" requisite is commonly combined with the requirement of foreseeability. Thus the Restatement, Section 18, speaks of a "foreseeable result", and Article 5 of the ILA Resolution of a "primarily intended result".[102] Also Meessen and Rehbinder, among others, consider that foreseeability is required by international law.[103] As mentioned in the Restatement, the intent requirement shall not be understood as an intent in the

subjective sense, but rather in the sense that "those responsible for the conduct had reason to foresee that the effect within the territory would result from the conduct outside".[104] The drafters of the ILA Resolution, however, give the requisite a somewhat more strict interpretation, as the words "primarily intended" suggest. As a "primarily intended" result they regard the situation where the conduct in one state is *directed specifically* at producing the effects complained of.[105] Meessen and Rehbinder, again, deny that international law requires a subjective intent, mainly because of the difficulty in proving of such an intent.[106] For them, foreseeability is an objective requirement. The closer the causal connection between the conduct and the effects, the suggestion seems to be, the more foreseeable the effects. In other words, the more direct the effects are, the more foreseeable will they be. In this way, foreseeability is measured by directness, and in this way, to be true, the requirement of foreseeability loses its independent significance.[107] This is also acknowledged by Rehbinder when noting: "Mit der Unmittelbarkeit ist grundsätzlich auch die Vorhersehbarkeit gegeben ...".[108]

Consequently, the interest of the state exercising jurisdiction should be measured in directness and not foreseeability. The latter is superfluous as an element in the weighing-of-interests process in this respect. For the protection of the affected individual, however, the element may have a function, as we shall see *infra*.

Let us, for a moment, very schematically consider different degrees of directness. (B) will here indicate the state exercising jurisdiction, (A) any other state, A, Y, Z, W, U, etc. the different companies involved and X(A) will indicate that X is both incorporated and seated in A. The sign <---> denotes the restraint, a horizontal or vertical agreement, and ↓ the continuous selling or buying taking place. Let us start with a situation where the degree of directness is low and increase the degree for every example.

a)


For the sake of simplicity, only one of the participants in the restraint (Y) either buys or sells the commodity. And as noted, the restraint carried out

by X and Y could be any horizontal or vertical agreement (or collusive conduct): a merger, price-fixing, market allocation, boycott, refusal to sell, exclusive agreement, price discrimination (where Z would be discriminated against, as compared to X), resale price maintenance, etc.

The more intermediaries there are between Y and U, the less direct, of course, are the effects that occur in state B. Likewise, the more processing or conversion of the goods that is carried through by any the intermediaries, the less direct are the effects. Thus if Z does not process or convert the goods in the following example, the effects are obviously more direct than in a):

b)

```
X(A) <---> Y(A)
             ↓
           Z(A)
             ↓
           U(B)
```

As they certainly are in the following situations:

c)

```
X(A) <---> Y(A)
             ↓
           U(B)
```

Here, the company U is legally independent from Y. The effects should probably be classified as more direct where the company in state B is an agent or subsidiary (here marked with y) of Y. And the more control there is over the agent or subsidiary, the more direct will probably the effects be:

d)

```
X(A) <---> Y(A)
             ↓
           y(B)
```

The next step is:

e)

```
X(A) <---> Y(B)
             ↓
           U(B)
```

And then it seems:

f)

More problematic is the following case:

g)

Here, state B exercises jurisdiction over its export companies. If either company Z or U is reselling to state B, we return to the situation in example b) above.

The sceme presented here has, of course, a very simple character. Anyone dealing with international antitrust cases knows that reality is not so uncomplicated. Every case contains several variables. In our examples the business of company X, for instance, would constitute such a variable. Nevertheless, the principal point was to demonstrate that establishing the degree of directness is far from impossible.

2.3.2.2 The type of effects

Here, the discussion of type of effects is done in a limited sense. The query is: effects on what? And what is the place of the query in the weighing-of-interests process? The jurisdictional rule as developed in the case law of United States courts, we have learned, provides that subject matter jurisdiction may be assumed when United States commerce, foreign or interstate, is affected. "Effects on commerce" is a broad concept, encompassing, *inter alia,* effects on prices of commodities in commerce, effects on demand and supply, effects on business opportunities — especially on those of the small business, but also of others — effects on commercial freedom, effects on the market conditions at large (the rationalisation process, efficient distribution). The jurisdictional rule developed in the Common Market, on the other hand, seems to require effects on competition within the Market *and* effects on the interstate commerce (*i.e.*, the commerce between the Member States). Hence, the jurisdictional rule of the Common Market parallels, in principle, the substantive requisites of Articles 85 and 86 of the Rome Treaty. Further, only the interstate commerce is protected. In many senses, thus, it seems that the jurisdictional rule is narrower than that of the United States.[109]

From an international law perspective the difference between these two jurisdictional rules lies in the degree of directness of effects required. The effects that must occur according to the Common Market jurisdictional rule are more direct than those required by the United States "effects on foreign or interstate commerce" formula. International law does not, however (which deserves repetition), have an absolute standard for directness by which these jurisdictional rules could be measured. All international law provides, as an element of the weighing of interests process, is that the less direct the effects in the specific case, the less interest the exercising jurisdiction has in the exercise. The question of the *type* of effects, as such, does-not raise an international law issue.[110]

In addition, however, both the *Restatement,* Section 18,[111] and Article 5 of the *ILA* Resolution have the jurisdictional requirement that "the conduct and the effect are constituent elements of activity to which the rule applies".[112] Thus, the conduct and the effects, shall, according to international law, be constituent elements of an activity which a state makes criminal, tortious, or otherwise subject to regulation. Or, as suggested in the ILA discussions: "[T]he occurence of effects within the territory must be an integral part of the *actus reus* of the crime charged".[113]

At first blush, the requirement of "constituent elements" may seem to hold a fixed standard: a state cannot exercise jurisdiction if the requisite is not met. Yet, when examined closer, it becomes clear that the requirement is without international law substance. The requirement seems to have its origin in the *Lotus* case, where the Court observed:

"[I]t 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 offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there."[114]

Moreover, Article 3 of the *Harvard Draft Convention with Respect to Crime* provides that a crime "is committed 'in part' within the territory when any essential element is consummated there."[115] Emerging in the lines quoted is the principle of objective territoriality, of which the requisite of "constituent elements" is thought to be a requisite component. Section 18 of the Restatement and Article 5 of the ILA resolution both constitute attempts to adjust the effects principle of international antitrust law to the principle of objective territoriality, as believed to be interpreted, *inter alia,* by the *Lotus* Court, and thereby consistency with international law is

sought. The reasoning, however, rests on false premises. It presumes, namely, that the principle of objective territoriality is a binding principle of international law. As we have seen in the preceding analysis of the present study, this is not the case.[116] The jurisdictional principles governing international criminal law are not binding as *methods* of assuming jurisdiction — as connecting factors — but are binding only as to their (common) normative content.[117] The requirement of "constituent elements" has no independent function outside the principle of objective territoriality. It is not a principle of international law. And if it were, how could the protective principle be justified?

Apart from these general observations, it seems that the concept "constituent elements" has not yet been satisfactorily defined. Would it, for instance, suffice for jurisdiction to lie if the state exercising jurisdiction in the specific case had itself prescribed that the occurence of effects establishing jurisdiction is a constituent element of the activity complained of? Or, as the rhetorical question put by *Metzger* reads: "[B]y the very act of prescribing conduct abroad that has a stated reprehensible effect within the territory, is not the prescribing state automatically fulfilling the requirements?"[118] And he continues: "All it [the state] needs to do is to couple accurately the conduct and the prescribed effect. I would assume that this much is to be expected of decent legislative draftsmanship...".[119] The requirement of "constituent elements" would this way be reduced to a matter of legislative technique. It is also in this sense that the requirement is understood by *Meessen,* and lately by *Rehbinder.* Meessen concludes:

"Das Verbot, an Wirkungen anzuknüpfen, die nicht tatbestandsmässig sind, stellt eine Blankettnorm dar, die von dem jeweiligen materiellen Recht ausgefüllt wird. Den Staaten steht es frei, an beliebige inländische Wirkungen anzuknüpfen, sofern diese nur zugleich zum Tatbestandsmerkmal der materiell-rechtlichen Norm erhoben werden."[120]

In an apparent attempt to avoid these consequences, Section 18 (b) (iv) of the *Restatement* provides that the rule regulating the activity with the "constituent elements" shall not be "inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems." In acual fact, however, the inserted clause does not add much substance. "Not inconsistent with" is something other than "consistent with", since, as expounded in Comment f.:

"The fact that a substantial number of states with reasonably developed legal systems do not recognize certain conduct and its effects as constituent elements of crimes or torts does not prevent a state which chooses to do so

from prescribing rules which make such conduct and its effects constituent elements of activity which is either criminal, tortious, or subject to regulation."

Whether this implies any international law restrictions and, if so, what these restrictions are, is not clear. Even less definite is the recourse had in Article 3(2) of the *ILA* Resolution, which provides:

"Whereas municipal law is the sole authority for the purpose of ascertaining the constituent elements of a particular offence, international law retains a residual but overriding authority to specify what is or is not capable of being a constituent element for the purpose of determining jurisdictional competence."[121]

This is merely a statement of the primacy of international law. The fact that the requirement of "constituent elements" is reduced to a matter of legislative technique has really not been surmounted. But even in this reduced form the requirement may have a certain intrinsic value from an international law standpoint which justifys its existence, *Krumbein* suggests.[122] If it is required, he explains, that the effects which occur within the state exercising jurisdiction, and which constitute the ground on which jurisdiction is exercised, be an element of the substantive provision regulating the conduct complained of, then at least some protection will be provided against a wholly arbitrary exercise of jurisdiction. And further: only when a legal system in advance deems undesirable or reprehensible certain effects resulting from a certain conduct, is there reason to believe that the legal system has an interest in regulating the activity.[123]

As can be seen, Krumbein's minimum standard prescribes nothing with regard to the *type* of effects required; it is not content-oriented. What remains is an obligation upon the municipal legislator to relate the municipal jurisdictional rule to the substantive provisions.[124] But then there is the problem of defining the elements of the substantive provision. For instance, according to the jurisdictional rule of United States antitrust laws a certain effect on foreign or interstate commerce is required. Is this an element of the substantive provisions, or is it not?[125] Does the company substantively violate the antitrust laws when its conduct affects competition *and* foreign or interstate commerce, or does it suffice that competition is affected? Can it be said that the *per se* prohibited price-fixing by two European companies is a violation of United States law, in the absence of effects on foreign or interstate commerce? Whatever the answer may be to these questions, it should be clear that the question whether the "effects on foreign or interstate commerse" formula is a substantive element, a juris-

dictional element or both, can have no significance from an international law viewpoint. For, should international law oblige the state to consider the formula as an element of both substantive and jurisdictional law, the compliance with that obligation would be a mere matter of form.

The conclusion thus is, that to the extent that the element "type of effects" has any significance from an international law perspective, it can be measured in terms of directness.[126] The type of effects is therefore not an independent factor in the weighing-of-interests process.

2.3.2.3 Substantial effects

Another requisite for jurisdicition under international law commonly advanced is that the effects shall be substantial.[127] This is also a requirement generally forwarded in American case law for the purposes of establishing subject matter jurisdiction.[128] However, there, as elsewhere, substantiality is not defined. No one, it seems, has yet delivered any firm criteria for determining what constitutes substantial effects, and yet it is maintained that a state cannot exercise jurisdiction in the absence of such. The legal writers also disagree as to whether the requirement shall be regarded as an absolute or a relative standard. *Rehbinder,* for instance, is of the opinion that the substantial effects-requisite has an absolute character.[129] According to international law, he claims, a certain minimum degree of substantiality must exist. *Meessen,* on the other hand, thinks otherwise: „Die Intensität einer Wirkung kann nicht an einem absoluten Maßstab, sondern nur unter Bezugnahme auf die Kartellpolitischen Ziele des handelnden Staates gemessen werden... Je geringfügiger die Inlandswirkung ist, um so mehr verliert das Regelungsinteresse des handelnden Staates an Gewicht."[130] Thus, while the requirement of "substantial effects" is, in Meessen's view, essential for the basis of state jurisdiction under international law — the fulfilling of which is necessary for jurisdiction to lie — it shall be considered a *relative* requisite. The inevitable question becomes, relative to what? If relative to the interests of the state exercising jurisdiction, the international requirement seems to be a mere adjunct of municipal law, or, as shrewdly remarked by Rehbinder: „Damit reduzieren sich die völkerrechtlichen Anforderungen auf das Postulat, Auslandsbeschränkungen nach gleichen Grundsätzen wie Inlandsbeschränkungen zu behandeln."[131] If relative to the interests of other states affected in the specific case, then Meessen's divided jurisdictional system[132] is abandoned: The substantial effects-requisite becomes a part of the weighing-of-interests process. For it is exactly as a factor in the weighing-of-interests process and nothing more, that the substantial effects-requisite is regarded in the present study, that is, the more substan-

tial the effects, the more interested is the state exercising jurisdiction in the exercise.

Still to be considered is how substantiality shall be measured. Substantiality, we have seen, connotes quantity. In focus is, *inter alia,* the amount of business (commerce, competition) encompassed by a particular restraint, the market shares of the enterprises involved, to what extent exports, prices, efficiency, the business of others, etc., is affected and the relative importance of the business or commerce affected. Whether it is the effects on commerce or the effects on competition that are measured is, as far as substantiality is concerned, immaterial from an international law viewpoint. As concluded above,[133] the type of effects, whether on commerce or on competition, is a matter of directness, a qualitative question. While it could be argued that the more direct the effects are, the more substantial they are, this is not how substantiality and directness are understood here. The distinction may be described as follows: the directness of effects is graded according to a vertical order — there are different "levels" of directness. Substantiality is measured in a horizontal sense at a specific level of directness. Directness concerns the closeness of the causal connection — substantiality, on the other hand, the amount of business, commerce, or competition affected.

2.3.2.4 Actual or potential effects?

Effects, finally, may be measured in terms of how actual they are. Whereas many writers are skeptical about or even opposed to the idea that state jurisdiction can be based on mere potential effects,[134] both *Meessen* and *Rehbinder* in his later writings, think it possible:[135] a state shall have the right not only of defensive protection ("Defensivschutz"), but also of preventive protection ("Präventivschutz"). The latter view concurs with the view expressed generally in United States case law.[136] It is seemingly also in accord with Section 18 of the *Restatement,* for, as elucidated in Comment i. under the heading "Prevention of effects within territory":

"The jurisdiction of a state under the rule stated in this Section is not limited to jurisdiction to prescribe a rule punishing or redressing the conduct after it has happened. It includes jurisdiction to prescribe a rule preventing conduct which would have the effects bringing it within the rule stated in this Section."[137]

But even Meessen and Rehbinder recognize that a minimum degree of potentiality or actuality cannot be established.[138] "Die Übergänge sind fliessend", says Meessen, the decision must be made in the particular case.[139] "Genaue Grenzen lassen sich... kaum ziehen", concludes Rehbinder .[140]

Here again the problem of laying down a minimum standard for the basis of jurisdiction is illustrated.[141] In the weighing-of-interests process, potentiality or actuality is only a matter of degree, as is directness and substantiality. In fact, whether effects are merely potential or whether they are actual, is a question of substantiality: potential effects are less substantial than actual effects. The more actual the effects are, the more substantial they are, and the more interested the state exercising jurisdiction will be in the exercise. And, since the question of potential or actual effects is a matter of substantiality, there is little point in regarding the question as an independent factor in the weighing-of-interests process.

2.3.3 Conflicting acts of states

2.3.3.1 Introduction

A portion of the normative content of the jurisdictional principles governing international criminal law is, we have found, that the state exercising jurisdiciton shall consider the sovereignty of the states affected by the exercise.[142] The duty to consider the sovereignty of affected states, together with the duty to consider the interests of the affected individuals, form the normative core of these jurisdictional principles, which is extracted from the examination of the rationale for jurisdictional limitations in the field of criminal law. Within the realm of international criminal law, *Rosswog,* for instance, has consequently claimed that the state exercising jurisdiction has a duty to consider the conflicting laws of other states.[143] The law of the state in which the criminal act occurred should according to him be given a certain preference over the *lex domicilii* of the actor or the victim; a state may not prescribe a certain conduct within the territory of another state if the conduct is prohibited there, nor may it, at least as far as foreigners are concerned, prohibit a certain conduct within the territory of another state, if the conduct is permitted therein.[144] The principle of territoriality has here been given priority over the principles of active and passive personality.[145] And Rosswog quotes *Jennings* with approval: "[I]t is obvious that the local law must be preferred; not to do so would be to permit one State to interfere in the affairs of another, for it would be to subordinate the municipal law to an external municipal system."[146]

The duty to consider conflicting laws, not only covers laws in the narrow sense of the concept, but all acts of state, in the sense that they emanate from any of the state's governmental branches or from agencies empowered to take action on behalf of the state[147] including the exercise of sovereign power by executive, administrative, legislative or judicial measures.

2.3.3.2 The act of state doctrine in the American case law — Generally
When contemplating a duty to consider a foreign act of state, the thought is inescapably lead to the *act of state doctrine* cherished in particular in the common law countries.[148] Although of earlier origin, the doctrine as developed in American law is normally traced back to the Supreme Court decision in *Underhill v. Hernandez* from 1897.[149] Here, Underhill, an American citizen, brought a tort action against Hernandez in a United States court. Hernandez had allegedly, in his capacity as military commander of the revolutionary Government of Venezuela, which was recognized by the United States prior to the suit, forcibly detained Underhill in the Venezuelan city of Bolivar. Ruling for Hernandez, the Court laid down the classic formulation of the act of state doctrine: "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgement on the acts of the government of another done within its own territory."[150] Hence the act performed by Hernandez was considered an act of state — Hernandez was considered a government agent — occuring within Venezuelan territory, and as such not reviewable by United States courts.

Similar formulations appeared in *Oetjen v. Central Leather Co.* and *Ricaud v. American Metal Co.*, both decided in 1918,[151] although the factual setting revealed distinct features. Displayed here were controversies between private litigants involving property — to which the parties in both cases claimed title — seized in Mexico during the Mexican revolution by commanders appointed by the Carranza government (recognized by the United States in 1917). The property was subsequently purchased from these commanders, in the first case by Central Leather Co. and, in the latter, by Ricaud, who in turn resold it. It is a settled principle of law, the court held, that the courts of one state do not examine the validity of the acts of another done within its own territory.[152]

A similar fact pattern was presented in the celebrated case of *Banco Nacional de Cuba v. Sabbatino.*[153] The non-reviewable act of state in question here was a Cuban nationalization decree. Disputed in the case was the title to property and the proceeds therefrom seized within Cuba as a consequence of the nationalization decree. Again the Supreme Court ruled that it would not examine the validity of the taking of property within its own territory by a foreign sovereign government, extant and recognized by the United States at the time of the suit, and this, the Court added, "even if the complaint alleges that the taking violates customary international law".[154] In an amendment to the Foreign Assistance Act of 1964,[155] the so-called Hickenlooper Amendment, the scope of the act of state doctrine was some-

what restricted. In essence, the Amendment provides that the act of state-doctrine shall not apply when the foreign act of state under consideration — consisting of a confiscation or other taking of property — violates international law.[156]

Arising as consequences of the Cuban nationalization decrees were also the two cases *First National City Bank v. Banco Nacional de Cuba* and *Alfred Dunhill of London, Inc. v. The Republic of Cuba.*[157] In these, the act of state doctrine was held *not* to bar a ruling on the merits. The two cases, however, left the doctrine in a state of confusion. Both decisions were supported by the closest majority possible (5—4)[158] and in both cases, four different opinions were delivered. It seems that the only opinion adhered to by a majority can be found in the *Dunhill* case: the act of state doctrine does not apply when the party resorting to it is unable to prove the existence of an act of state.[159]

2.3.3.3 The act of state doctrine in international antitrust case law

Before examining more closely the components of the act of state doctrine, a brief survey of the doctrine's role in international antitrust will be presented.

In *American Banana Co. v. United Fruit Co.,*[160] the Supreme Court, in what seems to be dicta,[161] observed that the seizure by the Costa Rican soldiers and officials of plaintiff's property was an act of state that cannot be "complained of elsewhere in the courts".[162] But this was not the reason why the Court ruled for the defendant, who was alleged to have instigated the seizure, and held that the Sherman Act was not violated. "The fundamental reason is", the Court explained,[163] "that it is a contradiction in terms to say that, within its jurisdiction, it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper... it makes the persuasion lawful by its own act." The law in the state in which the act is perfomed *(lex loci delicti),* governed. On the same ground, a violation of the U.S. antitrust laws was held to be at hand in the *Sisal* case, since acts were performed within the United States.[164] The act of state doctrine was only alluded to in passing.[165] The fact that the conspirators were aided by foreign legislation was held of no consequence.

In a wholly domestic case, *Parker v. Brown,*[166] the Supreme Court held that anticompetitive practices, which derived their authority and efficacy from the legislative command of a state, were not in violation of the U.S. antitrust laws, since it was not the object of these laws to prohibit a state from imposing a restraint as an act of government.[167]

In *Continental Ore Co. v. Union Carbide & Carbon Corp.*,[168] the Canadian government had appointed a Canadian enterprise its exclusive agent for the purchase of vanadium.[169] The Canadian enterprise acted in concert with an American company for the purpose of excluding a competitor to the latter from the Canadian market. Distinguishing both *American Banana* and *Parker v. Brown*,[170] the Court noted that the validity of the acts of the Canadian government or its agencies, including the Canadian enterprise, were not in issue (the Canadian enterprise was not served). What the case concerned, the Court continued, were the acts of United States persons, effectuated both within and without the United States. Neither the fact that the conspiracy involved some acts by the agent of a foreign government, nor the fact that the Canadian enterprise, in carrying out the bare act of purchasing vanadium from one company rather than the other, was acting in a manner permitted by Canadian law, made the conspiracy lawful, since: "[t]here is nothing to indicate that such law in any way compelled discriminatory purchasing, and it is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme."[171] Yet, nowhere did the Court refer to the act of state doctrine.

When the Swiss defendants in the *Swiss Watch* case[172] argued that a United States court should not assume jurisdiction over their activities because such activities were essentially the acts of a sovereign government, the Court, relying partly on the *Continental Ore* case,[173] replied:

"If, of course, the defendants' activities had been required by Swiss law, this court could indeed do nothing. An American court would have under such circumstances no right to condemn the governmental activity of another sovereign nation. In the present case, however, the defendants' activities were not required by the laws of Switzerland. They were agreements formulated privately without compulsion on the part of the Swiss Government. It is clear that these private agreements were then recognized as facts of economic and industrial life by that nation's government. Nonetheless, the fact the Swiss Government may, as a practical matter, approve of the effects of this private activity cannot convert what is essentially a vulnerable private conspirace into an unassailable system resulting from foreign governmental mandate."[174]

Again, however, no direct reference was made to the act of state doctrine. What was said here was essentially, as was indicated in the *Sisal* and the *Continental Ore* cases,[175] that while sovereign compulsion is a good defense, sovereign permission is not.

Somewhat more restricted was the view of Judge Ryan in *Sabre Shipping Corp. v. American President Lines, Ltd.*[176] Even if it could be sufficiently

demonstrated that the Japanese defendants were engaged in the unlawful activities at the direction of the Japanese government, it would not necessarily immunize them from prosecution or civil responsibility for acts done in United States commerce.[177] Judge Ryan did, however, not elaborate upon the crucial question of when an act occurs in United States commerce. Does it occur in United States commerce when commerce is "directly and substantially affected", as the effect formula may read? In that case, the sovereign compulsion defense as discussed in *Continental Ore*[178] and the *Swiss Watch*[179] cases would be reduced to a question of subject matter jurisdiction, that is, where the requisites for subject matter jurisdiction are met, no sovereign compulsion defense can be raised.[180]

In *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*,[181] the question of sovereign compulsion was raised again. The defendants, who had refused to deliver to the plaintiff, argued that their non-delivery was compelled by regulatory authorities in Venezuela. "It requires no precedent", the Court held, "to acknowledge that sovereignty includes the right to regulate commerce within the nation. When a nation compels a trade practice, firms there have no choice but to obey. Acts of business become effectively acts of the sovereign. The Sherman Act does not confer jurisdiction on United States courts over acts of foreign sovereigns."[182] The act of state doctrine in its "traditional" posture, as developed in the *Underhill* and *Sabbatino* cases,[183] was directly invoked to neutralize the plaintiff's argument that the Venezuelan orders were unauthorized and illegal according to Venezuelan law. Whether the Venezuelan orders were issued within authority and by legitimate procedures was not for the court to explore, the Court concluded.[184]

The fact pattern in *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*[185] shows a striking resemblance to that in *American Banana.* The American defendants were charged with having induced and procured assorted executive acts by foreign states within foreign territory allegedly causing damage to the American plaintiff. Subject matter jurisdiction was assumed on the ground of a "direct or substantial effects" formula. Since, however, foreign acts of state were involved, the complaint was dismissed. Even if the complaint was only concerned with the defendants' conduct in "catalyzing" the foreign acts of state, the Court reasoned, a determination on the merits would still require inquiries by the Court into the authenticity and motivation of the acts of foreign sovereigns. A such inquiry was prevented by the "traditional" act of state doctrine, especially the *Sabbatino*[186] precedent. Unlike the defendants in *Sisal* and *Continental Ore,*[187] the defendants here were not engaged in activities independent of

the foreign acts of states, causing damages to the plaintiff.[188]

In *Timberlane Lumber Co. v. Bank of America, N T & S A*,[189] the defendants had availed themselves of ordinary court procedures in Honduras and managed to obtain court orders, the enforcement of which (by Honduran authorities) was damaging to the plaintiff. The Court, distinguishing *Occidental Petroleum,*[190] reached the result that the act of state doctrine did not require dismissal. In that case, the Court argued, the foreign sovereign was the sole actor, although allegedly induced to take action. In the instant case, the defendants took independent action. There were, first, no indications to the effect that the decisions and actions of Honduran courts and authorities reflected a sovereign decision. Secondly, the defendants were charged with activities totally unrelated ("separate activities") to the acts of the Honduran courts and authorities.[191]

In *Mannington Mills, Inc. v. Congoleum Corp.*,[192] the antitrust violation allegedly consisted of, *inter alia,* the procurement of foreign patents (on fraudulent representations) and the enforcement of rights derived from the patents (the bringing and threatening the institution of suits) in foreign countries. But the granting of patents, the Court concluded, even if in substance ministerial activity, is not the kind of governmental action contemplated by the traditional act of state doctrine or the "correlative" doctrine of sovereign compulsion. The granting of patents did not occur as a result of a considered policy determination by a government to give effect to its political and public interests, nor did it compel the defendant to perform the acts constituting the restraint.[193]

In *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*,[194] the act of state doctrine was held not to apply, mainly on the ground that the defendants had carried out acts without the participation of the foreign sovereign (the Dominican Republic) — so-called separate activities.[195] Characterized as a separate activity and therefore not covered by the act of state doctrine was, for instance, the initiation of judicial proceedings in foreign courts, as were the acts of a foreign enterprise although operating under a (foreign) government sanction. "In order to trigger application of the act of state doctrine, the government act concerned must be a public one such as a legislative enactment, regulatory decree, or executive use of the police powers",[196] the Court explained. But the Court went further: even an act that would otherwise be immune from judicial inquiry may lose its privileged status if the foreign government were to repudiate the act. Moreover, even an unrepudiated government act may be scrutinized by the court if it is the result of corruption of foreign goverment officials."[197] Yet, that is not all. Following a Supreme Court minority view (four members) in

Alfred Dunhill of London, Inc. v. Republic of Cuba,[198] the Court drew a distinction between the sovereign acts that have a governmental character and those that have a commercial character — a distinction upheld for the purpose of granting a foreign government or its agents immunity.[199] In line with this distinction, conduct related to commercial endeavours is not immunized by the act of state doctrine.[200]

The defendants in *Industrial Investment Development Corporation v. Mitsui & Co., Ltd.,*[201] were allegedly engaged in a conspiracy to prevent the plaintiff from entering the Indonesian lumber market: By thwarting the cooperation between the plaintiff and an Indonesian company, the defendants effectively ruined the plaintiff's chances of procuring a license for harvesting from the Indonesian Goverment. The Court found the involvement of the foreign state too insignificant to invoke the act of state doctrine. The case did not raise political questions. No act of the foreign sovereign was really at issue.[202]

2.3.3.4 The components of the act of state doctrine — Sovereign immunity — Sovereign compulsion

What distinct features does the act of state doctrine have? Among American commentators, the doctrine is generally regarded *not* to be a rule of international law.[203] Nor is it regarded to be constitutionally compelled.[204] But it has "constitutional underpinnings". The basis of the doctrine seems to be judicial self-restraint. By not passing on the validity of foreign acts of state, the courts avoid embarrassing the executive branch in its conduct of the foreign relations. As expounded by Justice Harlan in the *Sabbatino* case:

"[The doctrine] arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in the past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere."[205]

Indicated here are the considerations underlying the doctrine. The legal source of the doctrine is the court-made common law. However, its theoretical foundation can, no doubt, be found both in international law and in the Conflict of Laws.[206] The doctrine is not a jurisdictional rule, but a rule of decision limiting determinations on the merits of a case. In its traditional

formulation the act of state doctrine, as we have seen, precludes a United States court from inquiring into the validity of a foreign act of state fully executed within the territory of that foreign state.[207] In order for the doctrine to apply, there thus must be an act of state and the act must have been fully executed within the territory of the acting state. These are the two major premises on which the doctrine rests.[208] As defined by the *Restatement (2d) of Foreign Relations Law,* an act of state concerns "the public interests of the state as a state, as distinct from its interest in providing the means of adjucating disputes or claims that arise within its territory." It is not so much the type of state organ or agency involved, but the *nature* of the act that determines the quality of the act as an act of state. It is crucial that the foreign state by exercising jurisdiction gives effect to its public interests (the public interest qualification).[209] The qualification of nationalization or expropriation decrees as acts of state has normally presented no problems. These are "typical" acts of state, the Restatement concludes. The public interest is considered evident. By contrast, court adjudication is generally not regarded as giving effect to the public interest.[210]

Whether an act of state is performed within or without the territory of the acting state may, as far as nationalization decrees are concerned again, not be too hard to determine. It is essentially a question of localizing the property involved and ascertaining whether the decree in question encompasses property outside the acting state's territory.[211] Consequently, nationalization decrees affecting property within the United States will not trigger the application of the act of state doctrine.[212]

Characteristic of nationalization decrees is also that they entail the actual seizure of the nationalized property. As regards property within the acting state, the decree is fully executed with the seizure. As regards property outside the acting state, again, the decree cannot be properly executed without the aid of the enforcement machinery of the state in which the property is situated.[213] And whether the acting state, any of its agents or any other person supporting a claim to property on the act of state in question will be assisted by the courts of the United States, turns on United States Conflict of Law rules, especially those pertaining to the "public policy" of the forum. The classic Conflict of Law concept of "public policy", that the courts of the United States will not enforce (or execute) the penal or revenue laws of other states,[214] thus has a secondary role in relation to the act of state doctrine: it operates when the foreign act of state is yet not fully executed and execution is sought in the United States courts.[215]

Hence, as long as we restrict the dicussion to nationalization decrees, the limits of the act of state doctrine seem fairly discernable: these decrees con-

cern property which can be localized and are fully executed with the seizure. (Analogous would be the detention or arrest of a person).[216] The act of state doctrine appears to be designed for nationalization decrees. Or would it be more correct to state that the act of state doctrine has developed through case law dealing primarily with nationalization decrees? The Restatement, Sections 41 and 43, are also essentially nationalization decree oriented. But moving away from this kernel area of the act of state doctrine, is entering a slippery slant. In the field of international antitrust, the case law presents a scattered picture. To what extent is the act of state doctrine applicable in this field? When, of course, as in *Hunt v. Mobil Oil, Corp.* and *Occidental Petroleum,*[217] the central issue is the nationalization decree or the equivalent act by the foreign sovereign, the applicability of the doctrine seems indisputable. Already here, however, there is a shadow of doubt. For, as noted above, four members (of nine) of the Supreme Court in *Alfred Dunhill of London, Inc. v. Republic of Cuba*[218] reached the result that the act of state doctrine does not extend to acts committed by foreign sovereigns in the course of their purely commercial operations.[219] This view was also endorsed by the United States Government in an *amicus* brief and in an accompanying letter from the Department of State,[220] where is was said: "[W]e do not believe that the Dunhill case raises an act of state question because the case involves an act which is commercial, and not public, in nature."[221] An this position was adopted, in principle, in *Hunt v. Mobil Oil, Corp.,* in *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.* and in *Industrial Investment Development Corp. v. Mitsui & Co., Ltd.*[222]

The emerging "commercial activity exception" is a reflection of the governmental-commercial distinction upheld in the doctrine of sovereign immunity[223] recently codified in the Foreign Sovereign Immunities Act of 1976 (the "FSIA"),[224] which provides in part that a foreign state shall have no immunity in a case where the action against the state is based upon

1) a commercial activity carried on in the United States by the foreign state;
2) an act performed within the United States in connection with a commercial activity of the foreign state elsewhere; or
3) an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.[225]

"Commercial activity" is defined as "a regular course of commercial conduct or a particular commercial transaction or act."[226] Regularity is thus

not necessary. The commercial character of an activity or transaction shall, the FSIA provides, be determined by reference to the *nature* of the conduct, rather than by reference to its purpose.[227] Distinguishing commercial acts from "public" ones by determining the nature of the state conduct is, often enough, a delicate task, especially in the field of antitrust law. Is a state boycott, for instance, by its very nature commercial, or can it under any circumstances be considered "public"? In *International Ass'n of Machinists and Aerospace Workers v. Organization of the Petroleum Exporting Countries (OPEC),*[228] the regulatory activities of the defendants involved were, although directly related to the sale of oil, *not* characterized as commercial mainly on the ground that the activities concerned the principal natural resources of the acting states.[229]

The "direct effect" requisite is not defined at all in the FSIA. *Rahl* takes the view that the requisite is a restatement of the "effects" doctrine as developed in the case law, and consequently an incorporation of the criteria for subject matter jurisdiction in the field of antitrust law, securities regulations, etc.[230] *Meal* and *Trachtman,* again, maintain that the "effects" doctrine has "no place in the context of a rule of jurisdictional immunity".[231] Sovereign immunity, they argue, is a doctrine of "adjudicatory jurisdiction", affecting the question whether the foreign state can be a defendant at all, whereas the "effects" doctrine concerns prescriptive jurisdiction, determining whether a certain law is applicable at all.[232] Instead, they conclude, the "direct effect" requisite shall be viewed as an incorporation of the "minimum contacts" standard required for jurisdiction *in personam*.[233]

The better view seems to be that the question of whether a foreign state engaged in commercial activities is immune from U.S. jurisdiction, is contingent upon whether the specific act or transaction complained of falls within the "legislative" jurisdiction of the United States, all according to the general (American) understanding of when such jurisdiction lies (for instance, as expressed in the Restatement (2d)of Foreign Relations Law, Section 18). The wording of the third clause, as stated above ("that act causes a direct effect in the United States") cannot possibly be construed otherwise.[234] Mark, however, that the requisites for "legislative" jurisdiction in this sense do not necessarily coincide with the reguisites for subject matter jurisdiction as prescribed for instance in the antitrust laws, or in any other law. (The scope of the antitrust laws may be stricter than what the principles for "legislative" jurisdiction allow). Note too, that the question of jurisdiction *in personam* is in no way excluded. If a court reaches the result, on the premises now indicated, that the foreign state engaged in commercial activities is not entitled to immunity (its acts have a "direct effect"), the court will proceed to determine whether there is jurisdiction *in personam* and, further, whether there is subject matter jurisdiction (provided these questions are raised, of course).[235]

However, the "commercial activity" analogy to the sovereign immunity doctrine is not self-evident. Those who favour the analogy, regard the two

doctrines as closely related. Their object is to synchronize the two doctrines. Not to do so, they argue, would undermine the policy supporting the restricted view of sovereign immunity.[236] *Jo Rachel Backer* touches the core:

"Given the parallel purposes and generally close relationship between sovereign immunity and the act of state doctrine, it would seem reasonable to exempt from act of state doctrine coverage those acts for which sovereign immunity would not be granted. First, if the defendant is a sovereign, it would be anomalous to deny it sovereign immunity on the ground that its action was commercial in nature, and yet to give effectively the same immunity by applying the act of state doctrine. Such an approach would clearly thwart the FSIA's objective of making purely commercial injuries cognizable in the courts. Second, if the defendant is a private entity, it would seemingly serve no foreign policy interest to give it a broader protection under the act of state doctrine than a foreign government would receive under sovereign immunity."[237]

Those, again, who oppose an automatic transfer of the "commercial activity exception" to the act of state doctrine, reason that the two doctrines, although related in many respects,[238] serve disparate purposes: they "differ fundamentally in their focus and in their operation".[239] Whereas the sovereign immunity doctrine has an international law origin, the act of state doctrine is more rooted in common law. While the former doctrine concerns the question whether a state can be immunized from a suit altogether, the latter doctrine concerns the limits for determining the validity of a foreign act of state. And while the former is focused upon the respect for foreign sovereign states, the latter, beyond this, is designed to be responsive to the system of separation of powers and the particular political role of the executive branch in its conduct of foreign affairs.[240] Moreover, the distinction between commercial and public acts is subtle.[241] If the purpose of the act of state doctrine — to avoid embarrassment to the executive branch in its conduct of foreign affairs — is not to be obstructed, a decision whether or not to apply the doctrine cannot rest on such narrow distinctions. Any doubt or hesitation would have to be a good enough reason for invoking the doctrine.[242]

An attempt to solve this controversy will not be made here. We will rather focus our attention on aspects of the act of state doctrine in the field of international antitrust law if either position is adopted. Since the act of state doctrine is applicable only to acts performed "within the territory" of the acting state, the "commercial activity exception" can, according to the FSIA, be invoked only where an act related to commercial activity causes a *direct effect* within the United States.[243]

As for "public" or "governmental" acts, on the other hand, the act of state doctrine *will* apply, provided such acts are performed within the territory of the acting state. If, however, we do not adopt the "commercial activity exception", the act of state doctrine will apply to all acts performed within the territory of the acting state, whether commercial or public.

Let us assume that the anticompetitive conduct complained of in a United States court is the foreign sovereign's seizure of property within its territory.[244] Can the foreign state be sued? If the act is characterized as public it obviously cannot; if characterized as commercial, it depends on how "direct effect" is defined. Does the act of state doctrine apply if action is brought against a private party, alleged to have induced the foreign state's seizure of property? Again, if the act is characterized as public, the doctrine applies; if, under the "commercial activity exception", it is characterized as commercial, its applicability depends on the definition of "direct effect".

In both cases it is thus the fact that an act performed within the territory of the foreign state (or at least outside the United States) causes a "direct effect" within the United States that activates the commercial exception. A public act, on the other hand, performed within the territory of the acting state, immunizes both the state and the act, even if a "direct effect" is caused within the United States. According to this scheme, the place of the conduct must be kept distinct from the place where the "direct effect" of the conduct occurs. For if it is said that the place of conduct is where the "direct effect" of the conduct occurs, the commercial-public act distinction immediately fades away, and the only decisive criterion in each case becomes that of "direct effect".[245]

In our example with the seizure of property in a foreign state, the commercial-public act distinction certainly has some significance, although for the most part, seizures will be considered public. In the traditional area of the act of state doctrine concerning nationalizations, expropriations, etc., the situs of the property governs the place of conduct, and the Conflict of Law rules regarding *situs* are, as noted, relatively clear. But the example is atypical for international antitrust law. The anticompetitive conduct is, in most instances, a horizontal or vertical restraint performed, directed, encouraged or at least permitted by a foreign state. In these situations the commercial-public act distinction seems to have less significance for the purposes of the act of state doctrine. The reason for this can be found in the difficulty in localizing the anticompetitive act and separating it from its direct effects.[246] Under what circumstances, for instance, is a boycott, a refusal to sell, a price discrimination, a price agreement, or a

market divisioning performed within the acting state?

It is strange to think that, suddenly, for the purposes of the act of state doctrine, the place of the contract or the *situs* of the companies involved, or their nationality, should be decisive.[247] The risk is further that courts confronted with "public" anticompetitive action, which has a "direct effect" within the United States, will either construe extraterritorial acts or deem the acts as commercial (and invoke the "commercial activity exception") in order to avoid unsatisfactory results. A decision whether to apply the act of state doctrine or not leaves room for too many artificial constructs. The suggestion thus is that, in the field of international antitrust law, the public-commercial act distinction is of little relevance on the ground that acts, whether public or commercial, are not shielded by that doctrine when they cause a "direct effect" within the United States. The decisive criterion in either case is the occurrence within the United States of a "direct effect" (or its corollary, that the acting state has not acted within its own territory). A further consequence of this reasoning is, that the act of state doctrine in the field of international antitrust law — the traditional cases of nationalization decrees aside — in theory at least, is encircled by the particular jurisdiction rule governing this area of law, assuming, as we have,[248] that "direct effect" is a manifestation of the requisites for "legislative" jurisdiction. In this way the act of state doctrine loses its independent significance in the field of antitrust law.

There is yet a correlative compelling reason for reducing the applicability and significance of the act of state doctrine in international antitrust law. With respect to the traditional domain of the act of state doctrine, we have found that the doctrine applies when the intraterritorial act is *fully executed* (normally with the seizure of property).[249] In international antitrust law, it will only seldom be found that acts are fully executed in this sense. Constituting the act of state is rather a law, a decree, an administrative measure, or the like, which requires, prohibits or permits certain conduct and the full execution of which is really never attained.[250]

However, the case law, we have seen, displays examples where full execution is not required for protection from antitrust liability. In *Continental Ore,* in the *Swiss Watch* case, in the *Timberlane* case and in *Mannington Mills,* it was clearly indicated that corporate conduct compelled by a foreign sovereign would provide a good defense, while mere sovereign approval would not.[251] And in *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.,* sovereign compulsion constituted a ground for dismissal.[252] Applied here is not the act of state doctrine as such, but a corollary to that doctrine, often referred to as the doctrine of sovereign compulsion.[253] But,

although there are certain dicta in the *Swiss Watch* case according to which this doctrine could be construed to cover acts outside the compelling state[254] (and even such committed within the United States), there seems to be little reason for extending the doctrine further than the act of state doctrine. Immunized, thus, should be acts compelled by a foreign sovereign and committed within the territory of the compelled state. Again, however, the problem of localizing an anticompetitive act arises. Should a boycott compelled by a foreign sovereign be localized to its territory on the ground only that the companies directed have their *situs* there? Should the fact that the boycott causes a "direct effect" within the United States be considered irrelevant in the localization process? The submission is, it should not, and for the same reasons that it should not as when the applicability of the act of state doctrine is in question.[255]

The foregoing analysis leads to the following conclusions:

1) Under the FSIA, a foreign state carrying out anticompetitive activities characterized as public acts of state is immune from antitrust suit in United States courts, irrespective of where the acts are committed and whether they cause a "direct effect" within the United States.
2) Under the act of state doctrine, foreign anticompetitive acts of state, characterized as public, performed and fully executed within the acting state — such as nationalization or expropriation decrees, the seizure of property, the arresting of persons, the taking of control of companies or property, etc. — will not be scrutinized in American courts.[256]
3) In other cases, such as when

a) action is brought in a United States court against a foreign state for anticompetitive activities which are characterized as commercial;
b) foreign anticompetitive acts of state performed and fully executed within the acting state (nationalization decrees, seizures of property, etc., as exemplified under 2 above) characterized as commercial (here presuming that the "commercial activity exception" is adopted) are at issue;
c) foreign anticompetitive acts of state not fully executed within the acting state, whether characterized as commercial or public, are at issue; and when
d) the anticompetitive acts complained of are compelled by a foreign sovereign;

the FSIA with respect to a), the act of state doctrine with respect to b) and c), and the doctrine of sovereign compulsion with respect to d), have no applicability when the acts complained of are within United States ("legis-

lative") jurisdiction or, as prescribed in the FSIA, when the acts cause a "direct effect" in the United States.

From this it seems clear that, except for the situations mentioned under 1) and 2) — atypical in international antitrust law — the respect and concern for foreign sovereigns, here formulated in different doctrines, should, as a matter of principle, be incorporated into a broad jurisdictional rule.[257] Theoretically and systematically, this seems to be the better solution. In a jurisdictional rule comprehending a weighing-of-interests process (as we claim every jurisdictional rule should comprehend according to international law) the question of respect and concern for the acts of foreign nations seems to be far better dealt with.

2.3.3.5 Consideration of foreign acts of state in the weighing-of-interests process

According to the general American view, as noted, the act of state doctrine is not a requirement of international law. Section 9 of the *Restatement (2d) of Foreign Relations Law* provides that a state "is not required by international law to give effect to" a foreign act of state, so long as its refusal is not arbitrary. This interpretation of international law is repeated in Section 41.[258] In the *Sabbatino* case, the Supreme Court concluded: "We do not believe that this doctrine is compelled... by some principle of international law... That international law does not require application of the doctrine is evidenced by the practice of nations".[259]

Nor is the doctrine of sovereign compulsion or any other consideration of foreign acts of state, at least according to the view presented in the Restatement, *supra,* required by international law. Thus, Section 39(1) of the Restatement provides that

"A state having jurisdiction to prescribe or to enforce a rule of law is not precluded from exercising its jurisdiction solely because such exercise requires a person to engage in conduct subjecting him to liability under the law of another state having jurisdiction with respect to that conduct."[260]

With reference to Section 40, however, the state is required in *some* situations to consider moderating the effects of the enforcement of its own law within the realm of an interest analysis.[261]

The American position is not generally adopted among writers in international law. *Kelsen,* for instance, proceeding from the principle *par in parem non habet imperium, i.e.,* that equals do not have jurisdiction over each other, reaches the conclusion that a state does not have jurisdiction over foreign acts of state or individuals acting in pursuance of such acts. Nor, as a consequence of this principle, may the courts of one state ques-

tion the validity of acts of another state, provided they are performed "within the jurisdiction" of that state.[262] Essentially in accord is *Heiz,* who also finds support for his view in the principle *par in parem*...[263] "Aus diesem Grundsatz", he writes, "geht aber positiv hervor, dass Handlungen, die ein Staat in Ausübung seiner Souveränität innerhalb seines völkerrechtlich anerkannten Herrschaftbereichs vornimmt, von andern Staaten als Hoheitsakte eines fremden Staates geachtet werden müssen."[264] Other publicists seem to agree.[265] And Article 7 of the New York Resolution of the *International Law Association* prescribes, as we have seen, that no state "shall require conduct within the territory of another State which is contrary to the law of the latter" in the event that both states have jurisdiction.[266] There are, however, among continental writers those who maintain the opposite view. *Schlochauer,* for instance, denies that the act of state doctrine has become a customary rule of international law, and with him, it seems, is *Ross.*[267]

Hence, whether there is an international law basis for the act of state doctrine and the doctrine of sovereign compulsion is controversial. No attempt to settle the controversy here need be made, however. As was submitted in the introduction of this section, the belief is that there is a duty to consider foreign acts of state, a duty which is derived from the jurisdictional principles governing international criminal law, and specifically the normative content of these principles — the rationale for jurisdictional limitations in this field of law. The consideration of foreign acts of state is a cardinal element in the weighing-of-interests process. To be examined next is the way in which this consideration is to take form.

The duty to "*consider*" the acts of foreign states must be seen in a limited sense. Envisaged shall be a state (or any of its organs) exercising jurisdiction. In exercising jurisdiction and thereby affecting the interests of other states (extraterritorial effects), the state has the duty to take into consideration the acts of those other states. It is therefore not a question of enforcing or executing the acts of other states. The active party is not the state from which the acts to be considered originate, or any person relying on such acts, as in the case where the act of state doctrine is applied.

In conflict are the interests of the state exercising jurisdiction and the state (or states) affected by that exercise. Which the interests of the exercising state are and how these are measured, we have already discussed. The initial question here becomes how the interests of the affected state are to be measured within the scope of a weighing-of-interests process. The standard by which the interests of the affected state are to be measured should be the degree to which the foreign state is involved or engaged in the activi-

ties over which jurisdiction is exercised. The more directly the foreign state is involved, the stronger its interest. The interest is no doubt strongest in the situation where the foreign state itself carries out the anticompetitive practices. Should these activities be qualified as public acts, jurisdiction cannot be exercised at all; acts *jure imperii* immunize the foreign state from jurisdiction. The doctrine of sovereign immunity is a generally recognized principle of international law.[268] This principle constitutes the only *absolute* barrier against the exercise of jurisdicition within the realm of a weighing-of-interests process.[269] Or more accurately stated: The principle of sovereign immunity, when invoked, eliminates an interests-analysis. Should, however, the state activities be qualified as commercial acts — acts *jure gestionis* — the interests-analysis is back in play again. The commercial-public act distinction is, of course, something of a conundrum. Which anticompetitive acts are public, and which are commercial? In performing typical government functions, such as enacting laws, taking administrative measures, enforcing laws and decrees, etc., a state is certainly carrying out "public" acts. When acting through publicly owned companies, conducting "normal" business, the acts are surely commercial. But, between these relatively clear-cut cases, there is a grey area for which no general answers can be provided. Here, as suggested by *Brownlie,* "[t]he least objectionable technique is to abandon a search for *general* principles of distinction and to except from immunity, empirically and on the basis of general practice, a particular type of activity or subject-matter".[270]

Leaving the public acts immunized by virtue of the principle of sovereign immunity aside, there seems to be a broad variety of ways in which a state can be involved in anticompetitive activities: the state itself is carrying out the activities (acts qualified as commercial); the state is participating actively in the activies; the state is not participating, but commanding the performance of the activities; the command is in the form of a decree adressed directly to the companies carrying out the activities; criminal sanctions are attached to the command; the command is in the form of a general obligation (or prohibition) prescribed by general law; the sanctions are criminal; the sanctions are administrative; the state encourages the companies involved to carry out the activities; the state encourages companies in general to carry out the type of activities complained of; the state gives its approval directly to the companies involved to carry out the activities; the state permits the carying out of the type of activities complained of by so prescribing in general law; the state has issued no regulation at all with respect to the activities complained of, but the activities are legal in the state

on the basis of a general freedom to form contracts and compete on the market; the state is wholly neutral with respect to the activities; the state has issued no regulation with respect to the activities at issue, but, according to its antitrust laws, everything not permitted is prohibited; the activities are generally prohibited by law; etc.

What we have here are only examples of different degrees of state involvement. (The atomization could no doubt be continued, but need not be here). Presented is what seems to be a sliding scale of state involvement. A state is obviously more directly involved — and therefore more interested — in the anticompetitive activities when commanding them than when merely permitting them. This is not to suggest, of course, that a state merely permitting the activities, by granting a general (constitutionally based) freedom, should be considered disinterested (although that may seem the case when the state demonstrates a wholly *neutral* attitude towards the activities; but then again, that is hardly a realistic situation). A state disinterested in the activities of the companies situated within its territory (and others as well) seems unimaginable. What distinguishes the command from the mere permission is the degree of state interest.

But the *form* in which a state is involved in certain anticompetitive activities cannot be wholly conclusive of the degree of state interest. The particular form of involvement must be seen in a broader context and especially against the background of the *general policy* of the state in this area. By merely permitting — by general freedom — companies to engage in anticompetitive activities, a small state, for instance, may be encouraging mergers in order to strengthen the competitive power of the domestic companies on the international arena. As a corollary, a command by a state may not always be representative of its general policy in the particular area at issue, but rather constitute an isolated case (maybe even against the general policy, or induced by the adressees of the command, or issued as a protest against the state exercising jurisdiction). Moreover, a command issued (*e.g.*, as a response) subsequent to the commencement of court proceedings in the state exercising jurisdiction, is hardly representative of the commanding state's general policy.

From the case law of United States courts we have seen examples of when companies are protected from liability in the case of foreign sovereign compulsion, as distinguished from mere approval.[271] In the weighing-of-interests process, a sovereign compulsion constitutes no absolute barrier against the exercise of jurisdiction. If, on the other hand, the sovereign command is representative of the sovereign's general policy in the field of antitrust law, it will be indicative of a strong interest of that sovereign, an

interest to be weighed against the interests of the state exercising jurisdiction. An interests-analysis must always be anchored in the facts of the individual case.

2.3.3.6 "Blocking statutes" and "anti-antitrust laws"

In response to the allegedly broad application of American antitrust laws, a number of states have enacted counter-legislation intended to prevent or block court orders, to obstruct enforcement or to counteract the extraterritorial effects of American antitrust law in general. The first "blocking statutes" were primarily geared at preventing domestic companies from supplying data and producing documents to American authorities on the basis of court orders.[272] They came mainly as a result of the broad investigations of the shipping industries in the fifties and early sixties.[273] Recently, however, veritable "anti-antitrust laws" have been enacted embodying the further purpose of thwarting the extraterritorial effects of the American antitrust laws as a whole. The British Protection of Trading Interests Act (Trading Interests Act), passed by the Parliament in March 1980, is one example of this, and probably the most extensive.[274] Through the years, Great Britain has most vehemently opposed the extraterritorial effects of the United States exercise of jurisdicition in antitrust cases. As late as July 1978, the British Government submitted to the United States Government a diplomatic note with the following content:

"HM Government considers that in the present state of international law there is no basis for the extension of one country's antitrust jurisdiction to activities outside of that country of foreign nationals."[275]

The immediate impetus for the Trading Interests Act was no doubt the *Westinghouse* uranium litigation, outlined above.[276] The object of the Act is, as the title indicates, to provide "protection for persons in the United Kingdom from certain measures taken under the laws of overseas countries when those measures apply to things done outside such countries and their effect would be to damage the trading interests of the United Kingdom, or would be otherwise prejudicial to the sovereignty or security of the United Kingdom."[277] The Act, which consists of eight sections, gives the Secretary of State extensive power to counteract measures or orders taken or issued by foreign authorities, courts or tribunals for the purpose of controlling or regulating international trade. The Secretary of State may, *inter alia* (Sections 1 and 2)

1) order a British person to give notice of any requirement or prohibition imposed or threatened on that person pursuant to any foreign measures,[278]

2) prohibit a British person from complying with any such requirement or prohibition,[279] and
3) prohibit a British person from complying with certain orders of a foreign court, authority or tribunal to produce any commercial document, to furnish any commercial information or to publish any such document or information, which is not within the territory of state from which the order originates.[280]

Section 3 of the Act provides criminal penalties for the failure to comply with the requirements imposed by the Secretary of State.

Moreover, according to Section 5, any judgment for multiple damages given abroad in civil proceedings shall not be enforceable (shall not be registered) in the United Kingdom, nor shall any other judgment based on a competition law which has been specified by an order made by the Secretary of State, or judgment on a claim for contribution to a multiple damage award or any other judgment based on a such law as specified.

The provisions of the Trading Interests Act outlined thus far have a defensive character. Sections 6 and 7, however, are more offensive. Section 6, also known as the "claw back" provision, enables a British citizen, British corporation (incorporated therein), and any other person carrying on business in the United Kingdom to recover back sums paid under foreign judgments for multiple damages in excess of the compensation for the loss of the person in whose favour the judgment was given. Recoverable are thus in principle, the so-called non-compensatory damages.[281] Section 7, finally, is intended to encourage other states to enact laws providing for recovery of non-compensatory damages paid. The provision furnishes a basis for the mutual enforcement of judgments resting on such recovery ("claw back") provisions.[282]

The "claw back" provision, coupled with the Section 7 incentive, certainly offers a novel approach in international antitrust law. It is an offensive instrument for the neutralizing of the effects of foreign, particularly American, antitrust law. The offensive character of the provision has given rise to strong criticism, especially from U.S. commentators.[283]

In Canada, a bill was introduced in 1980 (Bill C-41 of July 11, 1980) on a Foreign Proceedings and Judgments Act containing provisions at least as far-reaching as those of the British Act. The proposed Act gives the Attorney General broad powers to restrict or prohibit the disclosure of documents and data, and to order that a foreign judgment shall neither be recognized nor enforced (Sec. 3(I) and 7(I)). It also gives any Canadian citizen or corporation (either incorporated in Canada or doing business there) a

right to sue for and recover damages from a person in whose favour a foreign judgment is given (Sec. 8(I)). According to Section 8(3), a court that renders judgment in favour of a party seeking to recover damages pursuant to Section 8(I) may "order the seizure and sale of shares of any corporation incorporated by or under a law of Canada or a province in which the person against whom the judgment is rendered has a direct or indirect beneficial interest whether the share certificates are located inside or outside Canada." Exceptions are provided for in Section 8(2).[284]

Also primarily as a result of the *Westinghouse* uranium litigation,[285] the Federal Parliament of Australia enacted the Foreign Antitrust Judgment (Restriction of Enforcement) Act in March, 1979.[286] The Act empowers the Commonwealth Attorney General to order that a foreign antitrust judgment not be enforced at all, or only partially enforced if, *inter alia*

1) the foreign court, in giving the judgment, exercised jurisdiction in a manner inconsistent with international law or comity, *or*
2) it is desirable for the purpose of protecting the national interest, and the recognition or enforcement of the foreign judgment in Australia either could or might be detrimental to, or adversely affect, or where the national interest relates to "trade or commerce with other countries, the trading operations of a trading or financial corporation formed within the limits of the Commonwealth or any other matters with respect to which the parliament has power to make laws or to which the executive powers of the Commonwealth relate".[287]

The prime purpose of the "blocking statutes" and the "anti-antitrust laws" is, as mentioned, to block the foreign operation of American antitrust law. The total effect of this counter-legislation would no doubt be momentous for the exercise of jurisdiction under American antitrust laws should the dictum on sovereign compulsion in the *Swiss Watch* case, for instance, be generally followed in the American court ("If, of course, the defendants' activities had been required by Swiss law, this court could indeed do nothing ..."[288] This dictum is doubtlessly one of the major incentives for the enactment of counter-legislation.

From an international law perspective, the United States shall, of course, when exercising jurisdiction, take these laws (as any other relevant law) into consideration. In a weighing-of-interests process the counter-legislation reflects the interest of the affected state in this area. But, as commands in general, they do not form an absolute barrier against the exercise of jurisdiction.[289] (Whether they do so on grounds of municipal law, for instance by virtue of a sovereign compulsion, is an entirely different issue). And, as

emphasized above, the form in which the affected state is engaged in the particular antitrust matter should not be conclusive as to the interest that the state has in this. The general policy in the field of antitrust must be analyzed in order to establish whether the particular act of state is representative of that general policy.[290]

2.3.4 Consideration of other vital interests of the affected state

When exercising jurisdiction, a state must also consider the other vital interests of the affected state at stake in the specific case, such as economic interests, interests regarding the labor market and employment, security interests, interests in know-how and technical development and industrial interests in general. Here the economic interests dominate. To be established as a phase in the weighing-of-interests process are the possible effects that the exercise of jurisdiction may have on the particular companies and on the particular line of business involved, and the effects on the economy of the affected state. Relevant is also the relative importance of the industry in question for the affected state.

However, consideration of the economic or other interests of the affected state does not require detailed analysis. As an element in the weighing-of-interests process, such interests shall be given significance only in exceptional cases, where a part or the whole of the economy of the affected state, or a crucial part of its industry, is endangered. Considered shall be the *vital* interests of the affected state. Thus, for instance, when the majority of companies in a particular line of business are involved in an antitrust suit, and the business in question constitutes one of the major industries in the affected state, the court exercising jurisdiction would have to consider the effects of the suit and of possible decisions, upon the economy of the affected state. The situation is the same where jurisdiction is exercised over only one company, dominating a particular line of business and, crucial to the affected state. Of course, a small state which is dependent upon one or a few branches of industry, is especially vulnerable.[291]

Tantamount, in some sense, to the vital interests element, is the escape clause that can be found in many international free trade agreements, providing that a party to the agreement may, under exceptional circumstances, introduce protective measures.[292]

2.3.5 Consideration of the interests of the individual

2.3.5.1 Introduction

As one of the main underlying reasons for jurisdictional restrictions in international criminal law, we found the desire to protect the individual.[293] The protection of the individual is part of the normative content of the jurisdictional principles governing international criminal law.[294] The weighing-of-interests process must, therefore comprehend a consideration of the individual's interests. Thus far the formulation of this element of the interests-analysis has been very tentative indeed. Previously, brief mention has been made of interests such as foreseeability, avoidance of conflicting commands, and the principle of *ne bis in idem*. The time has come for elaboration.

First, however, some general starting-points.

The status of the individual in international law is traditionally a controversial question.[295] What interests us here, however, is not the status of the individual as compared to the status of a state under international law, but rather whether the individual can acquire rights under that law. And, surely, as to this question there can be no doubts, at least if we by "rights" imply *protection* under law.[296] According to customary law, for instance, aliens are afforded *protection* under the international minimum standard. A number of international treaties and conventions, further, provide for the protection of the individual in other areas. The Rome Treaty of 1957 and the European Convention on Human Rights of 1950 suffice as examples.

It may be argued, of course, that by protecting the interests of the affected state, within the scope of a weighing-of-interests process, the individual will indirectly be afforded protection. Anything moderating the exercise of jurisdiction will inevitably affect the situation of the individual. If the state exercising jurisdiction takes the conflicting laws and policies and other interests of the affected state into consideration, the situation of the foreigner will certainly change too, as a side-effect. But this is also true in the converse situation; in other words, when the interests of the individual are considered, the affected state will probably benefit therefrom. Why treat the two questions separately? Are they not just two aspects of one and the same question? Have we not exhausted the sources of protection by giving protection to the affected state? We think not. The normative content of the jurisdictional principles governing international criminal law indicates that the question of protecting the individual is independent of that concerning state protection. Whether there is any substance in this distinc-

tion in the field of international antitrust law remains to be seen.

For the purposes of international antitrust and the present study, we will focus our attention primarily on the individual who is foreign or alien in relation to the state exercising jurisdiction. And when the individual is a legal person, "foreignness" will at the minimum imply that the enterprise (company, etc.) is seated or incorporated outside that state, when a physical person, that he is a foreign citizen or residing or staying outside the exercising state.

2.3.5.2 The protection of aliens in international law

International customary law provides protection for the alien on the basis of an international minimum standard.[297] The standard does, on the one hand, *not* implicate that aliens may not be discriminated against. Such a non-discrimination rule may be found in international treaties (see *e.g.*, the Rome Treaty, Article 7), but is not part of the customary law. On the other hand, however, a state cannot always justify the treatment of aliens, by reference to the fact that its nationals are treated no better. The standard sets a minimum for the treatment of aliens, irrespective of how the state's own nationals are treated.[298]

While there are many opinions as to the content of the minimum standard,[299] legal capacity, personal security and the protection of life and property, constitute the prime ingredients. None of these aspects seem relevant in the context of international antitrust law, however. A foreign enterprise is generally not denied legal capacity, nor personal security or protection of property. This is not the problem. (To suggest that an enterprise is deprived of its property when forced to pay fines and damages as a result of court proceedings, is but begging the question: a breach of the minimum standard would at least require that jurisdiction is improperly exercised, the requisites for which we are seeking to establish).

Another component of the minimum standard is the concept of denial of justice (in the limited sense) or denial of procedural justice.[300] As defined by the American Law Institute in the *Restatement (2d) of Foreign Relations Law,* Section 178, denial of procedural justice means "conduct, attributable to a state and causing injury to an alien, that departs from the international standard of justice... with respect to the procedure followed in enforcement of the state's law as it affects the alien in criminal, civil, or administrative proceedings, including the determination of his rights against, or obligations to, other persons." In the following sections (Sections 179—182), the Restatement formulates some concrete rules which concern the rights of the individual in connection with an arrest or detention, the

right to trial or other proceeding, the right to a fair trial or other proceeding and the right to a determination that is not manifestly unjust.[301] It is clearly indicated, however, that the target of the rules are the extreme cases. So, for instance, is a decision "manifestly injust" when it is so obviously wrong that it cannot have been made in good faith and with reasonable care, or when a serious miscarriage of justice is otherwise clear.[302] A mere error in a decision, if not producing manifest injustice, does not constitute a denial of procedural justice. The concept of denial of justice must also be seen in light of the exceptional character of international minimum standard doctrine. A breach of the standard may, according to a passage in the *Neer Claim* decision often relied on, be found where the treatment of an alien amounts to "an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency".[303]

In exceptional cases, the exercise of jurisdiction in international antitrust may, no doubt, amount to an "outrage" as in any other field: a trial may be denied, rights deprived of, and the determination may be manifestly unjust. The question is, however, under what circumstances does the exercise of jurisdiction over foreign persons constitute a breach of the minimum standard. What steps must be taken by the state exercising jurisdiction in order to avoid such a breach? What considerations must be made? It seems that the minimum standard is too vague to allow conclusions with respect hereto. At the same time, it would seem that the minimum standard is too limited in scope: it has little or nothing to convey as to questions of conflicting commands, *ne bis idem* and foreseeability, *i.e.*, questions arising as a result of concurrent jurisdiction.

2.3.5.3 Beyond the international minimum standard

Ross breaks away from the minimum standard.[304] Beyond the requirements embedded in the minimum standard protecting the alien as a fellow-being, he argues, there are additional requirements regarding the treatment of aliens who reside in the state exercising jurisdiction. These requirements spring from the fact that the alien is subject to two legal orders: the legal order of the state of residence and that of the state of citizenship. Unless the two legal orders are in harmony, the individual will find himself under conflicting laws. It is the function of international law to prevent such conflicts. The international law solution is, Ross suggests without hesitation, that the law of the state in which the individual resides shall prevail.[305] But except providing a few examples, he does not elaborate.

For the protection of the individual, the *Restatement (2d) of Foreign Relations Law,* Section 40, provides that "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... (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person...". Thus, by considering the laws of other states, the state exercising jurisdiction may avoid or mitigate the results of inconsistent commands. The extent to which the state exercising jurisdiction shall moderate its exercise, depends on the "nature" of the penalty imposed by the affected state.[306] The more severe the punishment in the affected state for carrying out the command of the state exercising jurisdiction, the more moderation is required of the latter state.

Another variable is the nationality of the person over whom jurisdiction is exercised. Nationals of the exercising state are less likely to be afforded protection under this rule than aliens. The more "foreign" the particular person is, the more protection he will have, the rule seems to indicate. Comment c. to Section 40 of the Restatement concludes: "By giving weight to the nationality and penalty factors under a principle of reciprocal balancing of individual and state interests, conflicts of jurisdiction are resolved by each state applying its law more often to its nationals than to aliens...".[307]

Section 40 of the Restatement limits the protection of the individual to situations of conflicting commands, in particular where a prohibition and an obligation stand against each other. The case where the prohibition or obligation of the state exercising jurisdiction stands in conflict with a mere permission of the affected state is distinguished.[308] Since the Section deals with enforcement jurisdiction — and defined as such is according to Section 6, *inter alia,* the entry of a court judgment[309] — the individual, the reasoning seems to be, does not suffer hardship when commanded by the state exercising jurisdiction to act in a manner permitted in his home state. To this one cannot object. But the conflict between a prohibition or an obligation, on the one side, and a permission, on the other, affects the individual at an earlier stage: an individual staying — an enterprise incorporated — in one state, may be justified in adapting his activities according to the legal order of that state. And he may be justified in expecting that when he acts according to a permission, he will not be punished for his act.

Raised here are questions of foreseeability, predictability and certainty.[310] As to these, Section 40 is silent. Section 18 of the Restatement

(regulating "legislative" jurisdiction)[311], on the other hand, prescribes that the indivual must have had — objectively seen — reason to foresee that his act would cause results in another state, triggering the application of that state's law.[312] By this, however, the information in the Restatement on foreseeability is exhausted. We are thus left in a state of vagueness.

A consideration of the interests of the individual within the scope of an interests-analysis and beyond the international minimum standard, would, it seems, require something more tangible. What additional guidance does the normative content of the jurisdictional principles governing international criminal law give?

A number of international criminal law writers, from the past and the present, proceed from the — as they usually claim — international law principle of "norm-identity" ("Prinzip der identischen Norm").[313] This principle implicates, they suggest, that the act for which an individual is prosecuted and tried in one state, should also be an criminalized act in the state in which the individual committed the act. The correlative principle in municipal law is said to be the axiom *nulla poena sine lege*. *Glatzel* in particular (in 1936), and *Wendt* (in 1965) advocate this view. Both regard the principle of "norm-identity" as a binding principle of international law. Both refer to the frequency in which the principle is applied in municipal law systems. And both refer to the fact that the principle is fundamental in the law of extradition as developed in international treaties and by international custom.[314] Finally, both classify the principle as a "general principle of law", as defined in the Statute of the International Court of Justice, Article 38(I) (c).

This principle, if transferred to the sphere of international antitrust law, would no doubt have far-reaching consequences. But there are compelling reasons against such a transfer.

First, and this is also recognized by Glatzel and Wendt, the principle *nulla poena sine lege* may protect the individual against arbitrariness and as such be a component of the international minimum standard (since a deviation from the principle may constitute a manifest injustice), but it has no independent bearing on the question on the proper exercise of intraterritorial jurisdiction with extraterritorial effects. In this context, the applicability of the principle presupposes that laws can have no extraterritorial effect, and this we have found is not the present position of international law. On the contrary, jurisdiction is concurrent.[315]

Secondly, the question whether there exists a principle of "norm-identity" in international law, is controversial. *Rosswog* thinks not, and supplies substantial evidence for his view.[316] *Dahm* and *Jescheck* reach the

same conclusion.[317]

Thirdly, and more decisively: the principle, if valid at all, seems only to restrict the exercise of jurisdiction on the ground of the (active or passive) personal principle.[318] (When a national of the state exercising jurisdiction is either the actor or the victim of an act in another state, the act must be criminalized in both states to be punishable). The principle of "norm-identity" rests on the premise, namely, that the act sought to be punished can be fully localized to a state outside the state exercising jurisdiction, and that an act so localized has no effects elsewhere which can constitute a criminal offense. Hence, the principle of "norm-identity" can have no bearing on jurisdiction exercised on the basis of the protective principle. For, as observed in the *Harvard Research* on Jurisdiction With Respect to Crime: "To require that the act or omission be denounced as an offense by the *lex loci* would obviously defeat the legitimate purpose of protective jurisdiction."[319] In international antitrust law the situation is the same. Even if, by chance, anticompetitive acts could be localized, jurisdiction is exercised not on the ground of the acts as such, but on the ground of the effects of the acts within the state exercising jurisdiction. To require that the act be denounced as an antitrust offense by the law of the state in which the enterprises have their *situs* or by *lex loci contractus,* or by some obscure *lex loci actus,* would tend to exclude the exercise of antitrust jurisdiction in international cases. A principle of "norm-identity" can therefore not be upheld for the purpose of international antitrust law. The weighing-of-interests process has no room for such absolute barriers.[320]

For the very same reason, the results of *Rosswog*[321] seem inapplicable to international antitrust. Proceeding from the abuse of rights doctrine, which he claims to be a "general principle of law recognized by civilized nations,"[322] and further through the medium of an interests-analysis, Rosswog reaches the result that the exercise of jurisdiction on the ground of the active or passive principle of personality is restricted: a state may not punish its nationals for acting in accordance with the obligation or prohibition of another state within that state, nor may it punish a foreigner for acting in accordance with an obligation, prohibition or permission of another state and within that state. The laws of the state exercising jurisdiction must therefore yield to the conflicting provisions of *lex loci actus,* with one exception: where jurisdiction is exercised over a national and the provision of *lex loci* was merely permissive in nature.[323]

Here again, strict dividing lines are drawn, appropriate perhaps with respect to certain traditional crimes, but much too simplistic and wholly unsuitable in the field of international antitrust law. General rules of an ab-

solute character are much too blunt instruments in antitrust cases.[324]

Yet the interests of the individual must be considered. The protection of the individual, we have found, is part of the rationale for jurisdictional restrictions in international criminal law. The questions are, what factors shall be considered, and what weight shall they be given, in the weighing-of-interests process? The following is an appraisal of the possible factors and their possible weight.

2.3.5.4 Foreseeability

One of the main factors moderating the exercise of jurisdiction in international criminal law, is the possibility of the individual to foresee the legal consequences of his acts. The application of a law must not hit the individual like a *deus ex machina.*[325] On the other hand, full foreseeability can never be required. That would be wholly unfeasable in the modern state where almost every sector of life is regulated. Ignorance of law is, furthermore, usually no defence in a municipal court. What we have in mind are rather the limited situation where the individual, residing (a company incorporated or seated) in one state and acting in accordance with a permission or obligation of that state, is struck by a prohibition of another (or acting in accordance with a prohibition and struck by an obligation). In this situation, it seems, that the individual may be unduly victimized at times if his possibility to foresee the legal consequences of his acts is not considered.

The concept of foreseeability shall not be understood in a limited subjective sense. It is not a matter of establishing criminal intent, and it is not a question of establishing "primary intent" as the *International Law Association* in Article 5 of its New York Resolution suggests,[326] or the "intent" as suggested in the *Alcoa* decision.[327] But if, of course, it can be proved in the specific case that the individual intended (in the subjective sense) the result within the state exercising jurisdiction and for which the jurisdiction is exercised, then the individual's interest in protection decreases to a minimum — at least as far as foreseeability is concerned — which is a factor to be taken into consideration.

Foreseeability shall have primarily an objective connotation. The query should be, what can reasonably have been foreseen by the individual at time of acting in light of the specific facts of the case. This has at least two implications:

1) The closer the relationship between the conduct of the individual and the effects within the state exercising jurisdiction (*i.e.*, the more direct the

effects are) the more foreseeable the effects, and the more foreseeable the legal consequences of the particular conduct. Here, direct effects and foreseeability are nothing but two aspects of one and the same thing.
2) The more contacts the individual has with the state exercising jurisdiction, the more foreseeable the effects of his conduct in that state. To be taken into account as far as companies are concerned, are *inter alia,* the amount of business conducted within the state exercising jurisdiction, whether there are any agents or subsidiaries therein, whether anybody in the management is a citizen of, or residing in, that state, and whether the company is in any way controlled from that state.

It can readily be seen that foreseeability, given this content, will rarely have significance as a factor in the weighing-of-interests process in the field of international antitrust law. The "individual" here is generally a multinational corporation with ramifications in a number of countries. It is strange to think that a multinational — but very exceptionally — would be unable to foresee the legal consequences of its anticompetitive conduct. Today, there can hardly be a legal adviser to a multinational corporation who is unaware of the risks that the company runs when engaging in anticompetitive activities.

2.3.5.5 The individual under conflicting laws (or orders)
It has been repeatedly submitted in the present study that the conflicting law or order of the affected state constitutes no absolute barrier against the exercise of jurisdiction in another state.[328] The question thus becomes, what other consideration shall be given — within the interests-analysis — the fact that the individual is governed by conflicting laws or orders. Relevant here is primarily the situation where the law or a court order of the state exercising jurisdiction prohibiting certain conduct is in conflict with the law or a court order of the affected state enjoining the very same conduct, or *vice versa* — in other words, the situation where conflicting commands exist. Where the conduct in question is permitted in either state, there is really no legal conflict from the standpoint of the individual, and thus the individual will not be victimized.

A cursory look at the many antitrust laws around the world reveals that the laws as such generally contain no obligations, but rather prohibitions and permissions (the latter often moulded as exceptions from more general prohibitions). A conflict between a prohibitive and an obligatory provision, flowing from the laws of different states, will therefore only seldom arise. The cardinal conflicting area is where a court order originating from the state exercising jurisdiction is opposed to a prohibition in the affected

state. This is especially so on account of the many "blocking-statutes" and "anti-antitrust laws" recently emerging.[329] The situation can best be illustrated by some fragments from the American case law concerning the ordering of production of documents located in foreign states.

Requiring the production of foreign documents by subpoena is regarded as an essential element in the enforcement of the United States antitrust laws. The American courts and other authorities have not hesitated to issue orders to foreign enterprises for this purpose. That the documents have been located abroad has constituted no impediment. On the other hand, the American courts have restrained their exercise of jurisdiction when a discovery order conflicts with a prohibition to produce in *lex rei sitae.*[330]

One of the first cases high-lighting the conflict-situation was *In re Investigation of World Arrangements.*[331] As a link in a grand jury investigation in 1952 of what might have been a worldwide oil cartel, the court ordered the production of millions of documents, located both in the United States and abroad. The governments of the states affected by the order (United Kingdom, the Netherlands, France and Italy) immediately issued contra-orders prohibiting the production of the documents. The court took the foreign prohibitions into consideration, and for the purpose of avoiding hardship upon the defendants, it reserved its judgment as regards the foreign documents pending a showing by the defendants, *inter alia,* that they had in good faith endeavored to secure a consent (waiver) of the foreign state to produce the documents.[332] Subsequently the subpoenas were quashed and the grand jury proceedings dismissed.[333]

The *"good faith"* doctrine indicated in this case was developed further in the Supreme Court case *Société Internationale v. Rogers* decided in 1958.[334] Here the Swiss plaintiff sought to recover assets seized by the United States Government during the war under the Trading with Enemy Act.[335] In order to prove that the plaintiff was an "enemy" as defined in that Act, the American Government moved for a court order directing the *plaintiff* to produce certain documents located in Switzerland. The documents, however, had been (contructively) seized by Swiss authorities and a removal would have constituted a criminal offense. A non-compliance with the court order, the Supreme Court held, was, against this background, not a sufficient ground for dismissal of the plaintiff's complaint when the failure to comply was due to "inability, and not to wilfulness, bad faith, or any fault of petitioner."[336] Still, the Court was cautious not to lay down an inflexible standard,[337] thereby suggesting that the method on which to determine the existence of good faith could vary.

In *Ings v. Ferguson,*[338] subpoenas ordering three Canadian banks with

offices in New York to produce documents located in Canada and in Cuba were quashed on the ground of "fundamental principles of international comity".[339] The orders, the court said, would direct the banks to violate foreign law, or at least circumvent foreign procedures,[340] thereby indicating that foreign prohibitions, irrespective of whether based on a statute or a court order, would excuse the person ordered.

In *In re Grand Jury Investigation of the Shipping Industry,*[341] the case that probably has stirred the strongest international reaction,[342] a number of American and foreign companies were ordered to produce documents located within as well as outside the United State. In determining whether to exercise jurisdiction, the court considered the nationality of the parties, the location of the documents, possible international implications and the necessity of the documents in question. With regard to the documents of the foreign companies located abroad, the court reserved its opinion.[343] Subsequently, the investigation was closed.

Orders by the Federal Maritime Board were contested in *Montship Lines, Ltd. v. Federal Maritime Board.*[344] Again, the companies involved were required to make "a good faith attempt to obtain a waiver" of foreign prohibitions from the states affected. As to the effects of a failure in this respect, however, the court reserved its opinion.[345]

Though not decided in the Supreme Court, *United States v. First National City Bank*[346] is probably one of the leading cases. Here, a subpoena was served on Citibank in New York ordering it to produce documents located, *inter alia,* in its branch in Frankfurt and relating to any transaction in the name of or for the benefit of two of its customers, a German company and an American company suspected for antitrust violations. The bank refused to comply and offered evidence to the fact that the production of the documents would subject the bank to civil liability under German law.

The court, relying on and quoting Section 40 of the Restatement (2d) of Foreign Relations Law, pointed out:

"Mechanical or over-broad rules of thumb are of little value; what is required is a careful balancing of the interests involved and a precise understanding of the facts and the circumstances of the particular case... In the instant case, the obvious, albeit troublesome, requirement for us is to balance the national interests of the United States and Germany and to give appropriate weight to the hardship, if any, Citibank will suffer."[347]

Considered as the paramount U.S. interest was the enforcement of the antitrust laws. When weighing the German interest, the court examined the significance given bank secrecy in Germany and brought forth the fact, *in-*

ter alia, that violation of bank secrecy was no criminal offense, but only subjected the bank to civil liability — which in itself should not be accorded decisive significance — and called attention to the absence of opposition from the German Government. The subpoena would furthermore, if enforced, not "violate German public policy or embarass German-American relations".[348] And, finally, part of the documents related to the business of an American company, and "surely an American corporation cannot insulate itself from a federal Grand Jury investigation by entering into a contract with an American bank abroad requiring bank secrecy".[349]

The hardship that Citibank might suffer, the court held, was insignificant. The risk of civil liability, entailing possible damages, was held "slight and speculative".[350]

A similar balancing of interests approach was invoked in *In re Westinghouse Electric Corporation Uranium Contracts Litigation,*[351] where the court reversed a contempt order against an American company for refusing to produce documents located in Canada; a compliance would have been a violation of Canadian criminal law.

The court first examined whether the company in question, Rio Algom Corporation, had made a good faith effort to produce the requested materials and reached the conclusion that it had: Rio Algom had made diligent effort to produce materials not subject to the Canadian regulation; moreover, it had sought a waiver from the Canadian authorities.[352]

In applying the balancing of interests test, the court found guidance in Section 39 and 40 of the *Restatement (2d) of the Foreign Relations Law.* A relevant factor was the interest of Canada in the documents requested, primarily because these were "physically located" in Canada. The Canadian non-disclosure regulations were in furtherance of a national interest in controlling and supervising atomic energy, the court concluded. The United States, on the other hand, had an "interest in making certain that any litigant in its courts is afforded adequate discovery to the end that he may fully present his claim, or the defense, as the case may be."[353] Tipping the scale in favour of Rio Algom Corporation in the present case, the court held, was the fact that the documents were not of decisive significance for the company (Westinghouse) requesting them.

An excellent illustration of the balancing of interests process in function is *United States v. Vetco Inc.*[354] Here the United States Internal Revenue Service ("IRS") had issued summonses to Vetco Inc. ("Vetco"), an American corporation, and others, requesting the books, records and other documents of Vetco and its Swiss subsidiaries. Vetco resisted the sum-

monses and refused to comply with a subsequent district court order on the ground that complicance would requlre them to violate Swiss penal law (Art. 273 of the Swiss Penal Code). The court affirmed both the enforcement and the sanctions orders of the district court.

Guiding in conducting the interests-analysis, the court found, were the factors set forth in Section 40 of the *Restatement (2d) of the Foreign Relations Law*. Each factor listed therein was considered separately. In assessing the *vital national interests* of the states involved, the court considered the degree of difference in law or policy.[355] The United States had an interest in collecting taxes from and prosecuting tax fraud by its own nationals operating through foreign subsidiaries. Switzerland had an interest in preserving the secrecy of business records. Since the parties were subsidiaries of American corporations, the court argued, the Swiss interest was diminished. Further diminishing the interest of Switzerland was the fact — as the court found — that Switzerland had no predominantly *public* interest in non-disclosure: The concern of Switzerland in the present case was rather the protection of the interests of private third parties whose business secrets may have been involved. Since the IRS is required by law to keep the information received confidential, the court concluded, the latter interest had less weight.

As for the *hardships* that Vetco would suffer by complying with the court order, the court found none that were significant.[356] No case had been cited, the court reasoned, in which a person had been prosecuted for complying with a court order similar to the one at issue. There was further no evidence that third parties interested in the confidentiality of the documents requested would object to the production of these.

The required *conduct* was to *take place* both in Switzerland and in the United States.

The documents were further held *important* and *relevant* for the tax investigation carried out by IRS. No showing had been hade that the documents were cumulative of records already produced.[357] There were, finally, no substantially equivalent *alternative means* for obtaining the requested information available. The alternatives suggested by Vetco — obtaining consents to the disclosure from third parties, issuance of letters rogatory, use of treaty procedures, masking the names of third parties, use of an independent expert on Swiss law, and having the IRS examine the records in Switzerland — were held not substantially equivalent.

On balance thus, the court concluded, the United States had a "powerful interest in obtaining the summoned documents", while the interest of Switzerland in insisting that they not be produced was small.[358]

In conclusion, it seems that the balancing of interests approach, first introduced (at least explicitly: a balancing test seems to underlie the determinations in all cases) in *First National City Bank* has gained terrain. It is particularly noteworthy that besides the interests of the state exercising jurisdiction and the affected state(s), the courts consider the possible hardships on the individual company. The case law displays that the courts are reluctant to order the production of foreign documents where the production entails criminal liability, at least if a good faith attempt is made to secure a waiver of the criminal provision from the foreign government. A criminal provision prohibiting production, however, is no absolute bar. Other factors, such as the nationality of the person ordered, and the subject matter of the documents and the extent to which they are connected to the business of American companies and the United States market, are also considered. The principal argument against ordering the production of foreign documents, where the order opposes a criminal prohibition, is the concern for the individual.

If we return to the field of international law again, the following conclusions can be made: from the perspective of international law, the issuing of discovery orders constitute an exercise of state jurisdiction and therefore require an *independent interests-analysis* where the order stands in conflict with foreign law or a foreign court order. Of course, where there is no conflict, an interests-analysis seems not to be warranted. *One* of the elements of this interests-analysis, is the interest of the individual in protection. The interest of the individual shall be measured according to 1) the severity of the penalties or other sanctions or burdens imposed upon the individual for violations of the foreign provision and 2) the likelihood that such penalties, sanctions or burdens will be imposed. The fact that a violation entails criminal liability, shall not be conclusive, but must, of course, carry a particular weight. Other factors within the scope of the interests-analysis may counter-balance the weight of that fact, *inter alia,* the connection between the individual and the subject-matter of the documents, on the one hand, and the state exercising jurisdiction, and the affected state respectively, on the other. It would seem that the closer that connection is as regards the exercising state and the slighter it is as regards the affected state, the less weight will the fact that criminal penalties (or other sanctions) are imposed carry.[358a]

The same reasoning applies to the situation where the affected state enjoins the individual to take anti-competitive action which is prohibited in the state exercising jurisdiction, or *vice versa.* The latter state is obliged to consider the interests of the individual. The heavier the penalties or other

sanctions or burdens, and the stronger the probability that such will be imposed, the more weight shall the interest of the individual carry. But the interest of the individual shall be considered in light of the interests of the opposing states. The slighter the interests of the affected state, the slighter its connection to the individual, and the slighter its interest in the anticompetitive activities in question and in the business requlated, the less significance will the interest of the individual have. Thus, for instance, the fact that the individual has acted in accordance with an obligation sanctioned by criminal penalties, will have only little significance where the obligation does not rest upon a genuine interest on the part of the affected state. The interest of the individual in protection should, no doubt, be given a more independent significance in the area of traditional criminal law, where the individual runs the risk of being imprisoned or subjected to other severe penalties. However, in the field of international antitrust, the "individual" is generally a company. Judging from the antitrust law in the world today as expressed in case law and in statutes, imprisonment is a very rare device. As far as can be ascertained, it has never been used in the American foreign commerce case law.

2.3.5.6 Ne bis in idem

In the preceding section we have discussed the situation where the individual is subjected to conflicting laws and orders. The interests of the exercising and the affected states are in conflict and the individual is caught between the jaws of opposing jurisdictions. The conclusion was that the interest of the individual requires protection.

The protection of the individual has yet another dimension. In international antitrust law the conduct of an enterprise may have repercussions in several states, all of which may be interested in taking action against the company. Though jurisdiction is concurrent, the interests of the states as far as antitrust policies are concerned more or less coincide. The individual, however, runs the risk of being prosecuted and punished more than once. Is the individual protected against double punishment under international law? Is there a "double jeopardy" clause in international law, a principle of *ne bis in idem* or *ne bis poena in idem?*

In the *Harvard Draft Convention* on Jurisdiction With Respect to Crime, Article 13 under the title "Aliens — Non Bis In Idem" provides:

"In exercising jurisdiction under this Convention, no State shall prosecute or punish an alien after it is proved that the alien has been prosecuted in another State for a crime requiring proof of substantially the same acts or omissions and has been aquitted on the merits, or has been convicted and

has undergone the penalty imposed, or, having been convicted, has been paroled or pardoned."[359]

This principle, the Comment to the Article adds, is almost universally accepted. It is "so obviously just... and so widely approved in the world's legal systems, that it hardly seems necessary to adduce reasons in its support".[360] "Universally accepted," however, is (or was at least in 1935) only the principle as such in one or the other form, and not necessarily in the broad form suggested in Article 13, as the authors of the Draft Convention themselves recognize.[361] The Article is thus not a manifestation of *de lege lata*. For this purpose, the practice of states in 1935 was too heterogeneous.[362] The most that could be said was that "[p]ractically all States have given *some* recognition to the principle" of *ne bis in idem*.[363]

Recently a similar provision was inserted in a European convention concerning the effect of foreign criminal judgments,[364] providing, *inter alia*, that "[a] person in respect of whom a European criminal judgment has been rendered, may for the same act neither be prosecuted nor sentenced nor subjected to enforcement of a sanction in another contracting state".

The prevailing view seems to be that the principle of *ne bis in idem*, at least in the form given in the Harvard Draft, is not a principle of international law.[365] The question is, whether the fact that the individual has been prosecuted and punished for certain conduct shall be given any consideration within the scope of the weighing-of-interests process in the field of international antitrust. Must not the state exercising jurisdiction at least take into account the fact that the individual has been punished when determining what sanctions to impose and how severe those sanctions shall be? It seems that there is no clear answer.

First, the problem of double jeopardy is somewhat atypical for the weighing-of-interests process. The interests of the states do not, as noted, stand in conflict as far as antitrust policies are concerned. If there is a conflict at all, it lies on another level: the state first prosecuting and punishing the individual is interested in having its judgment recognized, the state exercising jurisdiction, again, in having its laws enforced. Moreover, the individual may be unable to pay double fines or the double amount of damages.

Secondly, the principle of *ne bis in idem* applies when the individual is prosecuted or punished more than once for the same, or substantially the same, act. An individual committing an antitrust act is generally subjected to liability for the actual or potential effects generated by the act. In the field of international antitrust, the effects generally occur in a number of states. Can it be said that acts and effects for which an individual is prosecuted

and punished in one state are substantially the same as acts and effects occuring in another state, only because the acts and their effects originate from the same anticompetitive agreement? No, rather it seems that each state, including the state exercising jurisdiction, is concerned exclusively with the effects occurring within the state's own territory. An illustration of the latter situation is the Common Market case *Boehringer Mannheim GmbH v. Commission of the European Communities.*[366] Boehringer was a member of a European cartel. The cartel was initially based on an agreement whereby, *inter alia,* the prices and quotas on exports of quinine and quinidine were fixed. The agreement was subsequently extended to all sales within the Common Market. The Commission imposed a fine of 190.000 units of account on Boenhringer. Before the Court of Justice, Boehringer argued that since it had already been ordered by an American court to pay a fine of 80.000 dollars — a fine which had been paid — based on the same acts for which the Commission was imposing a fine, the first fine ought to be deducted from the latter.[367] The Court did not agree. As the penalties imposed by the American court related to "restrictions on competition which occurred outside the Community", the Court held there was "no reason to take them into account in these proceedings".[368] When the matter was brought up again in the following year the Court expounded:

"In fixing the amount of a fine the Commission must take account of penalties which have already been borne by the same undertaking for the same action, where penalties have been imposed for infringements of the cartel law of a Member State and, consequently, have been committed on Community territory. It is only necessary to decide the question whether the Commission may also be under a duty to set a penalty imposed by the authorities of a third State against another penalty if in the case in question the actions of the applicant complained of by the Commission, on the one hand, and by the American authorities, on the other, are identical.

Although the actions on which the two convictions in question are based arise out of the same set of agreements they nevertheless differ essentially as regards both their object and their geographical emphasis."[369]

The duty of the Commission "to set a penalty imposed by the authorities of a third State" against another penalty was never discussed. The Advocate-General, however, having analyzed the question, was convinced that such a duty did not lie under international law.[370]

In conclusion it seems that the principle of *ne bis in idem* cannot be anchored in international law, nor can the correlative principle *ne bis poena in idem.* Whether this implies that a foreign criminal judgment shall be

wholly ignored cannot be settled here. In the field of international antitrust, the problem will not arise too often because of the difficulties in establishing identity of the act complained of in the several states.

2.4 The weighing-of-interests process — Proportionality

Established so far are the interests to be balanced within the scope of the weighing-of-interests process. On the one side, we have found the interests of the state exercising jurisdiction in having its laws enforced and its market protected from the effects of anticompetitive activities. The more direct and the more substantial the effects of such activities, the stronger the interest of the state exercising jurisdiction. On the other side, we have the interests of the state affected by the exercise of jurisdiction in having its laws and policies implemented, and the interest of the individual affected in some degree of foreseeability and in the prevention of conflict-situations.

Establishing the relevant interests, the elements of the weighing-of-interests process, is in itself an arduous task. Even more difficult, however, is establishing a norm for the balancing of the relevant interests. The question is, in order to render the exercise of jurisdiction improper, how much more weight must the interests of the affected state and the affected individual have than the interests of the state exercising jurisdiction? When does the exercise of jurisdiction become a violation of international law? Is it a violation of international law when jurisdiction is exercised in a case where the balanced interests have equal weight, or must the interests of the state exercising jurisdiction be outweighed by the opposing interests of the affected state and individuals; and if this is so, to what degree?

Whatever the principle governing the balancing process, it is by necessity abstract in nature. The principle can be no more than a very general standard to be applied in the individual case. The choice must be between such general standards as indicated above: equal weight, unequal weight, clearly unequal weight, manifest disproportion, substantial disproportion, extreme disproportion, etc.

The advocates of the abuse of rights theory have, as we have seen, proposed various standards.[371] *Bär,* for instance, suggests that the affected state must tolerate extraterritorial effects, as long as the disadvantage of the effects does not stand in an immense ("horrender") disproportion to the interests of the state exercising jurisdiction.[372] The abuse of rights doctrine will, according to Bär, apply only in the extreme situation. The doctrine is not applicable merely because the interests of the affected state are, objectively seen, stronger than the interests of the state exercising jurisdic-

tion. This is not in the nature of the abuse of rights doctrine. It is only in extreme cases where the jurisdictional rights of a state are abused, and therefore, Bär concludes, there is no need to decide which state has the strongest interests in the specific case.[373]

Rosswog, who also proceeds from the abuse of rights theory, comes to a different conclusion. The state exercising jurisdiction abuses its jurisdictional rights when it encroaches upon the, objectively seen, more vital ("höher bewertete") interests of the affected state.[374]

Dahm, on the other hand, suggests that the state exercising jurisdiction abuses its rights where its own interests are insignificant, while, at the same time the interests of the affected state (or of the whole international community) are severely damaged.[375]

Meessen, whose reasoning is based on other theories of international law,[376] is of the opinion that the exercise of jurisdiction is a violation of international law as soon as the interests of the affected state *outweigh* the interests of the state exercising jurisdiction.[377] *Rosenfield*[378] and *Bradford Reynolds,*[379] viewing the problem principally from the standpoint of municipal law, seem to agree in principle with Meessen, although neither of them is ready to lay down a fixed standard. "Clearly", says Bradford Reynolds, "if the weighing process were to reveal a substantial, irremediable conflict with the law of a foreign nation which has a far more significant interest in the transaction, extraterritorial application of the Sherman Act would be considered an affront to that nation's sovereignty."[380] On the other hand, "where the conflict is minimal or nonexistent and United States interest in the transaction is paramount, the threat to international legal order is virtually eliminated and an opposite conclusion should be reached."[381] Recognizing that he is merely enlightening the most obvious cases, the author concludes: "Between these extremes, of course, there lies a gray area awaiting judicial delineation."[382]

As these few examples show, the standards proposed for the balancing of interests are numerous. There seems to be almost as many propositions as authors .[383] It is notable that although the propositions are many, very few authors discuss the reasons for selecting a specific standard. *Bär,* being one of the few who does explain his choice, claims that his standard lies in the structure — in the nature — of the abuse of rights theory.[384] His observation seems to be correct. It certainly is in the nature of the abuse of rights theory to be applied in exceptional (extreme) cases.[385] Apparently, an abuse of jurisdictional rights cannot be found merely on the ground that the interests of the affected state outweigh the interests of the state exercising jurisdiction. It is not in the nature of the abuse of rights theory to rest on a

delicate interests-analysis; the "rights" abused (here: the jurisdictional "rights") would be too restricted.[386]

Meessen's standard has another basis; it rests on the principle of sovereign equality. The state exercising jurisdiction and the affected state, Meessen concludes, have an equal right to maintain their ability to function as independent centres of government ("Leitungszentren"), a right derived from the principle of sovereign equality.[387] This conclusion, however, is not in accord with the understanding of the concept of sovereign equality maintained in the present study.[388] Sovereign equality and the principle of equality, we have found, merely imply a right to be equal before the law. It is not possible to derive any other rights from the principle of equality. The application of the principle of equality presupposes the existence of some other rule or principle of international law. Meessen does not advance such a rule or principle.

The standard for balancing the interests within the scope of the weighing-of-interests process, would, it seems, have to reflect the general structure of the jurisdictional principles governing international criminal law. In the first place, the structure of those principles is vague; there are no clear borderlines between what is permitted and what is not. Moreover, in the absence of a general prohibition in this field of law, such as the principle of territoriality is sometimes thought to be (from which certain exceptions are made),[389] the presumption is for the freedom of the states.[390] Against this background it appears to be inappropriate to work with too narrow margins. The standard proposed here thus reads as follows: when the interests of the affected state and of the individual(s) in combination *clearly* outweigh the interests of the state exercising jurisdiction, the exercise of jurisdiction will constitute a violation of international law.

2.5 The weighing-of-interests process — An examination of some cases from the United States foreign commerce case law

For the purpose of illustrating some of the abstract reasoning in the preceding sections, we will here briefly seek to apply the weighing of interests analysis in concrete cases. As a basis for this concretization we have chosen a few cases from American case law involving antitrust issues, cases more fully discussed in part one of the present study. The state exercising jurisdiction is thus in each case the United States.

In *American Banana Co. v. United Fruit Co.*,[391] the affected state was Costa Rica and the affected person, an American company. The alleged anticompetitive practices damaged the business — both in Costa Rica and

in the United States — of an American company (American Banana Co., the plaintiff) and had effects on the trade of bananas between Costa Rica and the United States. The causal relationship between the acts complained of and their effects was close; the degree of "directness" was high. It also appears that the effects were rather substantial.

The interest of the United States in the enforcement of its laws was no doubt strong when seen in relation to the interest of Costa Rica: while the Costa Rican Government, as alleged — trough its agents — carried out some of the acts causing the effects, it may be presumed that these acts and the whole attitude of the Costa Rican Government in the specific case did not rest on a general economic or antitrust policy. The acts were not representative of the general policy of Costa Rica in this field. Thus, from the perspective of international law the interests of the United States clearly outweighed the interests of Costa Rica.

Taking into consideration the interests of the affected individual, one would still reach the conclusion that the exercise of jurisdiction would have been permitted from the standpoint of international law. The only issue left open is whether the applicability of American law was foreseeable. It may be that the applicability was not foreseeable in 1909, when the case was decided. In those days the Conflict of Law rule *lex loci delicti* was strictly construed. Today, however, the American defendant could hardly have argued that it was unable to foresee the legal consequences of his acts performed in a foreign country.

The reasoning and the conclusions reached with respect to the *American Banana* case, also apply to *U.S. v. Sisal Sales Corp.*[392]

In the *Alcoa*[393] case, the U.S. exercise of jurisdiction affected Canada and a company incorporated there. The interest of the United States lay in the protection of its market from the effects of foreign production quotas and price agreements. The degree of "directness" was high; the foreign arrangements applied directly to the foreign trade of the United States. The degree of substantiality was also significant; the arrangements covered a major part of United States aluminum imports. In Canada, on the other hand, the arrangements were probably permitted. Whether the Canadian Government encouraged production quotas and price agreements, is unclear. Still, it might have been the general policy of Canada to encourage cooperation between enterprises in some sectors of the industry, simply by permitting — or, more correctly, not prohibiting — named arrangements.

Hence it is conceivable that the antitrust policies of the United States were in conflict with a conscious economic policy of Canada.

The court in the *Alcoa* case did not explicitly adopt a weighing of inter-

ests approach. Implicitly, however, the court took the interests of the affected state and the affected individual into consideration. Thus, the "limitations customarily observed by nations upon the exercise of their powers" and the "international complications likely to arise" were considered.[394] Furthermore, an "intent" requisite was established. But rather than determining the jurisdictional issue on an *ad hoc* basis, in light of the particular interests involved in the case at bar, the court sought to establish a general jurisdictional rule, a convenient formula, intended to be guiding for the future ("actual and intended effects").

The fact that the court did not adopt the weighing of interests approach, does not, of course, render the exercise of jurisdiction illegal under international law. Laconic jurisdictional formulae of a general nature are also, as we have seen, based on considerations of conflicting interests. The problem with broad formulae is that they tend to obscure the real issues. But the fact that broad and general formulae are poor as jurisdictional instruments, and certainly inferior as methods to the weighing-of-interests process, is not in itself conclusive as to whether jurisdiction is properly exercised in a case where a formula is applied.[395] The question of whether the exercise of jurisdiction is proper, can only be determined by examining the whole case, including the remedy, the requisites for personal jurisdiction, and all relevant facts.

Thus, in weighing the interests of United States against the interests of Canada in the *Alcoa* case, one must, for instance, consider the circumstance that "Limited", the Canadian defendant, was closely connected to an American company and to the American market at large. This close connection ought to tip the scale in favour of the United States. One must also bear in mind that the remedy imposed was limited in character; it did not involve traditional criminal sanctions, but rather an injunction calculated to protect the American interests.

In the *General Electric* case,[396] the United States exercised jurisdiction over a Dutch corporation (Philips). The United States was interested in protecting its home market. An agreement to which Philips was a party implied a possibility for the other party of the agreement — an American company — to monopolize the American market. The degree of directness was again high, as was the substantiality of the effects: the arrangements affected the whole incandescent lamp industry of the United States. The Netherlands, on the other hand, was strongly interested in giving Philips relatively free hands in the world market, for the purpose of strengthening the international competitiveness of the company.[397] The antitrust policies of the both states were thus in conflict.

Although the remedy in the *General Electric* case contained provisions — *inter alia,* a so called saving clause — designed to restrict the exercise of U.S. jurisdiction, it is not entirely clear that jurisdiction was properly exercised. One may question, for instance, whether not the United States interests could have been sufficiently safeguarded by the exercise of jurisdiction over the American party to the anticompetitive agreement. Moreover, unlike the Canadian defendant (Limited) in the *Alcoa* case, Philips was not closely connected to the United States market. In addition, especially in light of this latter fact, the foreseeability of Philips, as regards the legal consequences of its acts, must have been limited. The economic interests at stake for the Netherlands may also have been significant.

But then, of course, whether the interests of the Netherlands *clearly* outweighed the interests of the United States, considering the restricted character of the remedy imposed upon Philips, is highly debatable. A full answer to this question cannot be given without a close examination of all relevant facts of the case within the scope of a weighing-of-interests process. Since the court did not adopt a weighing-of-interests approach, but rather applied a scanty jurisdictional formula, many of the relevant facts and issues were left unexposed. The suggestion that the exercise of jurisdiction in *General Electric* was questionable, is under such circumstances the best conclusion that can be offered with respect to the legality of the exercise under international law.

Much of the reasoning here with respect to the *General Electric* case also applies to the *ICI* case,[398] with one essential distinction however: in the *ICI* case the British defendant was more closely connected to the United States market than was Philips in the *General Electric* case.

The court in the *Swiss Watch* case[399] neither explicitly nor implicitly balanced the interests of the states involved: the interest of the United States in protecting its watch industry (besides procuring a free market) on the one hand, and the interest of Switzerland in protecting and strengthening the competitiveness of its watch industry on the other.

It is clear that the arrangements of the Swiss watch enterprise were initiated, encouraged and partly implemented by the Swiss Government. It is also clear that the Swiss watch industry constituted a very vital part of the Swiss economy. The industry constituted the "very heart and core" of the entire Swiss economy — 25 % of the gross national production and more than half of all Switzerland's exports.[400] The contacts of the Swiss defendants with the American market were besides an extensive export trade relatively insignificant. Against this background, it seems that the court in the *Swiss Watch* case should have considered the interests of Switzerland more carefully.

Yet it was not until the negotiations between the Government of the United States and Switzerland were concluded by an agreement subsequent to the intervention by the latter, that the court found cause to restrict its exercise of jurisdiction by modifying the final judgment.

Haight, having examined the *Swiss Watch* case *in extenso,* makes the following observations:

"[T]he Sherman Act conspiracy concept was employed in mechanical fashion without recognizing the apparent incongruity of applying this concept to long-standing industrial charters operating abroad in accordance with foreign law and with the active participation of a foreign government... In view of the extensive submissions of the Swiss Government, it is surprising that the court treated the case as one falling wholly within the domestic ambit of the Sherman Act, without regard either for principles of conflict of laws or of intenational law."[401]

The *Swiss Watch* case presented a pronounced conflict-situation. The antitrust policies of the United States clashed with the antitrust policies of Switzerland. The reorganization of the Swiss watch industry and the accompanying arrangements, although not directly prescribed or dictated by the Swiss Government, were energetically encouraged and desired by it. The arrangements effected by the Swiss defendants constituted a genuine part of Swiss antitrust and economic policy.

While the effects of Swiss activities upon the American market did reach a high degree of "directness" and substantiality — the entire United States watch industry was affected — it seems that the interests of Switzerland in implementing its own policies and in requlating its own trade, in combination with the interests of the affected Swiss corporations and associations (the foreseeability aspect) clearly outweighed the interests of the United States. It thus seems that the court's exercise of jurisdiction before entering the Modified Final Judgment in 1965[402] was not in accord with international law; whether the entry of the Modified Final Judgment was, is an entirely different matter. (The provisions of the Modified Final Judgment, however, indicate that they rest on a careful weighing of the various interests involved).[403]

In the *Timberlane* case,[404] an explicit weighing of interests approach was adpoted for the first time. The court in that case made a distinction between the following two jurisdictional questions: does the court have subject matter jurisdiction under the American antitrust laws?; and: should the court, as a matter of international comity and fairness, exercise the jurisdiction? The former question is purely a matter of municipal law; the latter, however, involves issues of international law. The elements to be

weighed in answering the second question, according to the court, were as follows:

1) the degree of conflict with foreign law or policy;
2) the nationality or allegiance of the parties, including the locations or principal places of business of corporations;
3) the extent to which enforcement by either state of their laws and policies can be expected to achieve compliance;
4) the relative significance of the effects on the United States as compared with those occurring elsewhere;
5) the extent to which there is an explicit purpose to harm or affect American commerce;
6) the foreseeability of effects on the United States; and
7) the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.[405]

However, the court in the *Timberlane* case did not really perform an interests-analysis. One of the principal reasons for remanding the action, the court noted, was namely that the lower court did not make a comprehensive analysis of the relative connections and interests of Honduras, the affected state, and the United States.

In *Mannington Mills*,[406] the weighing of interests approach was elaborated, but, as in the *Timberlane* case, an interests-analysis was not performed. In remanding the case, the court listed no less than ten factors to be considered by the lower court in determining the jurisdictional issue. *Added* to the factors advanced by the *Timberlane* court were, *inter alia*:

1) the possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
2) if relief is granted, whether a party will be placed in a position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
3) whether the court can make its order effective;
4) whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and
5) whether a treaty with the affected nations has addressed the issue.[407]

Nevertheless, the court gave a few indications on how it regarded the interests involved in the specific case. As to the interest of the United States, the court observed: "The antitrust statutes enacted by Congress commit this country to the free enterprise system and the exercise of open competition. If an American company is excluded from competition in a foreign country

by fraudulent conduct on the part of another American company, then our national interests are adversely affected."[408] Considering the interests of the affected state, the court went on: "In a purely domestic situation, the right to a remedy would be clear. When foreign nations are involved, however, its is unwise to ignore the fact that foreign policy, reciprocity, comity, and limitations of judicial power are considerations that should have a bearing on the decision to exercise or decline jurisdiction."[409] A judgment against the defendant, the court concluded, would have "direct and ripple" effects in the affected state: many of the policies with respect to patents could be frustrated by a decree of an American court.

The weighing-of-interests standard introduced in *Timberlane* and *Mannington Mills* is no doubt better fitted as a method to cope with the requirements of international law than the mechanical effects-formula presented in the *Alcoa* case. It provides for an *explicit* weighing of the relevant interests coupled with open arguments. Whether the exercise of jurisdiction in *Timberlane* and *Mannington Mills* is more in accord with international law, on the other hand, does not so much depend on the method adopted, but on the results reached by applying the method.[410]

What the courts in *Timberlane* and *Mannington Mills*, as well as in other cases, fail to realize, however, is that the consideration of the interests of the affected state(s) and individual(s) within the scope of a weighing-of-interests process is not merely a matter of international comity, but a requirement of international law.

The object of this section was, as pointed out at the outset, to briefly illustrate the weighing-of-interests process by examining its application in individual cases. A more thorough examination cannot be made without access to all relevant facts in the specific cases. The examination should therefore not be understood as conclusive, but rather as indicative at the most of how, and to what extent, the American courts consider the interests of the affected state(s) and individual(s) within the ambit of a weighing-of-interests process and as required by international law.

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[1] See further Dicke, at 196; Gerlach, at 29 ff.; Paschos, at 52 ff. Also see Art. III, Section 5a and Art. IV, Section 10 of the Statute of the World Bank (IBRD).

[2] As to the concepts sovereignty, independence and domestic sphere, see further *supra* chapter VIII and XI. As to the protected area, see further Gerlach, at 128 ff.; Dicke, at 18 ff.; Vincent, at 14 f.; Paschos, at 26 ff.; Thomas/Thomas, Non-Intervention, at 69.

[3] See e.g. Dicke, at 16: "Die Spannweite des Begriffs und die politische Brisanz, die stets mit Fragen der Intervention verbunden ist, haben dazu geführt, dass kein Punkt der Definition der Intervention unumstritten ist." Also see Wengler, at 1038: "Das Interventionsverbot stellt eines der am wenigsten geklärten Kapitel der allgemeinen Völkerrechts dar."

[4] See e.g. Gerlach, at 138 and 195; Dicke, at 144 f. and 186; Berber, at 186; Eek, Folkrätten, at 376; Dahm, at 201. *But* see Paschos, at 33.

[5] See Gerlach, at 53 ff. and 84 ff.

[6] See Gerlach, at 84.

[7] See e.g. Oppenheim-Lauterpacht, Vol. I, at 305; Brierly, Law of Nations, at 402; Kelsen, Principles of International Law, at 63 f.; Ross, at 218 f.; H. Sundberg, at 52 f.; Eek, Folkrätten, at 370 f.; Lauterpacht, International Law and Human Rights, at 167 (1950); A. Hershey, The Essential of International Public Law, at 147 (New York, 1923); Q. Wright, Is Discussion Intervention, 50 Am. J. Int. L. 102, at 106 (1956).

[8] Quoted after Gerlach, at 54 (Lawrence-Winfield, The Principles of International Law, at 120, 7th ed., Boston-New York-Chicago, 1923).

[9] See Verdross, at 228; Fenwick, at 243, n. 54; C.C. Hyde, International Law — Chiefly as Interpreted and Applied by the United States, Vol I, at 246 (Boston, 1947); E.C. Stowell, Intervention in International Law, at 317 f. (Washington, 1921); Fawcett, Intervention in International Law. A Study of Some Recent Cases, 103 Recueil des Cours 347, at 348 ff. (1961 II); J.G. Starke, An Introduction to International Law, at 94 (5th ed. London, 1963); M. Sibert, Traite de droit international public. Le droit de la paix. Vol. II, at 341 (Paris, 1951); Rousseau, Droit international public, at 326 (Paris, 1953); H. Becker, Die völkerrechtliche Intervention nach modernster Entwicklung, at 6 (Diss. Hamburg, 1953); H. Haedrich, "Intervention", in Wörterbuch des Völkerrechts, Strupp/Schlochauer, Vol. II, at 145.

See further Gerlach, at 53 ff.; Dicke, at 167 ff. Also see Vincent, at 8: "[I]ntervention will be understood as coercive interference. The use of threat or force will be taken as a guide to the incidence of intervention."

[10] This is not to say that the authors of the Charter intended to define the principle of non-intervention in these lines. See further Gerlach, at 29 ff.

[11] *Cf.* Gerlach, at 137 ff.; Dahm, at 201; Oppermann, Nichteinmischung in innere Angelegenheiten, 14 Archiv des Völkerrechts 321, at 321 ff. and 341 (1968—70); Ross, at 218 f.; E. Menzel, Völkerrecht, at 216 (Berlin — München, 1962).

[12] O'Connell, at 304 ff. *Cf.* L. Cavaré, Le droit international public positif, Vol II (Les modalités des relations jurisdiques internationales — Les compétences respectives des états, at 547 (2d ed. Paris, 1962).

[13] Oppermann, *supra* n. 11, at 521 ff.

[14] Jessup, A Modern Law of Nations, at 223 (New York, 1949).

[15] Friedmann, The Changing Structure, at 270 (footnote omitted). *Cf.* von Glahn, at 162 ff.

[16] Thomas/Thomas, Non-Intervention, at 273 ff., 391 ff. 440 ff. and 409 ff. Notice the following conclusions made by Thomas and Thomas (at 409): "International Law, for the most part, acknowledges that each state has a right to decide what economic policy it will follow in its dealings with other states, for the choice of a foreign economic policy which a government feels will best benefit its national economy is a matter ordinarily within the domestic jurisdiction of the state. Nevertheless, the external economic policy of a nation has

international character; and if such a policy is used as a weapon by which a state seeks to impose its will upon another... then such an interference falls easily into the classification of intervention and may be considered legal or illegal only as intervention may be considered illegal or legal."

[17] Dahm, at 204; Wengler, at 1038 ff.; Paschos, at 82: "Verlust der Entscheidungsfreiheit des betroffenen Staates...". Also see F.X. de Lima, Intervention in International Law With a Reference to the Organization of American States, at 15 f. (The Hague, 1971).

[18] *Cf.* Gerlach, at 159 f: "Die Kritik an der herrschenden Meinung hatte gezeigt, dass die Beschränkung des Interventionsbegriffs auf die Anwendung bzw. Androhung militärischer Gewalt der heutigen Wirklichkeit nicht mehr gerecht wird. Aber auch die bisher dargestellte Erweiterung auf andere Formen der vis absoluta, vor allem aber auf die Methoden kompulsiver Gewalt sowie die Drohung mit empfindlichen Übeln, die nicht allein aus der Androhung militärischer Gewalt zu bestehen brauchen, genügt noch nicht, um alle Möglichkeiter der Beeinträchtigung der Entscheidungsfreiheit eines Staates zu erfassen. Es handelt sich bei diesen Übrigen Arten des Eingriffs in fremde Angelegenheiten um Einwirkungen, die von der Methode her gesehen eine geringe Intensität enthalten, in der Wirkung aber oft das gleiche Ergebnis erzielen." (Footnotes omitted).

[19] Gerlach, at 159 ff.

[20] *Id.*, at 166 ff. *Cf.* Paschos, at 82.

[21] Gerlach, at 173 f.

[22] *Id.*, at 174. Also see R.M. Derpa, Das Gewaltverbot der Satzung der Vereinten Nationen und die Anwendung nichtmilitärischer Gewalt, at 60 ff. (Frankfurt, 1970). *Cf.* Dicke, at 183 f.

[23] Dicke, at 221 f. *Cf.* W. Kewenig, Gewaltverbot und noch zulässige Machteinwirkung und Interventionsmittel, in W. Schaumann, Völkerrechtliches Gewaltverbot und Friedenssicherung, 175, at 191 (Baden-Baden, 1971); Wengler, at 1047, n. 3; I. Seidl-Hohenveldern, Das Recht auf wirtschaftliche Selbstbestimmung, Aussenwistschaftsdienst des Betriebs-Beraters (1947), at 9 and 13.

[24] Dicke, at 225 ff.

[25] An extensive interpretation of the principle of non-intervention has Berber (at 187): "Eine Intervention kann also auch mit diplomatischen, finanziellen, wirtschaftlichen, propaganditischen, innenpolitischen (subversive Intervention) Mitteln vorgenommen werden, mit deren Vornahme versucht wird, in einer gegen die guten Sitten, gegen Treu und Glauben verstossenden Weise, unter Ausnützung einer überlegenden Machtlage, arglistig, heimtückisch in den Bereich der freien Selbstbestimmung eines Staates einzugreifen, um diesen zu einem Tun oder Unterlassen, das er in freier Selbstbestimmung *so* nicht gestalten würde, zu unterlassen." (Footnote omitted). From the outer periphery of the principle of non-intervention, Berber (at 188) takes the example where a state prescribes an obligation upon its nationals to commit acts which are prohibited in the foreign country in which they reside, and the reverse situation, where the state prohibits its nationals to commit acts in the foreign country in which they reside. These are cases of "illegal" interventions ("verbotene Interventionen"), Berber claims. But surely, these examples need to be qualified. The mere act of state can hardly — seen in light of the view expounded above — qualify as an intervention or interference. *Cf.* Reuterswärd, Lagstiftningsmaktens folkrättsliga gränser, SvJT (1977), p. 87, at 93.

Writers on international law from the U.S.S.R. seem generally to advocate a broad definition of intervention. See further Gerlach, at 77 ff. and Dicke, at 193 ff. Also see Schweisfurth, Sozialistisches Völkerrecht, at 304 f. (Berlin-Heidelberg-New York, 1979) and A.P. Mowtschan, Kodifizierung und Weiterentwicklung des Völkerrechts, at 140 f. (Berlin (DDR), 1974).

[26] Gerlach, at 177 ff. *Cf.* Dahm, at 206 f. See criticism, Dicke, at 180 ff. and Meessen, at 229.

[27] Gerlach, at 191 and 202 ff.

[28] *Id.*, at 204 ff. Gerlach takes the following example (at 206): "Wendet ein Staat wegen eines politischen Zieles, auf dessen Verwirklichung er nicht vital angewiesen ist, beispielsweise das besonders schwere Mittel des Abbruchs der Handelsbeziehungen oder der Verhängung eines Embargos über lebenswichtige Waren an und führt diese Methode zu einer Existenzbedrohung des Adressaten, so sind die Voraussetzungen der sozialen Inadäquanz gegeben; es liegt dann eine verbotene Einmischung, eine Intervention, vor."

Here the principle of proportionality is violated, Gerlach concludes.

[29] Meessen, at 200 ff. Also see H-C. Kersten, Zur Anwendbarkeit des GWB auf ausländische Unternehmenzusammenschlüsse mit Inlandswirkungen, 29 Wirtschaft und Wettbewerb 721, at 725 (1979).

[30] Meessen, at 204 f.

[31] *Id.*, at 204

[32] See the recent decision by the German Bundeskartellamt of Februar, 24, 1982 ("Morris Rothmans", B6-691100-U-49/81), in 32 Wirtschaft und Wettbewerb 483 (1982), at 493 f.

[33] Dicke, at 235. Also see Rehbinder, in Immenga/Mestmäcker, Kommentar zum GWB, at 1881.

Meessen (at 202 and 218) forwards the concept of sovereign equality as an additional basis for his reasoning. This concept does not, however, convey more than the principle of non-intervention shall apply equally to all states. See the discussion *supra* chapter XII.

[34] See *supra* p. 401 ff.

[35] See e.g. Meessen, at 198 ff,; Brewster, at 301 ff. and 444 ff.; Trautman, in Brewter, at 339 ff.; Rahl, at 410 ff.; Zwarensteyn, at 161 ff.; I. Hunter, Specific Application to Anti-Trust Matters of General Principles of International Law Governing the Assumption and Exercise of Jurisdiction, ILA 1970, p. 221, at 239. See the advocates of the abuse of rights theory, *supra* p. 527 f. In some respect also P. Müller, at 81 ff.; Rudolf, at 22 ff.; Jessup, Transnational Law, at 64; Mann, at 41.

[36] Restatement (2d) of Foreign Relations Law, Section 40, Comment a.

[37] See ILA 1972, at XX.

[38] *But* see e.g. Scheuner, ILA 1970, at 163 (contribution to discussion); Chilstrom, ILA 1972, at 137 and Meessen, *id.*, at 122 ff. (contributions to discussion).

[39] Hunter, *supra* n. 35, at 241 f.

[40] 396 F. 2d 897 (2d Cir. 1968).

[41] Hunter, *supra* n. 35, at 245 (emphasis added).

[42] 396 F. 2d 897, at 901 (2d Cir. 1968).

[43] For an extensive analysis of this trend and the application of the approach, see A. Shapira, The Interest Approach to Choice of Law (The Hague, 1970).

[44] Section 6(2) (1971), *cf.* Comment d.

[45] See *supra* p. 527 f.

[46] See *supra* p. 522 ff.

[47] P. Müller, at 81 ff.

[48] Hunter, *supra* n. 35, at 242.

[49] Restatement (2d) of Foreign Relations Law, Section 40.

[50] See e.g. Rahl, at 415. The concept of comity as used here denotes discretion as opposed to the *binding* character of international law. See Yntema, The Comity Doctrine, 65 Mich. L. Rev. 9 (1966); Nussbaum, Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws, 42 Colum L. Rev. 191 (1942); H. Müller, at 113 ff. and 157 ff.

[51] S.D. Metzger, The Restatement of the Foreign Relations Law of the United States: Bases and Conflicts of Jurisdiction, 41 N.Y.U.L. Rev. 7, at 19 f. (1966). *Cf.* Brewster, at 444 ff., especially at 446, where he states a jurisdictional rule of reason, urging forbearance to exercise jurisdictional power "to its fullest possible extent". Also see I.T. Onkelinx, Conflict of International Jurisdiction: Ordering the Production of Documents in Violation of the Law of the Situs, 64 Nw. U.L. Rev 487, at 501 (1969); H.G. Maier, Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law, 76 Am.J. Int. L. 280, at 294 (1982).

[52] See *supra* p. 496 ff.

[53] See *supra* p. 512 ff.

[54] *North Sea Continental Shelf Cases,* I.C.J. Reports (1969), p. 3, at 47 f. (section 85).

[55] *Cf.* the discussion *supra* p. 512 ff.

[56] *Barcelona Traction Case,* I.C.J. Reports (1970), p. 3, at 105 f.

[57] See *supra* p. 522 ff. And this is also true of the advocates of the abuse of rights theory, see *supra* p. 527 f.

[58] See e.g. Harvard Research and Draft Convention, at 484; Hermanns, at 24; Krumbein, at 111; Brewster, at 287; Brierly, The "Lotus" Case, 44 L.Q. Rev. 154, at 158 (1928); Rahl, at 404 f.

[59] U.S. v. Aluminum Co. of America, 148 F. 2d 416, at 443 f. (2d Cir. 1945).

[60] Brewster, at 301.

[61] *Id.*, at 302. This *ad hoc* approach is one of several approaches discussed. See, however, Brewster, at 444.

[62] See *supra* chapter XIV.

[63] See *supra* p. chapter XIV.

[64] See *supra* p. 529 ff.

[65] See Restatement of Foreign Relations Law of the United States (Revised) Tentative Draft No. 2 (1981), summarized in 75 Am. J. Int. L. 987 (1981). *Cf.* A.F. Lowenfeld, Extraterritoriality: Conflict and Overlap in National and International Regulation, American Society of International Law, Proceedings of the 74th Annual Meeting, April 17—19, 1980, at 30 ff., particulary at 31 f.

[66] See further Maier, *supra* n. 51.

[67] See *supra* p. 496 ff.

[68] See e.g. Bär, at 12 ff.; Rehbinder in Immenga/Mestmäcker, Kommentar zum GWB, at 1882 ff.; Meessen, at 108 ff.

[69] See *supra* p. 132 ff. and 171 ff. as regards the principle of effects as construed in the American case law.

[70] Meessen, Zusammenschlusskontrolle in auslandbezogenen Sachverhalten, 143 Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht 273, at 276 (1979). *Cf.* Mann, Studies, at 34 ff. and 41.

[71] The only element weighed would be the localization-of-acts process. On the other hand, the principle of territorial jurisdiction is in itself a manifestation of a weighing of state interests, see *supra* p. 512 ff.

[72] For an enlightening study of the question of the nationality of enterprises, see A. Philip, Studier i den internationale selskapsrets teori (Copenhagen, 1961). Also see H. Kronstein, The Nationality of International Enterprises, 52 Colum. L. Rev. 983 (1952).

[73] Berber, at 188.

[74] Meessen, at 219 ff.

[75] See *supra* p. 551 ff. as regards the principle of non-intervention (non-interference) and the relevance of this principle here. *Cf.* Rosswog, at 176 ff.

[76] *Cf. supra* p. 553 ff. as regards the extreme cases.

[77] Se *supra* p. 228 as regards the concern of the U.S. courts of not allowing United States territory to become a heaven for securities fraud.

[78] See *supra* chapter VII.

[79] *Cf.* Brewster, at 286 ff.

[80] See *supra* p. 561 ff.

[81] See *supra* p. 563 ff.

[82] See *supra* p. 565 ff.

[83] In the following we will consider the courts to be the state organs that carry out the weighing of interests in the specific case. While this seems to be the normal situation, it is not necessarily so. The interest-analysis may also be performed by other state organs (for instance, such attached to the State Department) all according to what the legislator sees fit in light of the question of the distribution of powers.

[84] See *supra* n. 72. Also see Cheshire, at 193 ff.; Dicey & Morris, at 702 f.; Niederer, at 162 ff. and 170 ff. (with further references); Bogdan, at 120 ff. *But* see the *Barcelona Traction Case,* where the Court found that the place of incorporation and the place of the registered office was controlling, ICJ Reports 1970 p. 3, at 43.

[85] See e.g. Tindall, at 11; Behrmann, at 1 ff.; E.J. Kolde, International Business Enterprise (N.J., 1973), at 145 ff.

[86] Section 27 of the Restatement (2d) of Foreign Relations Law provides that "[a] corporation or other private legal entity has the nationality of the state which creates it." Yet the nationality of the persons controlling the corporation is given some significance, but mark, only for the purposes of *founding* jurisdiction (as to this, see *supra* p. 522 ff. and 529 ff.). Section 40 of the Restatement, on the *exercise* of jurisdiction, essentially refers back to Section 27 (see Section 40, Comment d.). The impression is that the nationality of corporations and its significance for the weighing of interests process is not satisfactorily analyzed.

[87] As to the interest in protecting a foreign plaintiff, see *supra* p. 570.

[88] See *supra*. The state exercising jurisdiction hardly has an interest in protecting the controllers.

[89] It may be argued that jurisdiction exercised on the ground of control alone is for the protection of the interests of the state in which the corporation is seated. But then again, there should be no competing interests (there is a false conflict). On the other hand, the foreseeability of the consequences of a certain conduct is no doubt greater in this situation.

[90] Brewster (at 446) seems to give priority to the "corporate locality".

[91] It is sometimes argued that the seat of a corporation is merely "fictive", *i.e.*, it is chosen for the purpose of evading law, and that this is a fact that should be considered when determining the nationality of the corporation, or at least when performing the interests-analysis. But how do we know when the seat is fictive? The fact alone that all the business of a corporation in question is done outside the state in which it is seated, is hardly decisive. Neither is the fact that the corporation is controlled from abroad. The criteria applied in the field of international taxation have further no relevance. If state A, where the corporation is seated, levies no taxes, or only a minimum of taxes, state B from which the corporation is controlled can levy taxes from the persons controlling the corporation and residing in state B, without too much damaging the interests of state A. The situation is different, however, where the corporation is seated in state A, which has liberal antitrust laws, and state B, with rigorous regulations, seeks to regulate the conduct of that corporation. Here, a more careful weighing of the interests involved is required.

Also see as to the concept "bona fide resident" within the scope of the U.S. export control laws, see e.g. Note, Extraterritorial Application of the Export Administration Amendments of 1977, 8 Ga. J. Int. & Comp. L. 741, at 742 ff. (1978).

[92] See *supra* p. 570.

[93] See *supra* p. 171 ff.

[94] See *supra* p. 529 ff.

[95] See ILA 1972, at XX.

[96] See I. Hunter, Specific Application to Anti-Trust Matters of General Principles of International Law Governing the Assumption and Exercise of Jurisdiction, ILA 1972, at 156 ff. and report with the same title in ILA 1970, at 221 ff., particularly at 235 ff.

[97] See Hunter, *id.* ILA 1972, at 156 ff., particularly Illustration 1 and 2.

[98] See e.g. Rehbinder, at 91 and 127; Rehbinder in Immenga/Mestmäcker, Kommentar zum GWB, at 1884; Meessen, at 159 ff. and 171; Schwartz, at 158 ff.; Bär, at 345; Haymann, at 316; Stoephasius, at 114 f.; Frisinger, Extraterritoriale Anwendung des US-Antitrustrechts und "Personal Jurisdiction" über ausländische Gesellschaften, Aussenwirtschaftsdienst des Betriebs-Beraters (1972), p. 12, at 14.

[99] *Cf.* Krumbein, at 116.

[100] Meessen, at 162 f.

[101] Rehbinder in Immenga/Mestmäcker, Kommentar zum GWB, at 1884. Also see Barack, at 393 f.

[102] See *supra* n. 95.

[103] Meessen, at 159 ff. and 163; Rehbinder in Immenga/Mestmäcker, Kommentar zum GWB, at 1884. *But* see Bär, at 336 ff. and 340.

[104] Section 18, Comment f.

[105] See Hunter, *supra* n. 96, ILA 1970, at 236. Also see ILA 1966, at 141 f.

[106] Meessen, at 163; Rehbinder in Immenga/Mestmäcker, Kommentar zum GWB, 1884. Also see Schwartz, at 257.

[107] *Cf. supra* p. 132 ff. and 171 ff. as to the principle of effects as applied in the American case law and as contrued in the doctrine.

[108] Rehbinder in Immega/Mestmäcker, Kommentar zum GWB, at 1884.

[109] See *supra* p. 276 ff.

[110] *Cf.* the Restatement (2d) of Foreign Relations Law, Section 18, Reporters' Notes 4.

[111] The Restatement (2d) of Foreign Relations Law, Section 18 (b)(i).

[112] The ILA Resolution Art. 5(a), see ILA 1972, at XX. *Cf.* Hermanns, at 21 ff.; Jennings, Extraterritorial Jurisdiction and the United States Antitrust Laws, 33 B.Y. Int. L. 146, at 159 ff. (1957); Haight, International Law and Extraterritorial Application of the Antitrust Laws, 63 Yale L.J. 639, at 644 (1954); I. Seidl-Hohenveldern, Kartellbekämpfung im Gemeinsamen Markt und das Völkerrecht, Aussenwirtschaftsdienst des Betriebs-Beraters (1960), p. 225, at 229; J. Ellis, Extraterritorial Effects of Trade Regulation, 111 U. Pa. L. Rev. 1129, at 1130 (1962—63).

[113] Hunter, *supra* n. 96, ILA 1970, at 235.

[114] *S.S. Lotus,* P.C.I.J. 1927, Series A, No. 9, at 23.

[115] See Harvard Research and Draft Convention, at 480.

[116] See *supra* p. 512 ff.

[117] See *supra* p. 512 ff.

[118] S.D. Metzger, The Restatement of the Foreign Relations Law of the United States: Bases and Conflicts of Jurisdiction, 41 N.Y. U.L. Rev. 7, at 15, n. 18 (1966).

[119] *Id.*

[120] Meessen, at 153, and Meessen continues: "Nach diesem Verständnis des Begriffs der tatbestandsmässigen Wirkung wird dem Gesetzgeber also nur die Struktur kartellrechtlicher Normen, nicht aber die Art der Wirkung, die als Anknüpfungspunkt gewählt wird, vorgeschrieben." (Footnote omitted).
Cf. Rehbinder in Immenga/Mestmäcker, Kommentar zum GWB, at 1884.

[121] ILA 1972, at XIX.

[122] Krumbein, at 124. *Cf.* Schwartz, at 255.

[123] Krumbein, at 124. Krumbein continues: "Wollte man auf diese Mindestanforderung, dass ein Staat die Handlungs- und Erfolgsvoraussetzungen seiner Eingriffe im voraus tatbestandlich fixieren muss, verzichten, so wäre dem willkürlichen Vorgehen gegen ausländische Vorgänge auf Grund irgendwelcher im Staatsgebiet zutage tretender Einflüsse, die sich immer finden lassen, Tür und Tor geöffnet." *Cf.* Akehurst, Jurisdiction at 195 ff.

[124] *Cf.* Meessen, at 155; Rehbinder in Immenga/Mestmäcker, Kommentar zum GWB, at 1884.

[125] See e.g. Haymann, at 62, 205 ff. and 209 ff.

[126] See *supra* p. 573 ff.

[127] See e.g. the Restatement (2d) of Foreign Relations Law, Section 18 (b) (ii); ILA New York Resolution, Art. 5 (b); Meessen, at 156 ff; Rehbinder, at 91 and in Immenga/Mestmäcker, Kommentar zum GWB, at 1884 f.; Homburger and Jenny, at 55; Barack, at 393; Stoephasius, at 115; Frisinger, Extraterritoriale Anwendung des US-Antitrustrechts und "Personal Jurisdiction" über ausländische Gesellschaften, Aussenwirtschaftsdients des Betriebs-Beraters (1972), p. 12; Die Anwendung des EWG-Wettbewerbsrechts auf Unternehmen mit Sitz in Drittstaaten, Aussenwirtschaftsdienst des Betriebs-Beraters (1972), p. 553, at 558.

[128] See *supra* p. 132 ff. and 171 ff.

[129] Rehbinder in Immenga/Mestmäcker, Kommentar zum GWB, at 1885. (*Cf.* Rehbinder, at 91).

[130] Meessen, at 158.

[131] Rehbinder in Immenga/Mestmäcker, Kommentar zum GWB, at 1885.

[132] See *supra* p. 522 ff. and 529 ff.

[133] See *supra* p. 581.

[134] See e.g. Jennings, The Limits of State Jurisdiction, Nord. Tidskr. f. Int. R. (1962), p. 209, at 222 f.; Hermanns, at 23; Haymann, at 186 ff. and 314 ff.; Schwartz, at 100 and 102; Frisinger, *supra* n. 127, at 559; Seidl-Hohenveldern, Völkerrechtsliche Grenzen bei der Anwendung des Kartellrechts, Aussenwirtschaftsdienst des Betriebs-Beraters, (1971), p. 53, at 54 f.

[135] Meessen, at 158 f.; Rehbinder in Immenga/Mestmäcker, Kommentar zum GWB, at 1885 f.

[136] See *supra* p. 132 ff. and 171 ff.

[137] Restatement (2d) of Foreign Relations Law, Section 18 (at 52). Also see Illustration 12 under the same Section. *But* see the interpretation of Section 18 given in by Hunter, Specific Application to Anti-Trust Matters of General Principles of International Law Governing the Assumption and Exercise of Jurisdiction, ILA 1970, P. 221, at 235 f.

[138] Meessen, at 159; Rehbinder in Immenga/Mestmäcker, Kommentar zum GWB, at 1886.

[139] *Id.*

[140] Rehbinder, *supra* n. 138.

[141] See *supra* p. 522 ff. and 529 ff. The suggestion by Rehbinder (*id.*) that "[a]uf einigermassen sicherem Boden bewegt man sich wohl, wenn man in Verknüpfung beider Anforderungen verlangt, dass die Auslandsbeschränkung aufgrund konkreter Umstände geeignet sein muss, sich auf inländische Rechtsgüter spürbar auszuwirken", does not add much to the solution of the problem.

[142] See *supra* p. 496 ff.

[143] Rosswog, at 169 ff.

[144] See Rosswog, at 181: "Mehr noch als beim aktiven Personalgrundsatz, wo Normadressat immerhin der Staatsangehörige ist, führt ein auf den passiven Personalgrundsatz gegründeter Strafanspruch, der den Gebots- oder Verbotsnormen des Tatortstaates widerspricht, zu einer Beeinträchtigung der im Völkerrecht verankerten vorrangigen Ordnungsfunktion eines jeder Staates auf seinem Hoheitsgebiet. Indem der fremde Staat seine Verhaltensnormen mit Strafdrohungen bewehrt, nötigt er den Ausländer, der in der Regel ein Angehöriger des Tatortstaates sein wird, unter Missachtung der Gebote und Verbote der ihn ungebenen sozialen Umwelt nach einer fremden Rechtsordnung zu leben." (Footnote omitted).

[145] What has been said here does not apply to the protective principle.

[146] See Jennings, Extraterritorial Jurisdiction and the United States Antitrust Laws, 33 B.Y. Int. L. 146, at 151 (1957). Also see Oehler, at 127 ff. See further *supra* p. 496 ff.

[147] *Cf.* the Restatement (2d) of Foreign Relations Law, Section 41, Comment d.

[148] As to the application of the doctrine in other countries, see e.g. Restatement (2d) of Foreign Relations Law, at 134 f. (under Section 41).

[149] 168 U.S. 250 (1897).

[150] 168 U.S. 250, at 252 (1897). *Cf.* the formulation given in the English case Duke of Brunswick v. King of Hanover, decided by the House of Lords in 1848 (2 H.L.C. 1, 3 B.I.L.C. 138, at 17): "[T]he courts of this country cannot sit in judgment upon an act of a Sovereign, effected by virtue of his sovereign authority abroad". See further Folz, at 29 f.

In *Hatch v. Baez,* 7 Hun 596 (N.Y. Sup. Ct. 1876), at 599, the court used similar language: "[T]he courts of one country are bound to abstain from sitting in judgment on the acts of another government done within its own territory."

[151] 246 U.S. 297 and 246 U.S. 304 (1918).

[152] 246 U.S. 297, at 303.

[153] 376 U.S. 398 (1946). Also see *Bernstein v. van Heyghen Frères S.A.,* 163 F. 2d 246 (2d Cir. 1947), *certiorari denied,* 332 U.S. 772 (1947), and *Bernstein v. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij,* 173 F. 2d 71 (2d Cir. 1949) and 210 F. 2d 375 (2d Cir. 1954).

[154] 376 U.S. 398, at 428 (1964).

[155] Pub. L. 89—171, § 301 (d), 79 Stat. 659, 22 U.S.C. § 2370 (e) (2) (1970), *as amended.*

[156] The Amendment was implemented in *Banco Nacional de Cuba v. Farr,* 243 F. Supp. 957 (S.D.N.Y. 1965), *aff'd,* 383 F. 2d 166 (2d Cir. 1967), *certiorari denied,* 390 U.S. 959 (1968). Also see *French v. Banco Nacional de Cuba,* 23 N.Y. 2d 46, 295 N.Y. 2d 433, 242 N.E. 2d 704 (1966). See further Henkin, Act of State Today: Recollections in Tranquility, 6 Colum. J. Transnat. L. 175 (1967); S.K. Solomon, An Analysis of the Act of State Doctrine, 22 N.Y. Law School L. Rev. 995 (1977); E.F. Mooney, Foreign Seizures, Sabbatino and the Act of State Doctrine 110 ff. (U. of Kentucky Press, 1967); R.B. Lillich, The Protection of Foreign Investment, 111 ff. (Syracuse N.Y., 1965). For a recent alalysis, see Folz, at 139 ff. and 143 ff.

[157] 406 U.S. 759 (1972) and 425 U.S. 682 (1976).

[158] See further Folz, at 150 ff.; Meal/Trachtman, at 633 ff. especially n. 280; C.M. Greene, A New Approach to the Act of State Doctrine Turning Exceptions Into the Rule, 8 Cornell Int. L. J. 273, at 278 (1975); Solomon, *supra* n. 156, at 1004 ff.; Note, Executive Suggestion and Act of State Cases: Implications of the Stevenson Letter in the Citibank Case, 12 Harv. Int. L.J. 557 (1971); Lowenfeld, Act of State and Department of State: First National City Bank v. Banco Nacional de Cuba, 66 Am. J. Int. L. 795, at 799 ff. (1972).

[159] 425 U.S. 682, at 690 ff. and 715.

[160] 213 U.S. 347 (1909). For facts and analysis, see *supra* p. 67 ff.

[161] See *supra* p. 68 f., 163 ff. and 168 ff.

[162] 213 U.S. 347, at 357 f. (here referring to *Underhill v. Hernandez, supra* n. 149).

[163] 213 U.S. 347, at 358.

[164] 274 U.S. 268 (1927). See further *supra* p. 77 f.

[165] 274 U.S. 268, at 276.

[166] 317 U.S. 341 (1943). Also see *Goldfarb v. Virginia State Bar Association,* 421 U.S. 773 (1975); *Cantor v. Detroit Edison Co.,* 96 S.Ct. 3110 (1976); *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977); *City of Lafayette v. Louisiana Power and Light Co.,* 435 U.S. 389 (1978); *New Motor Vehicle Board of California v. Orrin W. Fox Co.,* 439 U.S. 96 (1979). *Cf.* the earlier cases *Olsen v. Smith,* 195 U.S. 332 (1904) and *U.S. v. Rock Royal Co-op.,* 307 U.S. 533 (1939).

[167] 317 U.S. 341, at 350 ff.

[168] 370 U.S. 690 (1962).

[169] See further *supra* p. 104.

[170] *Supra* n. 160 and 166.

[171] 370 U.S. 690, at 706 f.

[172] U.S. v. The Watchmakers of Switzerland Information Center, Inc., 1963 Trade Cases π 70,600 (S.D.N.Y. 1962), *order modified,* 1965 Trade Cases π 71, 352 (S.D.N.Y. 1965). See further *supra* p. 105 ff.

[173] See *supra* n. 166.

[174] 1963 Trade Cases π 70,600, at 77,456—457.

[175] See *supra* n. 164 and 168.

[176] 285 F. Supp. 949 (1968).

[177] 285 F. Supp. 949, at 954.

[178] See *supra* n. 168.

[179] See *supra* n. 172.

[180] This was obviously how the sovereign compulsion was construed in the *Swiss Watch* case (*supra* n. 172), where the court said:

"In the absence of direct foreign governmental action compelling the defendants' activities, a United States court may exercise its jurisdiction as to acts and contracts abroad, if, as in the case at bar, such acts and contracts have a substantial and material effect upon our foreign and domestic commerce". *Id.*, at 77,457 (emphasis added).

[181] 307 F. Supp. 1291 (1970).

[182] 307 F. Supp. 1291, at 1298. (Referring to the *Continetal Ore* case — *supra* n. 168 — the *Swiss Watch* case — *supra* n. 172 — and *Parker v. Brown* — *supra* n. 166).

Cf. Brewster, at 94; Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), at 3; Fugate, at 75 ff.

The court further noted (*id.*, at 1298): "American business abroad does not carry with it the freedom and protection of competition it enjoys here, and our courts cannot impose them. Commerce may exist at the will of the government, and to impose liability for obedience to that will would eliminate for many companies the ability to transact business in foreign lands. Were compulsion not a defense, American firms abroad faced with a government order would have to choose one country or the other in which to do business. The Sherman Act does not go so far." (Footnote omitted).

[183] See *supra* p. 584.

[184] 307 F. Supp. 1291, at 1298 f.

[185] 331 F. Supp. 92 (1971).

[186] See *supra* n. 153.

[187] See *supra* n. 164 and 168.

[188] 331 F. Supp. 92, at 108 ff., 110 f. *American Banana, supra* n. 160, was held to be controlling. Yet it seems that that case is misread, see *supra* p. 115 f. *Cf. supra* p. 68 f., 163 ff. and 168 ff.

[189] 549 F. 2d 597 (9th Cir. 1976).

[190] See *supra* n. 185.

[191] 549 F. 2d 597, at 608. The conclusion was preceded by a lengthy discussion of the act of state doctrine.

Also see *Hunt v. Mobil Oil Corp.*, 550 F. 2d 68 (2d Cir. 1977) (*certiorari denied* in 1977, May 12). Here the plaintiff was allegedly damaged by the activities (cut-backs, nationalizations, etc.) of the Libyan Government. The court consequently applied the act of state doctrine, all in line with the *Occidental Petroleum* case (*supra* n. 185). Again, the doctrine was surrounded by a lenghty discussion.

[192] 595 F. 2d 1287. (3d Cir. 1979).

[193] 595 F. 2d 1287, at 1292 ff. and 1294.

[194] 473 F. Supp. 680 (S.D.N.Y. 1979).

[195] *Cf. Timberlane,. supra* n. 189.

[196] 473 F. Supp. 680, at 689.

[197] 473 F. Supp, 680, at 690.

[198] See *supra* n. 157.

[199] See further *infra* p. 591 ff.

[200] 473 F. Supp. 680, at 689 f.

[201] 594 F. 2d 48 (1979).

[202] 594 F. 2d 48, at 51 ff.

[203] The American view seems to be stated in Section 9 and 41 (Comment a. and k.) in the Restatement (2d) of Foreign Relations Law. Also see Section 41, Repoters' Notes, 4. In *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398 (1964), at 421, the Supreme Court pointed out: "We do not believe that this doctrine is compelled either by the inherent nature of authority, as some of the earlier decisions seem to imply... or by some principle of international law.... That international law does not require application of the doctrine is evidenced by the practice of nations."

See further e.g. Note, Act of State Doctrine, 62 Colum. L. Rev. 1278, 1282 f. (1962); Oppenheim-Lauterpacht, at 241 f. (section 115aa); Bishop, Cases on International Law, 4 f. (2d ed. 1962); T.E. Simon, The Act of State Doctrine: International Consensus and Public Policy Considerations, 8 Int. L. & Pol. 283, at 286 (1975); J. Lipper, Acts of State and the Conflict of Laws, 35(1) N.Y.U.L. Rev. 234 at 237 (1960); H. Cohen, Nonenforcement of Foreign Tax Laws and the Act of State Doctrine: A Conflict in Judicial Foreign Policy, 11

Harv. Int. L.J. 1, at 13 ff. (1970); J.C. Stehpens, Act of State Doctrine, Actions of Intervenors Appointed by the Cuban Government and Statements of Counsel Do Not Constitute Sufficient Acts of State to Come Within the Doctrine, 7 Ga. J. Int. & Comp. L. 734, at 735 (1977); Solomon, *supra* n. 156, at 996; Backer, at 1255 ff.; Greene, *supra* n. 158 at 275 ff.; S.H. Green, Act of State — Extraterritorial Enforcement of Confiscatory Decrees, 5 Colum. J. Transnat. L. 315, at 316 (1966). Also see ILA 1962, at 122 ff. and 153 ff.; Joelson/Griffin, at 631;

[204] See the *Sabbatino* case, *supra* n. 203, at 423. Also see Note, The Act of State Doctrine, 62 Colum. L. Rev. 1278, at 1283 ff. (1962).

[205] 376 U.S. 398, at 423 (1964), see *supra* n. 203.

[206] See e.g. Folz, at 171 ff.; Note, *supra* n. 204, at 1283 ff.

[207] We leave the so-called Bernstein exception and the international law exception aside. Whether these exceptions exist at all and to what extent they are applicable, is controversial. The international law exception has been narrowly construed. See further Meal/Trachtman, at 627 ff.; Backer, at 1255 ff.; Folz, at 212 ff. and 217 ff. (with further references, at 217); Greene, *supra* n. 158, at 279: Restatement (2d) of Foreign Relations Law, Section 41, Reporters' Notes 5; Mooney, *supra* n. 156; Lillich, *supra* n. 156, at 45 ff.; Henkin, *supra* n. 156, at 175 ff.

[208] As to the acts of unrecognized states, see the Restatement (2d) of Foreign Relations Law, Section 42.

[209] See the Restatement (2d) of Foreign Relations Law, Section 41, Comment d. *Cf.* The *Timberlane* case (Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F. 2d 597 (9th Cir. 1976), at 607 f. Also see Folz, at 199 ff.; Note, *supra* n. 204, at 1288 ff.

[210] See e.g. the *Timberlane* case, *supra* n. 209. *Cf. Mannington Mills, Inc. v. Congoleum Corp.*, 595 F. 2d 1287 (3d Cir. 1979).

[211] See e.g. Note, *supra* n. 204., at 1292 ff. See Further *Republic of Iraq v. First National City Bank,* 353 F. 2d 47 (2d Cir. 1965); *Menedez v. Saks & Co.*, 485 F.2d 1355 (2d Cir. 1970), *revised on other grounds sub nom, Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682 (1976); *Harris v. Balk,* 198 U.S. 215 (1904); *Rupali Bank v. Provident National Bank,* 403 F. Supp. 1285 (E.D. Pa. 1975).

[212] See the Restatement (2d) of Foreign Relations Law, Section 43.

[213] See e.g. Folz, at 206 ff.; Restatement (2d) of Foreign Relations Law, Section 43, Comment b. and c. Also see *Second Russian Ins. Co. v. Miller,* 297 Fed. 404, at 409 (2d Cir. 1924), *affirmed,* 268 U.S. 552 (1925); *Moscow Fire Ins. Co. v. Bank of New York & Trust Co.*, 280 N.Y. 286, at 313, 20 N.E. 2d 758, at 764 (1939).

[214] See e.g. F.V. Harper, Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays, 56 Yale L.J. 1155 (1947); J. Dainow, Policy Problems in Conflicts Cases, 35 Texas L. Rev. 759 (1957); M.G. Paulsen/M.I. Sovern, "Public Policy" in the Conflict of Laws, 56 Colum. L. Rev. 969 (1956); R.A. Leflar, Extrastate Enforcement of Penal and Governmental Claims, XLVI Harv. L. Rev. 193 (1932). See generally, Leflar, at 20 ff, Ehrenzweig, at 133 ff. and 342 ff. Also see Stoel, The Enforcement of Foreign Non-criminal Penal and Revenue Judgments in England and the United States, 16 Int. & Comp. L.Q. 663 (1967); H. Cohen, Nonenforcement of Foreign Tax Laws and the Act of State Doctrine: A Conflict in Judicial Foreign Policy, 11 Harv. Int. L.J. 1 (1970).

[215] See the Restatement of (2d) of Foreign Relations Law, Section 41, Comment g. and Section 43.

See further in general, Folz, at 229 ff. and 234 ff.; Cohen, supra n. 214, at 1 ff.; C.M. Greene, A New Approach to the Act of State Doctrine: Turning Exceptions Into the Rule, 8 Cornell Int. L.J. 273, at 281 ff. (1975); J. Lipper, Act of State and the Conflict of Laws, 35(1) N.Y.U.L. Rev. 234, at 245 ff. (1960); W.R. Grove, International Law, Conflict Law and *Sabbatino,* 19 U. Miami L. Rev. 216, at 234 f. (1964); T.E. Simon, The Act of State Doctrine: International Consensus and Public Policy Considerations, 8 Int. L. & Pol. 283, at 290 ff.; Note, The Act of State Doctrine: Its Relation to Private and Public International Law, 62 Colum. L. Rev. 1278, at 1292 ff. (1962); S. Jacobs/R.H. King Jr./S. Rodriguez III, The Act of State Doctrine: A History of Judicial Limitations and Exceptions, 18 Harv. Int. L.J. 677, at 692 f. (1977).

[216] *Cf. Underhill v. Hernandez,* 168 U.S. 250 (1897).

[217] See *supra* p. 587 f.

[218] 425 U.S. 682 (1976), see further *supra* p. 585.

[219] See the opinion of Justice White, 425 U.S. 682, at 695 ff.

[220] See Appendix No. 1 to the opinion of the court, 425 U.S. 682, at 706 ff.

[221] *Id.,* at 707.

[222] See *supra* n. 191, 194 and 201.

[223] See in general the Restatement (2d) of Foreign Relations Law, Sections 65 ff. As to the commercial exception, Section 69. For a background, also see Justice White's opinion in the *Dunhill* case, *supra* n. 218, at 695 ff. In *Schooner Exchange v. McFaddon,* 11 U.S. (7 Cranch) 116 (1812), the Court laid down the theory of an absolute sovereign immunity, when holding that "the perfect equality and absolute independence of sovereigns" required that the plea of the (French) Government be upheld. (*Id.,* at 137). This theory of absolute sovereign immunity remained established law in the United States until the issuance of the "Tate Letter" in 1952 (letter from Jack. B. Tate, Acting Legal Adviser of the Department of State, to P.B. Perlman, Acting Attorney General, May 19, 1952, *reprinted in* 26 Departm. State Bull. 984 (1952). See further Cardozo, Sovereign Immunity: The Plaintiff Deserves a Day in Court, 67 Harv. L. Rev. 608 (1954); Backer, at 1251 ff.; Meal/Trachtman, at 584 ff.; Joelson/griffin, at 622 ff.

As to the role of the doctrine of sovereign immunity in international law, see e.g. Brownlie, at 314 ff.; O'Connell, at 841 ff.; Wengler, at 949 ff.;Eek, Folkrätten, at 380 ff. (For further references, see Brownlie, at 319, n. 6.

[224] Pub. L. No. 94—583, 90 Stat. 2891, *reprinted in,* 15 Int. Legal Mats. 1388 (1976), *codified in* 28 U.S.C. §§ 1330, 1332, 1441 and 1602—1611 (1976). The FSIA became effective on January 19, 1977.

For comments on the FSIA, see e.g. von Mehren, The Foreign Sovereign Immunities Act of 1976, 17 Colum. J. Transnat. L. 33 (1978); Brower/Bistline/Loomis, The Foreign Sovereign Immunities Act of 1976 in Practice, 73 Am. J. Int. L. 200 (1979); H. Smit, The Foreign Sovereign Immunities Act of 1976: A Plea for Drastic Surgery, American Society of International Law, Proceedings of the 74th Annual Meeting, April 17—19, 1980, at 49 ff.; Note, Sovereign Immunity — A Statutory Approach to a Persistent Problem, 1 B.C. Int & Comp. L.J. 223 (1977); Note, Sovereign Immunity: Limits of Judicial Control: The Foreign Sovereign Immunities Act of 1976, 18 Harv. Int. L.J. 429 (1977); Note, The Foreign Sovereign Act of 1976: Giving the Plaintiff His Day in Court, 46 Fordham L. Rev 543 (1977).

[225] 28 U.S.C. § 1605(a)(2).

[226] 28 U.S.C. § 1603(d).

[227] 28 U.S.C. § 1603(d).

[228] 477 F. Supp. 553 (C.D. Cal. 1979).

[229] As to the concept "commercial activity", see further e.g. Meal/Trachtman at 588 ff.; D.I. Baker, Antitrust Remedies Against Government-Inspired Boycotts, Shortages, and Squeezes: Wandering on the Road to Mecca, 61 Cornell L. Rev. 911, at 927 ff. (1976); Joelson/Grifin, at 622 ff.; Jacobs/King/Rodriguez, *supra* n. 215, at 691 ff.; Notes in Harv. Int. L.J. and in Fordham L. Rev., *supra* n. 224, at 438 and 551. Also see Timberg, Sovereign Immunity and Act of State Defences: Transnational Boycotts and Economic Coercion, 55 Tex. L. Rev. 1 (1976).; Comment, Suing a Foreign Government Under the United States Antitrust Laws: The Need for Clarification of the Commercial Activity Exception to the Foreign Sovereign Immunities Act of 1976, 1 Nw. J. Int. L. & Bus. 657 (1979).

[230] See Rahl, International Application of American Antitrust Laws: Issues and Proposals, 2 Nw. J. Int. L. & Bus. 336, at 360 (1980): "Conduct abroad having 'direct effect' in the United States is included within the exception, thus providing recent Congressional approval of the 'effects' test of jurisdiction (without an intent requirement)."

[231] Meal/Trachtman, at 593.

[232] *Id.*, at 593 ff. In support of their view, Meal and Trachtman refer to *Carey v. National Oil Corp.*, 592 F.2d 673 (2d Cir. 1979).

[233] *Id.*

[234] The legislative history alluded to by Meal and Trachtman and by the court in the case referred to (*supra* n. 233) is not conclusively contra. See Jurisdiction of United States Courts in Suits Against Foreign States, H.R. Rep. No. 1487, 94th Congress, 2d Sess., at 13 (1976), *reprinted in* 15 Int. Legal Mats. 1398 (1976).

[235] Followed by the possible issue whether the act of state doctrine is applicable. Still, the best solution would have been for the FSIA to provide that foreign states are not privileged to sovereign immunity when engaged in commercial activities irrespective of where the act takes place or where the effects occur. Under such a provision, the courts would only have to determine whether the act is "public" or commercial (which in itself is an arduous task). The question whether there is a "direct effect" or not would then be relevant only in relation to the question of subject matter jurisdiction.

[236] See Justice White's opinion in the *Dunhill* case, *supra* n. 218, at 695 ff., particularly at 699 and 705.

Cf. Mann, Studies, at 420 ff. Mann goes so far as to regard the act of state doctrine as an aspect of sovereign immunity. See further Folz, at 178 ff. (criticizing Mann) with references.

[237] Backer, at 1257. *Cf.* Stephens, *supra* n. 203, at 739; Joelson/Griffin, at 634 f.

[238] See e.g. Folz, at 178 ff. (with further references).

[239] See the dissenting opinion of Justice Marshall in the *Dunhill* case, *supra* n. 218 (joined by three other members of the Court), at 715 and 725.

[240] *Id.*, at 725 ff. *Cf.* the Restatement (2d) of Foreign Relations Law, Section 41, Comment e. Also see Folz, at 180 ff.

[241] See references made in *supra* n. 226 ff.

[242] *Cf.* Jacobs/King/Rodriguez, *supra* n. 215, at 692 f.

[243] *Cf.* the FSIA provision restated *supra* p. 591 under the third clause.

[244] *Cf. American Banana, Occidental Petroleum* and *Hunt v. Mobil Oil Corp.*, *supra* p. 585 ff.

[245] *Cf.* the following reasoning: When the act is qualified as commercial, the act of state doctrine does not apply where there is "direct effect"; when qualified as public, the doctrine does not apply when the act is done within the United States, *i.e.*, "direct effect" therein.

[246] As to this problem, see *supra* chapter I.

[247] *But* see Joelson/Griffin, at 634 ff. and *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena,* 293 F. Supp. 892, at 911 (S.D.N.Y. 1968).

[248] As to the meaning of "direct effect", see *supra* p. 573 ff.

[249] See *supra* p. 590 f.

[250] While it is possible that a government, through its organs, takes control over a company (or other property) temporarily for the purpose of effectively enforcing its laws, this is but very rarely the case. *But* see *Fruehauf Corp. v. Massardy,* [1968] D.S. Jur. 147 [1965] J.C.P. 11, *reprinted in* 5 Int. Legal Mats. See comment e.g. by Craig, Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections of Fruehauf v. Massardy, 83 Harv. L. Rev. 579 (1970).

[251] *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, at 706 f. (1962); *U.S. v. The Watchmakers of Switzerland Information Center, Inc.,* 1963 Trade Cases π 70,600, at 77,456 f. (S.D.N.Y. 1962); *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.,* 549 F. 2d 597, at 606 f. (9th Cir. 1976); *Mannington Mills, Inc. v. Congoleum Corp.,* 595 F. 2d 1287, at 1293 f. (3d Cir. 1979). See further *supra* p. 586 ff.

[252] 307 F. Supp. 1291, at 1296 ff. (1970).

[253] That the two doctrines are not identical is indicated in both the *Timberlane* case and in *Mannington Mills, supra* n. 251, at 606 and 1293 f. respectively.

[254] *Cf.* the conclusion in the *Swiss Watch* case, *supra* n. 251, at 77,456: "If, of course, the defendants activities had been required by Swiss law, this court could indeed do nothing." And regard this conclusion in relation to the fact that many of the acts complained of did take place within the United States (see *id.,* at 77,455).

[255] See *supra* p. 594 f. *Cf.* D.I. Baker, Antitrust Remedies Against Government-Inspired Boycotts, Shortages, and Squeezes: Wandering on the Road to Mecca, 61 Cornell L. Rev. 911, at 918 f. (1976). *But* see *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.,* 307 F. Supp. 1291 (1970), where the court ruled otherwise. Baker, *supra,* at 919 (n.51), regards this decision as wholly unsupportable.

Related to the act of state doctrine is also the *Noerr-Pennington* doctrine, which implies that the mere inducing by a person of a governmental body to take action in antitrust matters is not actionable under the United States antitrust laws. See the two precedents on which this doctrine rests: *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961) and *United Mine Workers v. Pennington,* 318 U.S. 657 (1965). See further e.g. B. Hawk, United States, Common Market and International Antitrust: A Comparative Guide, at 144 (1979): U.S. Department of Justice, Antitrust Division, Antitrust Guide for International Operations, at 62 f. (1977).

[256] Here disregarding the *possible* (but not *probable) "Bernstein" exception and the international law exception, see supra* n. 207.

[257] *Cf.* Brownlie, at 315 f.

[258] See Section 41, Comment a. and Reporters' Notes 4.

[259] *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, at 421 (1964). *Cf. supra* p. 584. Also

see F. Deák, Organs of States in their External Relations: Immunities and Privileges of State Organs and of the State, in M. Sørensen, Manual of Public International Law, at 381 ff., particularly at 447: "In view of divergent national court decisions, it may be concluded that customary international law does not require a state to recognize the validity of the 'acts of state' of a foreign state."

[260] *Cf.* the Restatement (2d) of Conflict of Laws (1971), Section 53, Comment d.

[261] See Section 39, Comment b. Also see the Reporters' Notes under the same section.

[262] Kelsen, Principles of International Law, at 235 ff. and 239.

[263] Heiz, at 163 ff.

[264] Heiz, at 164. See further at 177, where the following conclusion is made: "[E] in ausländischer Hoheitsakt [kann] im Inland nur in dem Masse Beachtung finden... als er bereits wirksam geworden ist." Hierin liegt deshalb die Grenze der völkerrechtlichen Pflicht des Staates zur Beachtung von ausländischen Hoheitsakten."

[265] See e.g. K. Reichlin, Schweizerischer Staatsschutz gegen ausländisches Wirtschaftsrecht, 65 Schweizerisches Zentralblatt für Staats- und Gemeindeverwaltung 89, at 100 (1964); G. Jaenicke, Berichte 1967, at 106; Schaumann, at 2 ff.; Oppenheim-Lauterpacht, at 262 f. Meessen, furthermore, recognizes the possibility (at 177 f.).

[266] ILA 1972, at XIX—XX. Also see Krumbein, at 142.

[267] Schlochauer, at 56. Ross, at 167 f. Also see K. König, Die Anerkennung ausländischer Verwaltungsakte, at 69 (Köln-Berlin-Bonn-München, 1965); Mann, Studies, at 484, also referring to ILA Brussels Resolution (1962), see ILA 1962, at XIV.

[268] See further e.g. Brownlie, at 314.; O'Connell, at 841 ff.; Restatement (2d) of Foreign Relations Law, Sections 65 ff.; Ross, at 223 f: Berber, at 220 ff. Also see *supra* p. 591 ff.

[269] The discussion as to whether conflicting commands or laws can constitute absolute barriers to the exercise of jurisdiction, will be continued *infra*, when examining the interests of the *individual*. The interests of the affected state and the affected individual are in many respects common here. Rehbinder (at 370), Bär (at 350 f.), Schwartz (at 274), Brewster (at 237 ff.) Wengler (at 945), Fugate (75 ff. and 128 f.), Dahm (Völkerstrafrecht, at 25 f.) and the authors of the Restatement (2d) of Foreign Relations Law (Section 39) do obviously not consider conflicting commands or laws as an absolute barrier. *But* see Hermanns, at 76 and Krumbein, at 140 f.

[270] Brownlie, at 324.

[271] See *supra* p. 585 ff.

[272] Such "blocking statutes" were enacted, *inter alia*, in Belgium, the Netherlands, Denmark, Sweden, Norway, Finland, the Federal Republic of Germany, France and the United Kingdom. Canada enacted the Business Records Protection Act (Ont. Rev. Stat. c. 54 (1970)) already in 1948 as a response to the discovery procedures in *In re Grand Jury Subpoena Duces Tecum Addressed to Canadian International Paper Company,* 72 F. Supp. 1013 (S.D.N.Y. 1947). Recently South Africa and Australia have enacted similar statutes. See further e.g. Rahl, Enforcement and Discovery Conflict, A View from the United States and Lever, Aspects of Jurisdictional Conflict in the World of Discovery, both in International Antitrust, Fifth Annual Fordham Corporate Law Institute, at 347 ff. and 364 ff. respectively (B. Hawk ed., 1979). Also See ILA 1968, at 386 f.; Note, Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation, 88 Yale L.J. 612 (1979); Note, Discovery of Documents

Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-production, 14 Va. J. Int. L. 747 (1974); H.H. Hollman, Problems of Obtaining Evidence in Antitrust Litigation: Comparative Approaches to the Multinational Corporation, 11 Tex. Int. L. J. 461 (1976); T.J. Kahn, The Protection of Trading Interests Act of 1980: Britain's Response to U.S. Extraterritorial Antitrust Enforcement. For detailed references to the "blocking statutes" in Canada, the United Kingdom, Australia, the Netherlands, Switzerland, South Africa, see e.g. Kahn, *supra,* at 479, n. 13. Also see Ellis, The Extra-Territorial Application of Restrictive Trade Legislation: Recent Developments, ILA 1970, at 178 ff.; Canenbley, at 72 ff.; I.T. Onkelinx, Conflict of International Jurisdiction Ordering the Production of Documents in Violation of the Law of the Situs, 64 Nw. U.L. Rev. 487 (1969).

[273] See further ILA 1964, at 577 ff. Also see Fugate, at 114 ff. and 119 ff.

[274] A broad "blocking statute" was enacted in the Netherlands already in 1956 (Economic Competition Act of June 28, 1956, [1956) Staatsblad voor het Koninrijk der Nederlanden [Stb] Art. 401, *as amended* [1958] Stb. No. 413, *reprinted in,* Organization for Economic Cooperation and Development, 2 Guide to Legislation on Restrictive Business Practices, at Netherlands § 1.0.

[275] Submission of Charles F. Meissner, Deputy Assistant Secretary for International Finance and Development, Department of State, on behalf of the British Embassy, Washington, D.C., to the Antitrust Commission (July 28, 1978. Diplomatic Note 196, concerning the extraterritorial application of United States antitrust laws). See National Commission for the Review of Antitrust Laws and Procedures, Report to the President and the Attorney General, at 84, *reprinted in* 897 Antitrust & Trade Regulation Reporter (BNA), Spec. Supp, January 22, 1979).

[276] See *supra* p. 129 ff. Also mark the private suits brought against the British shipping industry (and the shipping industries of other states as well), involving 10—15 billion dollars in (treble) damages. See further M.J. Danaher, Anti-Antitrust Law: The Clawback and Other Features of the United Kingdom Protection of Trading Interests Act, 1980, 12 L. & Pol. Int. Bus. 947, at 948 f. (1980); Kahn, *supra* n. 272, at 491 f. (1980); 922 Antitrust & Trade Regulation Reporter (BNA), at A-30 f. (July 12, 1979).

[277] See Explanatory Memorandum to the Protection of Trading Interests Bill [Bill 66] 48/1, 1979. As "measures" the following are mentioned in a prelude to the Act: requirements, prohibitions and judgments.

[278] 1980, c. II, § 1(2).

[279] 1980, c. II, § 1(3).

[280] 1980, c. II, § 2(1).

[281] *But* see 1980, c. II, § 6(2). Section 6 is not applicable where the foreign judgment concerned activities exclusively carried out in the foreign state (§ 6(4)). Also see § 6(3). Section 6(5) gives the British courts a broad jurisdiction: "A court in the United Kingdom may entertain proceedings on a claim under this section notwithstanding that the person against whom the preceedings are brought is not within the jurisdiction of the court."

[282] Section 7(1) reads: "If it appears to Her Majesty that the law of an overseas country provides or will provide for the enforcement in that country of judgments given under section 6 above, Her Majesty may by Order in Council provide for the enforcement in the United Kingdom of judgments given under any provision of the law of that country corresponding to that section." Section 8 of the Act deals, *inter alia,* with terminology. See further Danaher, *supra* n. 276, Kahn, *supra* n. 272; Canenbley, at 55, 68, 74 ff. and 95 ff.

[283] See e.g. Danaher, *supra* n. 276, at 958 ff. and 969 ff. (it "violates fundamental principles of British and international law" (at 960); it constitutes an "excessive interference with U.S. domestic jurisdiction" (at 963)); Kahn, *supra* n. 272, at 497 ff., 509 ff.; Rahl, International Application of American Antitrust Laws: Issues and Proposals, 2 Nw. J. Int. L. & Bus. 336, at 361 f. (1980).

[284] See further Canenbley, at 100 ff.

[285] See *supra* p. 129 ff.

[286] No. 13, Australian Acts (1979).

[287] Section 3(2)(b)(i)—3(2)(b)(ii). A first order was made, it seems, in June 1979, respecting two judgments entered by a U.S. court in the *Westinghouse* uranium litigation and for the purpose of protecting the "national interest". See further Canenbley, at 78 f.; Note, Recent Developments: Antitrust: Australian Restrictions on Enforcement of Foreign Judgments, 20 Harv. Int. L.J. 663 (1979).

[288] *U.S. v. The Watchmakers of Switzerland Information Center, Inc.*, 1963 Trade Cases π 70,600, at 77,456 (S.D.N.Y. 1962). See further *supra* p. 586.

[289] See *supra* p. 598 ff.

[290] See further *supra* p. 599 f.

[291] See e.g. the reasoning of the International Court of Justice in the *Fisheries Jurisdiction Cases* (United Kingdom v. Iceland and Federal Republic of Germany v. Iceland), I.C.J. Yearbook 1973—74, No. 28, at 109 ff., as regards the vital interests of Iceland. Also see the Restatement (2d) of Foreign Relations Law, Section 40, Illustrations 3—5.

[292] See e.g. the EFTA (European Free Trade Association) Agreement, Art. 20; the Free Trade Agreement between Sweden and the European Economic Community, Art. 26 and the GATT (General Agreement on Tariffs and Trade), Art. XIX.

[293] See *supra* p. 600.

[294] See *supra* p. 496 ff.

[295] See e.g. Berber, at 169 ff.; Ross, at 30 ff.; O'Connell, at 106 ff.; Verdross, Völkerrecht, at 216 ff.; Gihl, Huvuddragen, at 106 ff.; Nørgaard, The Position of the Individual in International Law (1962); Dahm, Die Stellung des Menschen im Völkerrecht unserer Zeit (1961); Korowicz, The Problem of the International Personality of Individuals, 50 Am. J. Int. L. 533 (1956). (For further references see Verdross, Völkerrecht, at 216 and Berber, at 169).

[296] See e.g. Ross, at 33 ff.; Wengler at 153 ff.; Berber, at 170 ff.; Brownlie, at 504 ff.; Eek, Främlingskap, at 39 ff. Verdross, Völkerrecht, at 221, makes a distinction between direct and indirect rights and claims, and only the latter (indirect) can be acquired by individuals. *Cf.* Gihl, Huvuddragen, at 117 ff.

As to the terminology, see Schwarzenberger, A Manual, at 64 f. and Brownlie, at 536 f.

[297] See further e.g. Brownlie, at 504 ff.; O'Connell, at 693 ff.; Ross, at 226 ff.; Eek, Främlingskap, at 67 ff.; Verdross, Völkerrecht, at 362 ff.; Dahm, at 504 ff.; Restatement (2d) of Foreign Relations Law, Sections 164 ff.; The Draft Convention on the International Responsibility of States for Injuries to Aliens, Harvard Law School 1961, see 55 Am. J. Int. L. 545 (1961); Roth, The Minimum Standard of International Law applied to Aliens (Leyden, 1949); Brierly, The Law of Nations, at 276 ff.; O. Bring, at 62 ff. (with further references).

[298] See e.g. Ross, at 229; Brownlie, at 511; Restatement (2d) of Foreign Relations Law, Section 165 (with Comments).

[299] See e.g. A.W. Freeman, The International Responsibility of States for Denial of Justice, at 522 (London, 1938); Roth, *supra* n. 297, at 87.

[300] As to the latter denomination, see the Restatement (2d) of Foreign Relations Law, Sections 178 ff.

As to the terminology in general, see e.g. Freeman, *supra* n. 299, at 106; Ross, at 232 ff.; Brownlie, at 514 f.; Brierly, The Law of Nations, at 286 f.; Eek, Främlingskap, at 73 ff.; Restatement (2d) of Foreign Relations Law, Section 165, Comment c.

[301] *Cf.* Art. 9 in Harvard Draft Convention, *supra* n. 297; Brownlie, at 514 f.

[302] Restatement (2d) of Foreign Relations Law, Section 182, Comment a.

[303] The *Neer Claim:* General Claims Commission, see Am. J. Int. L. 1927, at 555 ff. This case is held leading by, *inter alia,* Brownlie, at 510 f.; Ross, at 228 f.; Brierly, The Law of Nations, at 279 f.; Eek, Främlingskap, at 82 f.

[304] Ross, at 236 f. *But* see Dahm, Völkerstrafrecht, at 25 f.

[305] *Cf.* Oppenheim-Lauterpacht (at 262 f.): "[A] State is prevented from requiring such acts from its citizens abroad as are forbidden to them by the Municipal Law of the land in which they reside, and from ordering them not to commit such acts as they are bound to commit according to the Municipal Law of the land in which they reside." (Sec. 128, footnote omitted). Also see Berber, at 188 (regarding this to be covered by the principle of non-intervention, see *supra* p. 522 f.).

[306] See Section 40 of the Restatement, Comment c.

[307] *Cf.* the Restatement of Foreign Relations Law of the United States (Revised) Tentative Draft No. 2 (1981), Section 403(3), see in 75 Am. J. Int. L. 987 (1981).

[308] See Section 40, Comment c.

[309] Section 6, Comment a.

[310] *Cf.* the Restatement (2d) of Conflict of Laws (1971), Section 6(2)(f) and the Tentative Draft No. 2, *supra* n. 307, Section 403(2)(d) ("justified expectations").

[311] As to the distinction enforcement-legislative jurisdiction and its relevance in international law, see *supra* chapter XIV.

[312] Restatement (2d) of Foreign Relations Law, Section 18, particularly Comment f.

[313] See e.g. Glatzel, at 143 ff.; Drost, Völkerrechtliche Grenzen, at 138; Wendt, at 98 ff. (with further references).

[314] Glatzel, at 147 ff.; Wendt, at 100 ff. In fact the parallels in reasoning, references and conclusions as regards these two writers are strikingly close. (Strangely enough Wendt does not refer back to Glatzel).

[315] See e.g. Wendt, at 100. Also see Oehler, at 135 (with references).

[316] Rosswog, at 150 ff.

[317] Dahm, Völkerrecht, at 63 f.; H-H. Jescheck, Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht, at 231 ff. (Bonn, 1952).

[318] Wendt (at 100 ff.) limits his analysis to the principle of passive personality, but seems to claim that the principle of "norm-identity" is generally applicable.

[319] Harvard Research and Draft Convention, at 557. *Cf. id.*, Art. 13, at 616 ff. Glatzel (at 157 ff.) takes considerable pains in trying to neutralize this fact, but he is not convincing.

[320] *Cf. supra* n. 269 and the references made there. Also see Haymann, at 323 with accompanying n. 5.

[321] Rosswog, at 158 ff. *Cf. supra* p. 496 ff.

[322] Art. 38(1)(c) of the Statute of the International Court of Justice.

[323] The latter situation Rosswog (at 177) maintains is not a genuine norm-conflict. *Cf.* Harvard Research and Draft Convention, Art. 13 (at 602). Jescheck is of the view that even in this case the laws of the state exercising jurisdiction must yield, H-H. Jescheck, Zur Reform der Vorschriften des STGB über das internationale Strafrecht, Internationales Recht und Diplomatie (1956), p. 75, at 84.

[324] See *supra*. Better then to adopt the more limited approach suggested by Rappaport (The Problem of Inter-State Criminal Law, 18 Transactions of the Grotius Society (1933), at 58):

"The fact that in certain determined cases offences committed outside of the territory of the State are taken into consideration involves evidently as a consequence, when the internal penal code is applied, the necessity of taking into account principles contained in the foreign law which govern the place where the offence has been perpetrated. It is necessary to examine if that foreign law recognizes in general the act in question as an offence, and also to take into account the provisions in that foreign law which may be more favourable to the given offender. The Judge when he applies the local law, must have regard for these differences in delivering his judgment."

[325] *Cf.* Oehler, at 135.

[326] ILA 1972, at XX. Also see ILA 1970, at 235 ff.

[327] See *supra* p. 81 ff.

[328] See *supra* n. 269 and 320.

[329] See *supra* p. 601 ff.

[330] See generally I.T. Onkelinx, Conflict of International Jurisdiction: Ordering the Production of Documents in Violation of the Law of the Situs, 64 Nw. U. L. Rev. 487 (1969); Note, Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation, 88 Yale L.J. 612 (1979); H.H. Hollman, Problems of Obtaining Evidence in Antitrust Litigation: Comparative Approaches to the Multinational Corporation, 11 Tex. Int. L.J. 461 (1976); Fugate, at 114 ff.; Brewster, at 474 ff.; Comment, Ordering Production of Documents from Abroad in Violation of Foreign Law, 31 U. Ch. L. Rev. 791 (1963—64); Note, Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Devalopments in the Law Concerning the Foreign Illegality Excuse for Non-production, 14 Va. J. Int. L. 747 (1974).

[331] 13 F.R.D. 280 (D.D.C. 1952). Also see the earlier case *In re Grand Jury Subpoena Duces Tecum Addressed to Canadian International Paper Company,* 72 F. Supp. 1013 (S.D.N.Y. 1947), where, however, the subpoenas were withdrawn during the proceedings. (The case involved a court order requiring Canadian companies to produce documents located in Canada.)

[332] 13 F.R.D. 280, at 286 (D.D.C. 1952).

[333] In a following civil case (*United States v. Standard Oil Co.,* 23 F.R.D. 1 (S.D.N.Y. 1958), the defendants were again required to make a good faith attempt to secure a waiver from the governments in the affected states, (*Id.,* at 4 f.).

[334] 357 U.S. 197 (1958).

[335] 40 Stat. 419 (1917), § 9(a).

[336] 357 U.S. 197, at 212 (1958).

[337] *Id.*, at 207 f. and 213.

[338] 282 F. 2d 149 (2d Cir. 1960), *modifying, In re Equitable Plan,* 185 F. Supp. 57 (S.D.N.Y. 1960). Also see *First National City Bank v. I.R.S.,* 271 F. 2d 616 (2d Cir. 1959) and *Application of Chase Manhattan Bank,* 297 F. 2d 611 (2d Cir. 1962).

[339] 282 F. 2d 149, at 152 (2d Cir. 1960).

[340] *Id.*

[341] 186 F. Supp. 298 (D.D.C. 1960).

[342] See *supra* chapter I, section 7. Also see ILA 1964, at 577 ff. *Cf. supra* p. 601 ff. regarding "blocking statutes".

[343] 186 F. Supp. 298, at 348 (D.D.C. 1960).

[344] 295 F. 2d 149 (D.C. Cir. 1961).

[345] 295 F. 2d 149, at 156 (D.C. Cir. 1961). As to the aftermath of this case, see further Onkelinx, *supra* n. 330, at 520 ff.

Also see *Federal Maritime Commission v. De Smedt,* 268 F. Supp. 972 (S.D.N.Y. 1967).

[346] 396 F. 2d 897 (2d Cir. 1968).

[347] *Id.*, at 901 f.

[348] *Id.*, at 902 ff.

[349] *Id.*, at 905.

[350] *Id.*

[351] 563 F. 2d 992 (10th Cir. 1977). *But* see *In re Uranium Antitrust Litigation,* 480 F. Supp. 1138 (N.D. Ill. 1979), where a district court ruled that conflicting foreign legislation shall not affect the determination of whether to order production or not, but rather the determination of what sanctions that should be imposed for non-compliance (*id.*, at 1147 f.).

[352] 563 F. 2d 992, at 998 (10th Cir. 1977).

[353] *Id.*, at 999.

[354] 644 F. 2d 1324 (9th Cir. 1981).

[355] *Id.*, at 1331.

[356] *Id.*, at 1331 f.

[357] *Id.*, at 1332.

[358] *Id.*, at 1333.

[358a] See the work carried out by the Committee of Experts on Restrictive Business Practices within the framework of OECD, *infra* chapter XVII, n. 10.

[359] Harvard Research and Draft Convention, at 602 ff.

[360] *Id.*, at 603.

[361] *Id.*, at 604 ff.

[362] See *id.*, at 615.

[363] *Id.* (emphasis added).

[364] See the European Convention on the International Validity of Criminal Judgments of May, 1970, Article 53 (European Treaty Series, No. 70).

[365] See e.g. Dahm, at 261; Völkerstrafrecht, at 24; I. Hunter, Specific Application to Antitrust Matters of General Principles of International Law Governing the Assumption and Exercise of Jurisdiction, ILA 1970, p. 221, at 240; R. Winkler, Anrechnung amerikanischer Kartellstrafen auf EWG-Kartellbussen?, Aussenwirtschaftsdienst des Betriebs-Beraters (1972), p. 565, at 567; Mann, Studies, at 77; Haymann, at 318 ff., particularly at 319; Meessen, at 246 ff., particularly at 247; Barack, at 413; Opinion of Mr. Advocate-General Mayras in *Boehringer Mannheim GmbH v. Commission of the European Communities,* [1972] E.C.R. 1281, p. 1291, at 1296 f. As to international taxation, see e.g. P. Müller, at 128 ff.; Vogel, at 351.; Verdross, Völkerrecht, at 320.

But see Seidl-Hohenveldern, Limits Imposed by International Law on the Application of Cartel Law, 5 Int. Law. 289 (1971); Völkerrechtliche Grenzen bei der Anwendung des Kartellrechts, Aussenwirtschaftsdienst des Betriebs-Beraters (1971), p. 53, at 56.

[366] Case 45/69, [1970] 769.

[367] *Id.*, at 793.

[368] *Id.*, at 807.

[369] *Boehringer Mannheim GmbH v. Commission of the European Communities,* [1972] E.C.R. 1281, at 1289.

[370] *Id.*, at 1291 ff.

[371] See *supra* p. 527 f.

[372] Bär, at 334.

[373] *Id.*

[374] Rosswog, at 164 f.

[375] Dahm, at 197.

[376] See *supra* p. 522 ff. and 529 ff. Also see p. 401 ff.

[377] Meessen, at 202 f., 218 f. and 227.

[378] B.A. Rosenfield, Extraterritorial Application of United States Laws: A Conflict of Laws Approach, 28 Stan. L. Rev. 1005, at 1025 (1976).

[379] W. Bradford Reynolds, Extraterritorial Application of Federal Antitrust Laws: Delimiting the Reach of Substantive Law Under the Sherman Act, 20 Vand. L. Rev. 1030, at 1056 (1966—67).

[380] *Id.*

[381] *Id.*

[382] *Id.*

[383] See *supra* p. 522 ff.

[384] Bär, at 334.

[385] *Cf.* Meessen, at 206.

[386] See *supra* p. 522 ff.

[387] Meessen, at 202 and 206.

[388] See *supra* chapter XII.

[389] See *supra* p. 489 ff.

[390] See *supra* p. chapter X.

[391] 213 U.S. 347 (1909). See further *supra* p. 67.

[392] 274 U.S. 268 (1927). As to the facts, see further *supra* p. 77.

[393] 148 F. 2d 416 (2d Cir. 1945). As to the facts, see further *supra* p. 81.

[394] *Id.*, at 443.

[395] See *supra* p. 568 ff.

[396] *U.S. v. General Electric Co.*, 80 F. Supp. 989 (S.D.N.Y. 1948); *U.S. v. General Electric Co.*, 82 F. Supp. 753 (D.N.J. 1949). As to facts, see further *supra* p. 91.

[397] An interest corresponding to that partly furthered by the Webb-Pomerene Act, enacted in the United States, see further *supra* p. 61 ff.

[398] *U.S. v. Imperial Chemical Industries Ltd.*, 100 F. Supp. 504 and 105 F. Supp. 215 (S.D.N.Y. 1951). For facts, see further *supra* p. 96.

[399] *U.S. The Watchmakers of Switzerland Information Center, Inc.*, 1963 Trade Cases π 70,600 (S.D.N.Y. 1962). For facts, see further *supra* p. 105.

[400] See Message of the Federal Council of the Swiss Confederation to the Federal Assembly of Dec. 16, 1960, 112—11 Feuille Federale [F.F.] 1489, Tables I and II (Dec. 29, 1960).

President Truman, rejecting a recommendation of the U.S. Tariff Commission on a tariff increase of about 50% on watch products from Switzerland, said in 1952:

"The impact which the tariff increase now proposed would have on Swiss-American Relations would be extremely serious. United States imports from Switzerland in 1951 totalled only $ 131 million of which over 50 percent were watches. Thus, tariff action on watches would strike at Switzerland's most important export to us, affecting adversely an industry tailored in large part to the United States market and employing one out of every ten industrial workers in the country. In addition, the industry is concentrated in a part of Switzerland where there is relatively little other industry and the possibilities for transfer of employment small." U.S. Tariff Commission Report, "Watches, Watch Movements, Watch Parts, and Watchcases", T.C. Rep. No. 176, 2d Series, June 14, 1952, at 79. (Here quoted after C.W. Haight in Rahl, at 355).

(Subsequently, (in 1954) the recommendation was accepted by the new — Eisenhower — administration. Simultaneously the suit against the Swiss Watch industry was filed, thereby initiating the *Swiss Watch* case. See further Haight in Rahl, at 353 ff.

[401] Haight in Rahl, at 359.

[402] 1965 Trade Cases π 71, 352 (S.D.N.Y. 1965).

[403] See *supra* p. 108 ff.

[404] *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F. 2d 597 (9th Cir. 1976).

[405] *Id.*, at 614.

[406] *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F. 2d 1287 (3d Cir. 1979).

[407] *Id.*, at 1297 f.

[408] *Id.*, at 1296.

[409] *Id.*, at 1296 (footnote omitted).

[410] See *supra* p. 560 ff.

Chapter XVII
Conclusion

From unilateral action to bilateral or multilateral agreements

In the introduction to part two of the present study, the following questions were stated: *Can* principles of international law exist in the sense that they are binding on states in their exercise of jurisdiction; if so, do they exist; and, if so, what exactly do these principles imply? Before approaching these questions we examined some Conflict of Laws aspects, particularly whether international antitrust law — a parallel field of law to international criminal law, international administrative law, etc. — terminologically and logically forms a part of the Conflict of Laws. Our conclusion was that international antitrust law has a proper place in the field of Conflict of Laws, that the jurisdictional rules and principles which have been moulded in national antitrust law may properly be called rules and principles of Conflict of Laws. Unlike Conflict of Law rules in general, however, the Conflict of Law rules governing the application of antitrust law (as well as criminal law and other "public" laws) are unilateral in character, *i.e.*, there is no real choice between two or several applicable laws — the choice is strictly whether or not to apply *lex fori*. International antitrust law is consequently composed of a set of unilateral rules and principles of Conflict of Laws.

In attempting to answer the question whether principles that are binding on states in their exercise of jurisdiction *can* exist, in other words, whether international law governs international antitrust law *in principle,* we briefly studied the monist-dualist controversy and we reached the conclusion that yes, international law is supreme; the "Kompetenz-Kompetenz" lies in international law; international law — at least potentially — governs international antitrust law. No writer in international law today, whether a monist, a dualist or an advocate of another theory on the relation between international law and national law, denies the supremacy of international law. We next examined whether there is any subject matter that belongs exclusively to the "domestic domain", *i.e.*, whether there is any subject mat-

ter that is governed exclusively by national law, and, consequently, a subject matter not governed — in principle — by international law. We found that there exists no subject matter, no aspect of international or national life, on which national law, as a matter of principle, has monopoly; in other words, all subject matters, including, of course, international antitrust law, can be regulated by international law.

The next question, *do* principles of international law, governing the exercise of jurisdiction, exist, we approached by first discussing the fundamental problems of lacunae and *non liquet* in international law. We concluded that the existence of lacunae in international law is logically possible. However, a declaration by international tribunals of a *non liquet* can and should be avoided. This, we found, is possible by the application of the residual negative principle, which, as far as the solution of the problem of *non liquet* is concerned, is the most probable instrument *de lege lata*, and the most desirable *de lege ferenda*, in this respect. The residual negative principle includes a presumption for the freedom of states, *i.e.*, what is not prohibited in international law is permitted. We asked ourselves why the reverse principle,the principle that everything not explicitly permitted in international law is prohibited,is *a priori* rejected. The conclusion was that this principle would paralyze the development of international law and cannot therefore be maintained. In the absence of principles or rules of international law in a certain area, the presumption must be for the freedom of states.

In search of principles or rules of international law governing the intraterritorial exercise of jurisdiction, we have examined whether any such principle or rule can be derived — whether any "rights" or "duties" can be derived — from the concepts of "sovereignty", "independence", "equality", "sovereign equality", "fundamental rights". Our conclusion was that these concepts — as classic as they are controversial — convey nothing with respect to substantive jurisdictional rules and principles of international law. They are nothing but hollow formal concepts. "Sovereignty" denotes the quality of a state under international law. "Independence" is a correlative concept. "Equality" implies equality before the law. "Fundamental" are such rights that publicists from time to time, and with varying results, choose to qualify as fundamental, as they are convinced that the rights so qualified are essential for the proper functioning of internaional law.

However, there are principles of international law aimed at protecting sovereignty and independence. One of the principles protecting sovereignty is the prohibition against extraterritorial enforcement: a state may

not exercise jurisdiction within the territory of another state without the consent of that state. This is a principle on which international lawyers and publicists agree in general. As to the principles or rules of international law governing the intraterritorial exercise of jurisdiction with extraterritorial effects, on the other hand, the opinions diverge. Although nobody today suggests that a state is prohibited under international law from exercising jurisdiction intraterritorially, even though the exercise has extraterritorial effects, publicists generally disagree as to what jurisdictional restrictions the international law includes. Still, the common point of departure is that international law leaves the states a wide measure of discretion; but then again, the freedom of the states is not at all absolute.

Our next concern was to establish the principles or rules of international law governing international antitrust law. A review of the doctrine of international antitrust law revealed a multitude of methodologies and opinions as regards the establishing and content of such principles. Some publicists suggested that the jurisdictional principles of international law governing international criminal law were guiding, others advocated the abuse of rights theory, and others, again, considered the genuine-link doctrine to be controlling. We proceeded from the jurisdictional principles governing international law. We examined the rationale for jurisdictional restrictions in this field. We found that the rationale for jurisdictional restrictions in international criminal law is the need to protect the sovereignty of the affected state(s) and to protect the affected individual. We asked ourselves whether these "circumstances", constituting the rationale for jurisdictional restrictions in international criminal law, were relevant in international antitrust law too. Having examined, *inter alia,* the character of antitrust law — whether it has a civil, an administrative (regulatory), or criminal character — we reached the conclusion that these circumstances were equally relevant in international antitrust law. The reasons for limiting state jurisdiction in international criminal law and in international antitrust law are identical; from the viewpoint of international law, the character of the antitrust law is such that jurisdictional restrictions are motivated on the same grounds as those regarding international criminal law.

The next question was, to what extent are the jurisdictional principles governing international criminal law binding on states? Having studied the elements and growth of international customary law, we reached the conclusion that the principles are not binding as *methods* of delimiting state jurisdiction. The only binding element, we found, is the normative content of these jurisdictional principles. The normative content of the principles is that a state exercising jurisdiction intraterritorially must take the interests

of the affected state and the interests of the affected individual into consideration. The intraterritorial exercise of jurisdiction with extraterritorial effects must rest on an interests-analysis, a weighing of the interests involved in the specific case. The weighing-of-interests standard is a principle of international law. The relevant interests to be weighed, we found, are, *inter alia,* the interest of the state exercising jurisdiction in enforcing its laws and policies and in protecting its market from the effects of anticompetitive practices (the more direct and the more substantial the effects, the stronger the interests); the interest of the affected state in enforcing its laws and policies without foreign disturbance and in independently regulating its own market; and the interest of the affected individual in foreseeability and in protection from being caught between conflicting commands. The interests of the state exercising jurisdiction are always relative to the interests of the affected state and of the affected individual in the specific case. The weighing of interests standard is an *ad hoc* instrument.

The conclusions reached rest upon a *lex lata* analysis of international law. The weighing-of-interests standard restricts the intraterritorial exercise of jurisdiction having extraterritorial effects; it constitutes the ultimate barrier as regards the intraterritorial exercise of jurisdiction. Within the jurisdictional limitations of international law, every state is free to adopt the jurisdictional rules it finds proper and that it deems optimal. A state may find it proper to restrict its exercise of jurisdiction much more than is necessary under international law by reason of mere curtesy or comity, or by reason of the fact that the chances of making its judgments and orders effective are minimal. A state may also find it unsatisfactory in having its courts to administer the weighing of state interests and to determine fine political issues. It may find it more appropriate that the political questions are determined by the state organs conducting foreign relations: the performance of an interests-analysis is a painstaking and delicate task: it requires an extensive analysis of the facts in the specific case coupled with a comprehensive knowledge of the legal and the political context. *Rahl,* for instance, questions whether the courts are appropriate fora for the administering of an interests-analysis. How can the court, he asks, "adequately inform itself of the nature of, and weight to be given to, foreign nation interests — a task which our best-informed foreign relations agencies have difficulty enough doing through more flexible non-judicial action?"[1]

The present study has merely demonstrated that a state *may* exercise jurisdiction intraterritorially through any of its organs, even though the exercise of jurisdiction has extraterritorial effects. It has furthermore attempted to define the limits of the intraterritorial exercise of jurisdiction.

But unilateral action and restraint is, of course, not the ultimate solution to jurisdictional conflicts. From the point of view of *de lege ferenda,* there are no doubt better ways in which jurisdictional conflicts may be solved, or, for that matter, prevented. A harmonization of the various antitrust laws of the world, would, for instance, significantly reduce the risk of jurisdictional conflicts. Bilateral, or preferably *multi*lateral, agreements would certainly have like effects. However, although one can discern a slow process towards harmonization — the antitrust law of the Common Market is a significant step in that direction — there is still a long way to travel. And although several agreements have been concluded on the international level, the international cooperation as regards international antitrust regulation is still very much in an incipient stage. The following is a short account of the development in this field.

A first attempt to internationally regulate restrictive trade practices was made in 1927 under the auspices of the League of Nations. The conclusion subsequently reached was, however, that the antitrust laws and policies of the Member States differed too widely to allow international rules.[2]

International rules concerning restrictive business practices also formed a part of the 1948 Havana Charter for the creation of the International Trade Organization (ITO), partly a realization of the intentions of the General Agreement on Tariffs and Trade (GATT). The Charter provided for consultation and investigatory procedures to be initiated upon a complaint to the Organization of practices specifically listed in Article 46 of the Charter. The Charter, however, failed to receive the necessary ratifications and today, consequently, it constitutes a mere piece of political history. It seems that the question of international regulation of restrictive practices was raised prematurely. *Garrison*, commenting upon this failure to establish the ITO, including the international regulation of restrictive business practices, concludes: "The apathy displayed by nearly every prospective signatory suggests that almost no country at the time was persuaded that antitrust regulation should be a matter of international concern."[3]

The matter of international regulation was raised again in 1951 by the United Nations Economic and Social Council (ECOSOC). An Ad Hoc Committee was established for the purpose of preparing an agreement on international regulation of restrictive business practices. In 1953 the Committee submitted a report holding a draft agreement based to a great extent on the provisions in the Havana Charter relating to the same subject matter. However, the draft was subsequently rejected.[4] The time was not yet right for international cooperation in this field. Simultaneously (1951), a draft European Convention for the Control of International Cartels was

prepared by the Secretariat of the Council of Europe. The draft proposed, *inter alia,* the introduction of an investigation and a consultation procedure and that all restrictive practices between enterprises in two or more Contracting Parties be registered. This draft Convention was also rejected. A report on the extraterritorial application of antitrust legislation was presented by the Legal Committee to Consultative Assembly of the Council of Europe in 1966 concluding in essence that "each State has jurisdiction to pass judgment in accordance with its laws against an agreement made outside its territory, even between parties who are not nationals of that State" but that the state "cannot give effect to such a judgment unless in addition it enjoys extra-territorial powers of enforcement".[5]

New initiatives for the purpose of international regulation of restrictive business practices were taken by GATT in 1954. Pursuant to some preliminary investigations of the matter, a resolution was adopted which acknowledged the hazards of international cartels and emphasized the importance of international cooperation and control. In a Decision of the Contracting Parties reached in 1960, this concern was repeated in the Preamble, followed, however, by the declaration that "in present circumstances it would not be practicable for the Contracting Parties to undertake any form of control of such practices or to provide for investigation".[6] In essence the Decision simply recommends a Contracting Party to enter into consultations with another Contracting Party at the latters request "with a view to reaching mutually satisfactory conclusions" as regards business practices that cause harmful effects.[7a] As far as can be ascertained, consultations in this respect have so far never been entered into in accordance with the Decision.

Meanwhile, the Treaty of Rome was signed (1957) and the Common Market — primarily the European Economic Community — was established, based on common antitrust law (Articles 85 and 86 of the Treaty in particular). In 1959, West-European states outside the Common Market organized the European Free Trade Association (EFTA). Article 15 of the EFTA Convention deems restrictive agreements and abuses of a dominant position "incompatible" with the Convention "insofar as they frustrate the benefits expected from the removal or absence of duties and quantitative restrictions on trade between the Member States". Similar provisions were later inserted in the various free trade agreements concluded between the European Community, on the one hand, and several EFTA-states, on the other. (See *e.g.*, Article 23 of the free trade agreement between EEC and Sweden, in force since 1973).

Recently, new efforts have been made under the auspices of the United

Nations to formulate international rules and principles for the control of restrictive business practices. Pursuant to a decision by the United Nations General Assembly in 1978, a diplomatic conference was held in 1979 within the framework of the United Nations Conference on Trade and Development (UNCTAD). The conference was preceded by the preparatory work of three different *ad hoc* committees of experts, of which the third committee was given instructions to, *inter alia,* identify harmful restrictive business practices, to formulate rules and principles for the control of such practices and develop systems for the collection and exchange of information. The work was also to be specifically profiled to cope with the problems of the developing countries. The work of the third "Ad Hoc Group of Experts on Restrictive Business Practices" was completed in 1979 by the submission of a final document entitled "A Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices Having Adverse Effects of International Trade, Particularly That of Developing Countries, and on the Economic Development of These-Countries"; a document containing almost fifty elaborate provisions.[7b]

The principles and rules proposed in this document were, in a somewhat modified form, approved of in a resolution adopted by the United Nations Conference on Restrictive Business Practices on April 22, 1980. In the same year, on December 5, the same principles and rules were unanimously adopted by the United Nations General Assembly in Resolution 35/63. The U.N. Restrictive Business Practices Code thus adopted, entitled "The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices", has the form of a *recommendation* of certain principles and rules addressed both to states and private as well as public enterprises. The Code has seven sections (Section A-G) and numerous sub-sections. Section A sets forth the objectives of the Code (*inter alia,* to secure the benefits of a liberated trade, to promote efficiency, to protect and encourage competition and to protect consumers). Section B defines such basic terms as "restrictive business practices", "enterprises" and "dominant position", and specifies the scope of application of the Code. Section C lays down general principles for the control of restrictive business practices. The principles and rules addressed to enterprises, including transnational corporations, are specified in Section D, where particular types of horizontal and vertical anticompetitive activities are listed which the enterprises *should* refrain from performing. Section E contains the principles and rules addressed to states concerning, *inter alia,* the adoption, improvement and effective enforcement of legislation against restrictive business practices. Section F provides for international measures regarding col-

laboration, communication (to UNCTAD), publication of reports on developments (by UNCTAD), information and consultation, the latter at the request of one state but voluntary for the state requested. Section G, finally, provides for the establishment of an Intergovernmental Group of Experts on Restrictive Business Practices, operating within the framework of a Committee of UNCTAD and the function of which is, *inter alia,* to provide a forum and modalities for multilateral consultations and to collect, study and forward information on restrictive business practices.

For a review of the Code, the General Assembly has decided that a United Nations conference shall be held in 1985 under the auspices of UNCTAD.

International cooperation in the antitrust field is also provided within the framework of the Organization for Economic Cooperation and Development (OECD). In 1976, the Council of the OECD adopted guidelines on the "Restrictive Practices of Multinational Enterprises" — a "code of conduct" providing for consultation procedures, exchange of information and cooperation with regard to the restrictive practices of multinational enterprises.[8]

In 1953 the Group of Experts, and in 1961 — its successor — the Committee of Experts on Restrictive Business Practices was established, the function of which is, *inter alia,* to review the municipal and international developments in this field, to examine municipal legislation and problems related to the application of such, to examine existing practices, and to promote and develop a common terminology and definitions concerning restrictive business trade practices. The results of the Committee's work are continuously published (see *e.g.*, the Guide to Legislation on Restrictive Business Practices).[9]

Moreover, in 1967 the Council of the OECD adopted a recommendation developed by the Committee of Experts on "Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade", succeeded by a like recommendation in 1973, and recently of September 25, 1979. The object of the 1979 Recommendation is to encourage the members of the OECD to notify each other when they undertake investigations or proceedings likely to affect the interests of other member states, to exchange information concerning restrictive business practices and to coordinate the implementation and enforcement of their laws. The Recommendation also provides for consultation and conciliation procedures. Matters not solved by consultation may be submitted to the Committee of Experts for conciliation.[10]

Partly on the basis of the OECD 1979 Recommendation (and its prede-

cessors) on cooperation and notification, several bilateral agreements regarding consultation-, notification- and information procedures have been concluded. Thus, for instance, an informal agreement, or rather an understanding, was reached between the United States and Canada in 1959 concerning an "Antitrust Notification and Consultation Procedure", which has been described as follows:

"Each country in enforcing its own antitrust or anticombines laws consults the other when it appears that the interests of the other country will be affected by such enforcement. The object of such consultations is to explore ways and means of avoiding situations which could give rise to objection or misunderstanding in the other country. While such consultations are designed to eliminate friction and to find a common approach to antitrust problems affecting both countries, it is understood that each country reserves the right and responsibility to take such action as it considers appropriate and necessary to enforce its own laws. The consultations do not give one country a veto over the actions of the [other] country ... The normal course ... is that each country notifies the other prior to the institution of an antitrust suit which involves the interests or the nationals of the other country and permits time for consultation concerning the contemplated suit. While not required by the understanding, notification is given during the investigative phase whenever possible ...".[11]

Urged by the 1967 OECD Recommendation, the governments of the United States and Canada decided in 1969 to extend the understanding to cover matters of cooperation and coordination.[12]

In 1976 an agreement on mutual cooperation was reached between the United States and the Federal Republic of Germany, and on June 29, 1982, a similar agreement was concluded between the United States and Australia.[13]

Consultation clauses regarding restrictive business practices can also be found in bilateral treaties concluded between the United States, on the one side, and numerous other states, on the other, treaties on Friendship, Commerce and Navigation (FCN). The first consultation clause in the FCN Treaty between the United States and Italy, concluded in 1948, became somewhat of a model for the treaties concluded later in the 1950:s. The clause reads:

"The two High Contracting Parties agree that business practices which restrain competition, limit access to markets or foster monopolistic control, and which are engaged in or made effective by one or more private or public commercial enterprises or by combination, agreement or other arrangement among public or private commercial enterprises may have harmful effects upon the commerce between their respective territories. Accordingly, each High Contracting Party agree upon the request of the other High Contracting Party to consult with respect to any such practices and to take

such measures as it deems appropriate with a view to eliminating such harmful effects."[14]

In conclusion: Although the process towards international cooperation in the antitrust field is slow, significant progress has been made, particularly in recent years. The adoption of an international code on restrictive business practices, the harmonization of the municipal antitrust systems, the recommendations of cooperation, coordination and consultation, and the bilateral consultation clauses, they all carry the potential of relieving the tensions caused by the jurisdictional conflicts in international antitrust law. The practical results of an international code, however, are still meagre. The harmonization process must further not conceal the fact that municipal antitrust laws and policies have essentially a self-centered character. And while a notification and consultation procedure seems the better way of solving jurisdictional problems surrounding the intraterritorial exercise of jurisdiction in antitrust matters — the better way of balancing the interests of the states and individuals involved in a particular case; the better way of reaching acceptable solutions for all parties — its practical results have been sparse. *B.R. Campbell,* who has studied the functioning of the Canada-United States Antitrust Notification and Consultation Procedure, comes to the following conclusion with regard to the efficiency of the Procedure:

"Those seeking a formula for bilateral dispute settlement in the Canada-United States context would be well advised to consider the anguished evolution of the Antitrust Notification and Consultation Procedure. The road to dispute settlement in the antitrust field has proven to be long and rocky. But the continued presence of aggravating disputes ... the continued irritation over the issues of sovereignty and extraterritoriality, the residual bitterness and cynicism, are less a reflection of a failure of institutions, or technical arrangements or good will as they are a reflection of a failure in attitudes. Smooth working technical arrangements and the best of intentions will be insufficient to guarantee the success of any bilateral framework as long as one or both sides exhibit a failure to appreciate differences 'in national policies, priorities and unspoken assumptions'."[15]

Thus, while consultations procedures do have, and should have, a role to play in the international antitrust field, unilateral action and unilateral measures are still routine, which the present study ought to have demonstrated. However, this fact does not change the conclusion that an interests-analysis is better conducted in consultation procedures.

Notes, chapter XVII

[1] Rahl, International Application of American Antitrust Laws: Issues and Proposals, 2 Nw. J. Int. L. & Bus. 336, at 363 (1980).

[2] See E. Günther, The Problems Involved in Regulating International Restraints of Competition by Means of Public International Law, in Cartel and Monopoly in Modern Law, Vol. 2, at 581 f. Also see Rahl, at 417 f.

[3] J.D. Garrison, in Rahl, at 425.

[4] See Günther, *supra* n. 2, at 586 ff.; Rahl, at 425 ff.; Joelson, The Proposed International Codes of Conduct as Related to Restrictive Business Practices, 8 Law & Pol. Int. Bus. 837, at 843 ff. (1976).

[5] Report on the Extra-Territorial Application of Anti-Trust Legislation of Jan. 25, 1966 (Rapporteur: Mr. de Grailly) to the Consultative Assembly of the Council of Europe (Doc. 2023), p. 1, at 14.

[6] Decision of Nov. 18, 1960 of the Contracting Parties, Preamble, (9th Supp. 1961) Basic Instruments and Selected Documents (B.I.S.D.) 28. See further Rahl, at 432 ff.; Furnish, A Transnational Approach to Restrictive Business Practices, 4 Int. Law. 317, at 328 (1970); Kintner/Joelson/Vaghi, Groping for a Truly International Antitrust Law, 14 Va. J. Int. L. 75, at 89 f. (1973).

[7a] See UNCTAD Annual Report on Legislative and Other Developments in Developed and Developing Countries in the Control of Restrictive Business Practices, U.N. Doc. TD/B/C.2/AC.6/15 (1978); First Draft of a Model Law or Laws on Restrictive Business Practices to Assist Developing Countries in Devising Appropriate Legislation, U.N. Doc. TD/B/C.2/AC.6/16 (1978); Report of the Third Ad Hoc Group of Experts on Restrictive Business Practices on Its Sixth Session, U.N. Doc. TD/250, TD/B/C.2/201, TD/B/C.2/AC.6/20 (1979). For reports of the previous ad hoc committees, see U.N. Doc. TD/B/C.2/119/Rev. 1 (1974); U.N. Doc. TD/B/600, TD/B/C.2/166, TD/B/C.2/AC.5/6 (1976); U.N. Doc. TD/B/C.2/AC.6/18 (1978).

[7b] See further e.g. J. Davidow, The UNCTAD Restrictive Business Practices Code, 13 Int. Law. 587 (1979); D.G. Gill, The UNCTAD Restrictive Business Practices Code: A Code for Competition, 13 Int. Law. 607 (1979).

[8] See the Sixth Report on Competition Policy (OECD).

On July 20, 1978 a recommendation was adopted by the Council of the OECD addressed to the governments of the OECD member countries with the following objectives:

1) to adopt new or supplement existing measures on restrictive business practices, such as anticompetitive acquisitions and discriminatory pricing;

2) to develop appropriate national rules to facilitate investigations and proper procedures where relevant information is located outside the national territory of the responsible authority, and the delivery of legal documents and the execution of decisions regarding enterprises located abroad.

Stronger international cooperation in the areas indicated is also recommended. See Eighth Report on Competition Policy (OECD).

[9] See OECD Observer, No. 6, Oct, 1963.

[10] For the full original Text, see OECD Doc. C(67)53 (Final) of Oct. 10 1967, reprinted in Appendix to Market, Developments in International Antitrust Cooperation, 13 Antitrust Bull. 355, at 370 ff. (1968).

The Committee of Experts on Restrictive Business Practice is currently (1982—83) engaged in the questions of collection of information abroad and fact-finding methods used in antitrust proceedings.

[11] See Hearings on International Aspects of Antitrust Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 89th Congress, 2d Sess., at 453 f. (1966). See further ILA 1964, at 565 ff.; B.R. Campbell, The Canada-United States Antitrust Notification and Consultation Procedure; A Study in Bilateral Conflict Resolution, 55 Can. B. Rev. 459 (1978); Rahl, at 441 f.

[12] See Statement on Co-operation Between United States and Canada on Anti-Combines and Anti-Trust Matters, House of Commons Debates, 1969, Vol. 1, Appendix. See further Campbell, *supra* n. 11, at 463.

[13] Agreement on Mutual Cooperation in the Field of Restrictive Business Practices of June 23, 1973. For text, see Canenbley, at 93 f.; 5 Trade Regulation Reporter (CCH) 50, 283. The German text in Wirtschaft und Wettbewerb (1976), p. 578.

[14] Treaty of Friendship, Commerce and Navigation with the Italian Republic, Feb. 2, 1948, Art. XVIII, para. 3, 63 Stat. 2255, 2282 (1949), T.I.A.S. No. 1965. (Effective July 26, 1949). Similar clauses can be found in bilateral treaties, *inter alia,* with Ireland, Denmark, Israel, Greece, Japan, Germany and Korea. See further J.U. Kusumowidagdo, Consultation Clauses, at 250 ff.; Canenbley, at 85 ff.; Haight, The Restrictive Business Practices Clause in United States Treaties: An Antitrust Tranquilizer for International Trade, 70 Yale L.J. 240 (1960); Rahl, at 448 ff.; C.H. Fulda & W.F. Schwartz, Regulation of International Trade and Investment, at 103 ff. (New York, 1970).

[15] Campbell, *supra* n. 11, at 493.

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The subject matter of this book is the phenomenon frequently referred to as the "extraterritorial application" of competition laws. In the center there is always the individual, whether a human being or a corporation, living or incorporated in one state, but affected by the laws of another. In an increasingly complex world, the as yet unsettled issues of whether and to what extent competition laws, as well as other regulative laws, can be extraterritorially applied under international law and municipal law, have become more delicate than ever.

In an attempt to throw light on these issues, the author in the first part of the book conducts a profound analysis of the United States case law in the fields of antitrust law and securities regulation, accompanied by an analysis of the views of numerous commentators. The extraterritoriality of the Common Market Competition Law and the Swedish Competition Act are also examined.

The second part of the book is entirely devoted to the Conflict of Law and international law aspects of extraterritorial application of competition laws including questions of international law presumtions, sovereignty, equality, fundamental rights, extraterritorial enforcement, intraterritorial exercise of jurisdiction, principles of international criminal law, non-intervention, sovereign immunity, abuse of rights, weighing of interests, etc. The "blocking" statutes, which have recently emerged, and the question of international cooperation in this field are also discussed, as is the act of state doctrine and the question of extraterritorial fact-finding procedures.

ISBN 91-1-837102-7