

Sovereign Immunities Act Jurisdiction and Antitrust Policy

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The Foreign Sovereign Immunities Act presents special due process and statutory interpretation problems when it is used to obtain jurisdiction over foreign sovereigns in cases brought under the American antitrust laws. This article argues that when American courts have personal jurisdiction under the due process clause and subject matter jurisdiction under the antitrust laws themselves, the jurisdictional tests of the FSIA will usually be met as well. Therefore, the jurisdictional reach of American antitrust law in actions against foreign sovereigns should be governed by the policy of the antitrust laws themselves, and not by the jurisdictional limits of the FSIA. A decision to apply the American antitrust laws to a transaction involving a foreign sovereign should rest on the specific economic and regulatory goals of the antitrust laws, and not on the more general, adjudicative standards of the FSIA.

INTRODUCTION

The Foreign Sovereign Immunities Act of 1976¹ (FSIA) creates a judicial test for determining when American courts shall have jurisdiction over the acts of foreign sovereigns and their agents; that is, when the doctrine of foreign sovereign immunity will not apply. At the same time a great body of federal antitrust case law is concerned with the extraterritorial reach of the American antitrust laws. Some special problems of due process and statutory interpretation can arise when a foreign sovereign or its agent is sued under the federal antitrust laws and jurisdiction is obtained under the FSIA.

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¹ Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1332(a)(2), (4), 1391(f), 1441(d), 1602-1611 (1976)) [hereinafter cited as FSIA].

The FSIA codifies the restrictive theory of sovereign immunity, which holds that foreign sovereigns² can be held liable for their "commercial" activities.³ The FSIA also sets some standards for determining when the commercial activities of foreign sovereigns have a sufficient effect in America to create jurisdiction.⁴ Similarly, the American antitrust laws require certain minimum effects on American commerce before an American court will assert antitrust jurisdiction.⁵ Nevertheless, from many foreign viewpoints American antitrust laws reach too far, often presuming to determine the legality of foreign activities that are none of America's business but the business of other nations who have a closer relationship with the alleged illegal conduct. This problem may become particularly serious when the regulated activity involves a foreign government. In these situations foreign nations often perceive Americans as the moral and economic regulators of the world, much too quick to interfere in affairs that are really the prerogative of other nations.⁶ Read to-

² As used in this article, the term "foreign sovereign" or "foreign state" refers to a foreign state, its political subdivision, or to the agency or instrumentality of a foreign state as defined in the FSIA at § 1603(b). 28 U.S.C. § 1603(b) (1976). Under the Act's terms, an "agency or instrumentality" of a foreign sovereign, even if it is a separate legal person, is a "foreign state" for purposes of the FSIA provided that it is an "organ of" the foreign state, or that a majority of its shares or other ownership interest is vested in the sovereign; and that it is neither a citizen of the United States or of any state, or of any third country. Today it is questionable whether a foreign nation itself is a "person" that can be a defendant under the American antitrust law. See *International Ass'n of Machinists v. Organization of Petroleum Exporting Countries*, 477 F. Supp. 553, 570-72 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, — U.S. —, 102 S. Ct. 1036 (1982). However, it has been held that an agency or instrumentality of a foreign nation is a person who can be sued under the antitrust laws. See *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384, 393-97 (D. Del. 1978). See generally Meal & Trachtman, *Defenses to Actions Against Foreign States Under the United States Antitrust Laws*, 20 HARV. INT'L L.J. 583 (1979); Note, *The Liability of Foreign Governments Under United States Antitrust Laws*, 11 GA. J. INT'L & COMP. L. 103 (1981).

³ 28 U.S.C. § 1605(a)(2) (1976), set forth in note 13 *infra*. See also discussion in text accompanying notes 141-150 *infra*.

⁴ The standards of 28 U.S.C. § 1605(a)(2) (1976) are set forth in note 13 *infra*.

⁵ See text accompanying notes 69-99 *infra*.

⁶ See, e.g., the British reaction, 973 PARL. DEB., H.C. (5th ser.) 1540-42 (1979); *In re Westinghouse Uranium Contract*, 1978 A.C. 547 (House of Lords). See generally P. MARCUS, *ANTITRUST LAW AND PRACTICE* 487-91 (1980); Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading In-*

gether literally, for example, the FSIA and the American anti-trust laws suggest that an American court could declare illegal an agreement among oil exporting countries to restrict production and support the price of oil.⁷ Judicial power of this sort makes Americans appear much too quick to judge the legitimacy of other countries' policies concerning the best use of their natural resources.

However, three important restrictions limit the extraterritorial reach of American antitrust laws. These three restrictions create tests that purport to measure the contact that an alleged anti-trust violator or violation has with America. The first test is the requirement of a "direct effect" in the United States that is embodied in the FSIA.⁸ The second test encompasses the "minimum contacts" and "doing business" requirements elaborated in the *International Shoe* line of cases.⁹ The third test concerns congressional power and intent to use American antitrust laws to condemn acts that adversely affect American foreign commerce.¹⁰ Under existing case law, a plaintiff's cause of action presumably would have to pass all three tests before an American court would have personal and subject matter jurisdiction under the FSIA and the antitrust laws.

One of the FSIA's most serious conceptual difficulties is that it rolls the tests of personal jurisdiction, subject matter jurisdiction over the activities of foreign sovereigns, and extraterritorial reach into the same language. The FSIA combines these tests even though they traditionally have been perceived to be quite different from one another.¹¹ Further, the substantive extraterri-

terests Act, 1980, 75 AM. J. INT'L L. 257 (1981); Paugh, Antitrust Principles and United States Trade Laws: A Review of Current Areas of Conflict, 12 L. & POL'Y INT'L BUS. 545 (1980); Stanford, The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad, 11 CORNELL INT'L L.J. 195 (1978).

⁷ See, e.g., text accompanying notes 141-150 *infra*.

⁸ 28 U.S.C. § 1605(a)(2) (1976), set forth in note 13 *infra*.

⁹ See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Hanson v. Denckla*, 357 U.S. 235 (1958); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). See also 4 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §§ 1061-75 (1969); Woods, *Pennoyer's Demise: Personal Jurisdiction After Shaffer and Kulko and a Modest Prediction on World-Wide Volkswagen Corp. v. Woodson*, 20 ARIZ. L. REV. 861 (1978); text accompanying notes 22-33 *infra*.

¹⁰ See text accompanying notes 76-113 *infra*.

¹¹ See Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN. L.

torial limits of the antitrust laws themselves presumably still operate to restrict federal jurisdiction in antitrust cases brought under the FSIA. Neither the case law nor any other source indicates that Congress intended that antitrust liability of foreign sovereigns be broader than antitrust liability of private alien corporations.

This article explores the jurisdictional problems that courts face in deciding antitrust actions brought against foreign sovereigns under the FSIA. It also provides some suggestions for simplifying and clarifying the process of determining jurisdiction.

I. THE EXTRATERRITORIAL REACH OF THE FSIA

Section 1604 of the FSIA provides that, except for contrary provisions in existing international agreements, the FSIA will be the exclusive means by which an American court may obtain jurisdiction over a foreign sovereign.¹²

The FSIA's jurisdictional test¹³ consists of two parts. First, the alleged illegal activity must be "commercial." Second, there must be sufficient contacts with or effects in the United States to meet one of the three tests provided in section 1605(a)(2).¹⁴

The effects test of section 1605(a)(2)[3] is the most expansive and troublesome of the FSIA's three alternative tests. Under

REV. 385 (1982). See also provisions of the FSIA, set forth in note 13 *infra*.

¹² 28 U.S.C. § 1604 (1976). Other relevant jurisdictional provisions are § 1330(a) (original federal subject matter jurisdiction) and § 1330(b) (personal jurisdiction). *Id.* § 1330(a) & (b).

¹³ *Id.* § 1605(a). This section provides:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . .

(2) in which the action is based upon a commercial activity

[1] carried on in the United States by the foreign state;

[2] or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere;

[3] or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States

¹⁴ *Id.* § 1605(a)(2), set forth in note 13 *supra*. The proper definition of commercial activity has caused a great deal of debate, particularly with regard to antitrust law. See Kahale & Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 COLUM. J. TRANSNAT'L L. 211, 236-44 (1979); Note, "Commercial Activity" in the Foreign Sovereign Immunities Act of 1976, 14 J. INT'L L. & ECON. 163 (1979). But see text accompanying notes 141-150 *infra*.

that provision, jurisdiction exists when the action of a foreign sovereign is based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."¹⁵ According to the statutory language, any commercial act by a foreign sovereign having a "direct effect" on the United States will generate jurisdiction under the FSIA, no matter where the act is performed and against whom it is directed, and regardless of intent.¹⁶

The nature of antitrust injury makes it difficult to apply the FSIA's third effects test to antitrust cases. A breach of contract generally injures the non-breaching party; a seizure of property injures the property owner. However, antitrust injury tends to continue from one person to another without limit—witness the injury that the OPEC cartel has inflicted on virtually every person in the oil importing world.¹⁷

II. ANTITRUST, DUE PROCESS, AND THE FOREIGN SOVEREIGN IMMUNITIES ACT

In most private antitrust actions against private defendants, a federal court obtains personal jurisdiction over nonresidents by using Federal Rule of Civil Procedure 4 and the long-arm stat-

¹⁵ 28 U.S.C. § 1605(a)(2) (1976), set forth in note 13 *supra*.

¹⁶ Compare the "effects" language of the FSIA, 28 U.S.C. § 1605(a)(2) (1976), with the language of the RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 415 (Tent. Draft No. 2, 1981), set forth in note 92 *infra*.

¹⁷ Under the doctrine of *Reiter v. Sonotone*, 442 U.S. 330, 342-43 (1979), if an ordinary American citizen buys gasoline for his automobile at \$1.50 per gallon because of OPEC's actions, he has been injured in his "business or property" within the meaning of the Clayton Act, § 4, 15 U.S.C. § 15 (1976) (authorizing private antitrust actions by consumers.) To be sure, the citizen's status as an indirect purchaser would bar an action for damages. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). However, *Illinois Brick* might permit a remedy that would more extensively intrude into foreign affairs: an injunction against the cartel and presumably a contempt citation if OPEC disobeyed. See *Mid-West Paper Prods. Co. v. Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979); *International Ass'n of Machinists v. Organization of Petroleum Exporting Countries*, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, — U.S. —, 102 S. Ct. 1036 (1982). See also discussion of *International Ass'n of Machinists v. Organization of Petroleum Exporting Countries*, at text accompanying notes 141-150 *infra*. See generally II P. AREEDA & D. TURNER, ANTITRUST LAW §§ 334-43 (1978).

ute of the state in which the court sits.¹⁸ Before a state may assert personal jurisdiction over a nonresident defendant, the defendant must have sufficient minimum contacts with the forum state, such that the court's assertion of jurisdiction does not offend traditional notions of fair play and substantial justice.¹⁹ Federal courts that base personal jurisdiction in an antitrust action upon a state long-arm statute employ the rules developed in the line of cases succeeding *International Shoe Co. v. Washington*.²⁰ For example, a single contact between the defendant and the forum state can create personal jurisdiction for causes of action arising from that particular contact.²¹ On the other hand, more substantial contacts are required to assert personal jurisdiction in causes of action unrelated to the defendant's contacts with the forum state.²² In any case, a court's assertion of personal jurisdiction over a nonresident defendant generally requires that, in some way, the defendant availed itself of the privilege of doing business within the forum state.²³ This may require, for example, an attempt to market products within the forum state, or at least sale of products with the knowledge or intention that they reach the forum state.²⁴

However, courts must use Federal Rule 4 and a state long-arm statute to create personal jurisdiction in federal causes of action only when no relevant federal statute provides for service of process.²⁵ The United States is a unitary jurisdiction with respect to federal claims in the federal courts. The due process clause of the fifth amendment defines the constitutionality of a federal court's assertion of personal jurisdiction in federal question cases. Courts have widely held that due process permits asser-

¹⁸ See, e.g., *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229 (6th Cir. 1981); *Hitt v. Nissan Motor Co.*, 399 F. Supp. 838 (S.D. Fla. 1975). See generally 4 C. WRIGHT & A. MILLER, *supra* note 9, at §§ 1068-75. But see cases cited at note 26 *infra*.

¹⁹ *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

²⁰ 326 U.S. 310 (1945). See, e.g., *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1236 (6th Cir. 1981).

²¹ See *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Darden v. Heck's Inc.*, 459 F. Supp. 727 (D. Va. 1978).

²² See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Pardo v. Wilson Line of Washington, Inc.*, 414 F.2d 1145 (D.C. Cir. 1969).

²³ *Hanson v. Denckla*, 357 U.S. 235 (1958).

²⁴ See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

²⁵ *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229 (6th Cir. 1981); *Black v. Acme Markets*, 564 F.2d 681 (5th Cir. 1977).

tion of personal jurisdiction over a nonresident defendant based on the defendant's "aggregate contacts" with the United States as a whole, and not merely contacts with the state where the federal court sits.²⁶ In such cases the federal statute that provides for service of process creates jurisdiction, rather than a state long-arm statute based on minimum contacts.

For example, the Federal Securities Exchange Act provides for worldwide service of process.²⁷ Courts have uniformly held that when service of process is based on this statute, personal jurisdiction may arise from the defendant's jurisdictional contacts with the United States as a whole.²⁸ Although the minimum contacts rules still apply, the entire United States, and not a single state, provides the relevant geographic area in which sufficient contacts must be found.

Similarly, section 12 of the Clayton Act provides for service of process wherever the corporate antitrust defendant is found.²⁹ Recent case law occasionally has held that section 12 permits a federal court to rely on a defendant's aggregate contacts with the entire United States to establish personal jurisdiction over corporations in private antitrust actions.³⁰

The FSIA also contains its own provisions governing service of process.³¹ In actions brought under the FSIA, personal jurisdiction is established under the FSIA's service of process provisions, and not under the terms of the statute that creates the substantive cause of action.³² The Second Circuit has held that

²⁶ *Black v. Acme Markets*, 564 F.2d 681 (5th Cir. 1977); *Centronics Data Computer Corp. v. Mannesmann*, 432 F. Supp. 659 (D.N.H. 1977). See Hovenkamp, *Personal Jurisdiction and Venue in Private Antitrust Actions in the Federal Courts: A Policy Analysis*, 67 *IOWA L. REV.* 485, 498-505 (1982).

²⁷ 15 U.S.C. § 78a(a) (1976).

²⁸ See, e.g., *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972); *Kramer v. Scientific Control Corp.*, 365 F. Supp. 780 (E.D. Pa. 1973).

²⁹ 15 U.S.C. § 22 (1976).

³⁰ *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229 (6th Cir. 1981); *Black v. Acme Markets*, 564 F.2d 681 (5th Cir. 1977); *Centronics Data Computer Corp. v. Mannesman*, 432 F. Supp. 659 (D.N.H. 1977). But see *Superior Coal Co. v. Ruhrkohle, A.G.*, 83 F.R.D. 414 (E.D. Pa. 1979) (reversing magistrate's order permitting discovery of defendant's nationwide contacts outside of the forum state). See generally Hovenkamp, *supra* note 26.

³¹ 28 U.S.C. § 1608 (1976).

³² FSIA § 1330(b) provides: "Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction

the FSIA also permits the aggregation of a defendant's jurisdictional contacts over the entire United States to provide personal jurisdiction.³³

Congress modeled the FSIA's long-arm provisions after the District of Columbia's long-arm statute,³⁴ which has been interpreted to grant the maximum reach permitted by the United States Constitution.³⁵ Likewise, courts have frequently found that American antitrust laws, which are based on the commerce clause of the United States Constitution, reach to the full extent of Congress' constitutional power to regulate interstate and foreign commerce.³⁶

Courts frequently apply some kind of effects test as a predicate for jurisdiction, both in cases involving the antitrust laws³⁷ and in cases involving the FSIA.³⁸ However, the "effects" label belies the fact that not all effects tests are alike. The effects test used to create long-arm jurisdiction developed from the minimum contacts doctrine regarding personal jurisdiction,³⁹ and is derived from the due process clauses of the fifth and fourteenth

. . . where service has been made under section 1608 of this title." 28 U.S.C. § 1330(b) (1976). *See also* Verlinden, B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284 (S.D.N.Y. 1980).

³³ *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 314 (2d Cir. 1981).

³⁴ D.C. CODE ENCYCL. § 13-423 (West Cum. Supp. 1979).

³⁵ S. REP. NO. 94-1310, 94th Cong., 2d Sess. 13 (1976) [hereinafter cited as S. REP.]. *See also* Margoles v. Johns, 483 F.2d 1212, 1218 (D.C. Cir. 1973). Whether the FSIA's long-arm provisions actually extend that far has sparked some controversy among the courts. *See* text accompanying notes 40-62 *infra*.

³⁶ *See, e.g.,* *United States v. Frankfort Distilleries*, 342 U.S. 293, 298 (1945); *Pacific Seafarers, Inc., v. Pacific Far East Line, Inc.*, 404 F.2d 804, 814 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969). *But see* text accompanying notes 69-99 *infra*.

³⁷ *See, e.g.,* *United States v. Aluminum Co. of America*, 148 F.2d 416, 443-44 (2d Cir. 1945), discussed in text accompanying notes 85-93 *infra*.

³⁸ *See, e.g.,* *Carey v. National Oil Co.*, 453 F. Supp. 1097 (S.D.N.Y. 1978), *aff'd*, 592 F.2d 673 (2d Cir. 1979). In *Carey*, plaintiff American oil corporations sued Libya and its National Oil Company (NOC) for breach of contracts to supply crude oil. The court held that the direct effect test of 28 U.S.C. § 1605(a)(2) (1976) was the same as the minimum contacts standard of *International Shoe*, and denied jurisdiction because "[t]here has been absolutely no attempt by Libya or NOC to avail itself of any of the protections or privileges afforded by the United States" 453 F. Supp. at 1101.

³⁹ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). *See* notes 19-24 and accompanying text *supra*.

amendments. On the other hand, the effects test applied in American antitrust law is based on federal subject-matter jurisdiction under the commerce clause. The antitrust effects test asks whether a certain activity sufficiently "affects commerce" that use of the American antitrust laws is within congressional power.⁴⁰ The three tests stated in section 1605(a)(2) of the FSIA are designed to encompass both personal and subject-matter jurisdiction effects tests simultaneously.⁴¹ Section 1330, the FSIA's basic long-arm provision, incorporates the three alternative jurisdictional tests of section 1605(a)(2) by reference and provides that "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief" which satisfies one of the three incorporated tests.⁴²

This treatment of jurisdiction raises an initial problem. The minimum contacts doctrine of *International Shoe* is constitutional and not susceptible of any easy statutory modification. For that reason the legislative history of the FSIA acknowledges that the statute "embodies" the "minimum jurisdictional contacts" requirements of *International Shoe*.⁴³ In fact, however, the language of the three alternative tests stated in section 1605(a)(2) is both broader and narrower than the *International Shoe* minimum contacts requirements, as various courts have held.

For example, in *Harris v. Vao Intourist, Moscow*,⁴⁴ the plaintiff sued two Soviet state-owned tourist services to recover for a wrongful death resulting from a Moscow hotel fire. The court believed that the Soviet Union conducted sufficient "integrated tourism activities" within the United States to provide for "due process-in-personam jurisdiction under *International Shoe v. Washington*."⁴⁵ The Soviet tourism agencies had, for many years, continuously and actively solicited business in New York,

⁴⁰ See generally I P. AREEDA & D. TURNER, ANTITRUST LAW §§ 220, 231-232 (1978).

⁴¹ The legislative history states: "For personal jurisdiction to exist under section 1330(b), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(a) [the subject matter jurisdiction provision], meaning a claim for which the foreign state is not entitled to immunity [under sections 1605-1607]." S. REP., *supra* note 35, at 13.

⁴² 28 U.S.C. § 1330 (1976).

⁴³ S. REP., *supra* note 35, at 13.

⁴⁴ 481 F. Supp. 1056 (E.D.N.Y. 1979).

⁴⁵ *Id.* at 1059.

where the district court sat. However, the court went on to hold that in the FSIA Congress "authorized the exercise of less than the complete personal jurisdiction that might constitutionally be afforded American courts under traditional concepts of fairness and due process."⁴⁶

The court examined the FSIA's three jurisdictional tests. The first test requires that the cause of action arise "from commercial activity within the United States." The court observed that the defendants conducted two different kinds of activities. They solicited tourist business in New York and they operated a Moscow hotel. The court concluded that "despite the apparent integration of the Soviet tourist industry, the relationship between the negligent operation of the National Hotel and any activity in the United States is so attenuated that this clause is not applicable."⁴⁷ The court reached this conclusion even though the circumstances of the case probably satisfy the "doing business" requirements of the *International Shoe* line of cases.⁴⁸ Since the cause of action arose from the hotel activities in Moscow and not from the solicitation activities in the United States, the first FSIA test was not satisfied.

The second FSIA test deals with claims arising from acts performed in the United States. The court determined that this test did not apply because the negligent operation of the hotel took place in the Soviet Union.⁴⁹

The third FSIA test grants jurisdiction for actions based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere" which cause "a direct effect in the United States." The court decided that the effect in this case was not direct enough to satisfy the FSIA requirement, even though it was sufficient to satisfy the due process requirements of *International Shoe*.⁵⁰ The court reasoned that "had Congress wished to provide broader protection it could have omitted the word 'direct,' requiring instead only the degree of effect necessary to satisfy due process requirements."⁵¹

⁴⁶ *Id.*

⁴⁷ *Id.* at 1061.

⁴⁸ *Id.* at 1059.

⁴⁹ *Id.* at 1061.

⁵⁰ *Id.* at 1061-62.

⁵¹ *Id.* at 1065. See generally Note, *The Foreign Sovereign Immunities Act*

*Verlinden, B.V. v. Central Bank of Nigeria*⁵² was a breach of contract action⁵³ brought against a nationally owned foreign bank that did considerable business in the United States. The district court assumed that the due process "doing business" standard for personal jurisdiction would have been met. However, it concluded that the three jurisdictional tests in section 1605(a)(2) of the FSIA did not extend as far as due process might permit. Beginning with the proposition that the FSIA was modeled after the District of Columbia long-arm statute, the court nevertheless noted certain differences between the two laws. The reach of the District of Columbia long-arm statute had been interpreted to coincide with the boundaries set by the due process clause.⁵⁴ On some occasions courts had held that the District of Columbia statute permitted jurisdiction even when the defendant's contacts with the District bear "no relation to the particular tort" that forms the basis of the cause of action, if the contacts were substantial enough.⁵⁵ However, the FSIA appears to require a relationship between the forum contacts and the cause of action. In this particular case, the parties negotiated the contract abroad, where it was to be performed. Although the defendant had substantial contacts with the United States, the offense in this case was not "based upon" those contacts. The court held the FSIA did not grant jurisdiction.⁵⁶

On the other hand, the three tests in section 1605(a)(2) of the FSIA may sometimes exceed the due process limits set by the *International Shoe* line of cases. Read literally, the FSIA's third test permits jurisdiction when conduct outside the United States has a direct effect in the United States whether or not the due process requirements are met. In interpreting the FSIA however,

of 1976: *Direct Effects and Minimum Contacts*, 14 CORNELL INT'L L.J. 97 (1981); Note, *Sovereign Immunity*, 18 HARV. INT'L L.J. 429 (1977); Note, *Direct Effect Jurisdiction Under the Foreign Sovereign Immunities Act of 1976*, 13 N.Y.U. J. INT'L L. & POL. 571 (1981); Note, *Effects Jurisdiction Under the Foreign Sovereign Immunities Act and the Due Process Clause*, 55 N.Y.U. L. REV. 474 (1980).

⁵² 488 F. Supp. 1284 (S.D.N.Y. 1980), *aff'd*, 647 F.2d 320 (2d Cir. 1981). *But see* *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981).

⁵³ Actually, an action for anticipatory breach of a letter of credit.

⁵⁴ *Margoles v. Johns*, 483 F.2d 1212, 1218 (D.C. Cir. 1973).

⁵⁵ *Aiken v. Lustine Chevrolet, Inc.*, 392 F. Supp. 883, 885 (D.D.C. 1975).

⁵⁶ *Verlinden, B.V. v. Central Bank of Nigeria*, 488 F. Supp. 1284, 1295-96 (S.D.N.Y. 1980), *aff'd*, 647 F.2d 320 (2d Cir. 1981).

courts have necessarily limited its jurisdictional reach to comport with those restrictions set by *International Shoe*. For example, the court in *Harris v. Vao Intourist, Moscow*⁵⁷ limited the reach of the third FSIA test, which provides jurisdiction based upon acts outside United States territory in connection with commercial activity elsewhere but which cause a direct effect in the United States. The court held that this test will apply only when the effect "occurs as a direct and foreseeable result of the conduct outside the territory."⁵⁸ Similarly, in *Carey v. National Oil Corp.*⁵⁹ the Second Circuit noted that the legislative history of the FSIA "makes clear" that Congress intended section 1605(a)(2) to embody "the standard set out in *International Shoe Co. v. Washington*."⁶⁰ From this the court concluded that courts must read certain additional requirements dictated by the *International Shoe* line of cases into the statute. For example, the court implied a requirement that before the third effects test will apply with respect to acts carried on outside the United States, the defendant must purposely have "avail[ed] itself of the privilege of conducting business in the United States."⁶¹

*Decor By Nikkei International, Inc. v. Federal Republic of Nigeria*⁶² was based on the same general transactions as *Verlinden*.⁶³ The district court held that section 1605(a)(2)[3]'s "direct effect in the United States" test required not only "an immediate causal effect within the United States" but also "that there be sufficient minimum contacts between the matter in contro-

⁵⁷ 481 F. Supp. 1056 (E.D.N.Y. 1979).

⁵⁸ *Id.* at 1062-63.

⁵⁹ 592 F.2d 673 (2d Cir. 1979).

⁶⁰ *Id.* at 676.

⁶¹ *Id.* (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). See also *Thomas P. Gonzalez Corp. v. Consejo Nacional de Produccion De Costa Rica*, 614 F.2d 1247 (9th Cir. 1980), where the court held that the words "direct effect" in § 1605(a)(2) of the FSIA, were meant to embody "the minimum contacts standard of *International Shoe* as well as the requirement of *Hanson* . . . that the defendant purposely avail itself of the privilege of conducting business within the forum . . ." *Id.* at 1255. See generally *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

⁶² 497 F. Supp. 893 (S.D.N.Y. 1980), *aff'd sub nom. Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981).

⁶³ *Verlinden, B.V. v. Central Bank of Nigeria*, 488 F. Supp. 1284 (S.D.N.Y. 1980), *aff'd*, 647 F.2d 320 (2d Cir. 1981). See notes 52-53 and accompanying text *supra*.

versy and the United States to support the court's exercise of in personam jurisdiction."⁶⁴ In formulating a test for sufficient minimum contacts, the court considered section 18 of the *Restatement (Second) of the Foreign Relations Law of the United States*.⁶⁵ The court cited comment F to that section, which suggests that in order to create personal jurisdiction "the effect" of a remote act within the forum territory "must be substantial and occur as a direct and foreseeable result of the conduct outside the territory."⁶⁶ The court then effectively rewrote section 1605(a)(2) of the FSIA. Before an American court could base personal jurisdiction on an act committed abroad, the court required that the act committed outside the United States territory cause "a substantial, foreseeable, and immediate effect in the United States" and that the defendant itself have certain minimum contacts with the United States.⁶⁷ The court went on to hold that the Federal Republic of Nigeria met these tests and that therefore jurisdiction over it was appropriate.⁶⁸

III. THE EXTRATERRITORIAL REACH OF THE ANTITRUST LAWS AND THE FSIA

The American antitrust laws were enacted under the commerce clause, which gives Congress authority "to regulate Com-

⁶⁴ *Decor by Nikkei Int'l, Inc. v. Federal Republic of Nigeria*, 497 F. Supp. 893, 904 (S.D.N.Y. 1980), *aff'd sub nom. Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981).

⁶⁵ RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965).

⁶⁶ *Decor by Nikkei Int'l, Inc. v. Federal Republic of Nigeria*, 497 F. Supp. 893, 904 (S.D.N.Y. 1980), *aff'd sub nom. Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981).

⁶⁷ *Id.* at 904-05. *See also Gemini Shipping, Inc. v. Foreign Trade Org. for Chemicals and Foodstuffs*, 496 F. Supp. 256 (S.D.N.Y. 1980), *rev'd*, 647 F.2d 317 (2d Cir. 1981), where the district court held that the FSIA barred the district court's jurisdiction over Syria and two Syrian owned companies for breach of a shipping contract with an American corporation. The FSIA, the court said, "calls for evidence of continuous and systematic activities in the United States; or, corporate agencies regularly doing business in the United States; or, evidence showing that defendants have exercised the privileges or benefitted from protections of conducting business in the United States." 496 F. Supp. at 258. The court found no evidence that these tests had been met.

⁶⁸ *Decor by Nikkei Int'l, Inc. v. Federal Republic of Nigeria*, 497 F. Supp. 893, 904 (S.D.N.Y. 1980), *aff'd sub nom. Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1982).

merce with foreign nations, and among the several States"⁶⁹ Although the jurisdictional provisions in the various antitrust statutes use differing language, they typically prohibit restraints on "trade among the several States, or with foreign nations."⁷⁰

The law governing the extraterritorial reach of American anti-trust law is, at best, chaotic.⁷¹ Those who have attempted to discover some order or principle in the decisions have generally not been successful.⁷² A brief summary is nevertheless in order.

Congress intended the Sherman Act to extend to the constitutional boundaries of congressional power to regulate *interstate* commerce.⁷³ However, congressional intent regarding *foreign* commerce was probably less expansive.⁷⁴ Even Judge Learned Hand's broad view of antitrust jurisdiction in *United States v. Aluminum Co. of America*⁷⁵ recognizes an important limitation.

⁶⁹ U.S. CONST. art. I, § 8. See I P. AREEDA & D. TURNER, *supra* note 40, at § 231.

⁷⁰ The Sherman Act prohibits restraint or monopolization "of trade or commerce among the several states." 15 U.S.C. §§ 1-2 (1976). The Clayton Act speaks of persons or acts "in commerce" or "in the course of such commerce." *Id.* §§ 13, 14, & 19. The Federal Trade Commission Act applies to activities "in or affecting commerce." 15 U.S.C. § 45(a) (1976 & Supp. IV 1980).

⁷¹ Detailed investigation of the problems of the extraterritorial reach of these laws is beyond the scope of this article. For more extensive treatment see generally *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976); *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969); 799 ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS, ANTITRUST AND TRADE REGULATIONS REPORTER (BNA) E-1 (1977); K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD (2d ed. 1981); F. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS (2d ed. 1973); Rahl, *Extraterritorial Substantive Scope of Antitrust Laws of the United States and of the Communities and Member States in COMMON MARKET AND AMERICAN ANTITRUST: OVERLAP AND CONFLICT* 50-54 (Rahl ed. 1970); Ongman, "Be no Longer A Chaos": Constructing A Normative Theory of the Sherman Act's Extraterritorial Jurisdictional Scope, 71 Nw. U.L. REV. 733 (1977).

⁷² See, e.g., Ongman, *supra* note 71.

⁷³ *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 558 (1944). See also I P. AREEDA & D. TURNER, *supra* note 40, at §§ 231-32. However, the Clayton Act does not reach as far. See *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194-95 (1974); I P. AREEDA & D. TURNER, *supra* note 40, at §§ 233a-233e.

⁷⁴ *Pacific Seafarers, Inc. v. Pacific Far East Lines, Inc.*, 404 F.2d 804, 814 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969). See text accompanying notes 118-121 *infra* for a discussion of *Pacific Seafarers*.

⁷⁵ 148 F.2d 416 (2d Cir. 1945).

Judge Hand stated that “[w]e are not to read general words, such as those in [the Sherman] Act, without regard to the limitations customarily observed by nations upon the exercise of their own powers.”⁷⁶ For example, although the Constitution gives Congress the power to violate international law,⁷⁷ Congress probably did not have that design when it passed the anti-trust laws.⁷⁸

However, the precise definition of the “affecting commerce” test in the antitrust laws presents a difficult problem. The courts have been inconsistent and inarticulate in defining the proper extraterritorial reach of those laws. The *Antitrust Guide for International Operations*,⁷⁹ produced by the United States Department of Justice in 1977, argues that “when foreign transactions have a substantial and foreseeable effect on United States commerce, they are subject to United States law regardless of where they take place.”⁸⁰ However, this asserted rule is both broader and narrower than the case law. It is narrower because it would require that the effect be both “substantial and foreseeable.” Some cases suggest, however, that American courts have jurisdiction when an action merely “affects” United States commerce.⁸¹ Other cases suggest that jurisdiction will be found when an act “directly affects”⁸² American commerce or has an “impact upon” it.⁸³ On the other hand, the *Antitrust Guide for International Operations* is broader than other case law in that it would

⁷⁶ *Id.* at 443. See also *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 579-613 (9th Cir. 1976).

⁷⁷ *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972) (upholding district court's subject matter jurisdiction under § 10(b) of the Securities Exchange Act in action by American corporation against English defendants for fraud in sale of securities on the London Stock Exchange).

⁷⁸ *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804, 814 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969).

⁷⁹ ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS, *supra* note 71.

⁸⁰ *Id.* at E-2.

⁸¹ See, e.g., *Thomsen v. Cayser*, 243 U.S. 66, 88 (1917); *United States v. Imperial Chemical Indus. Ltd.*, 100 F. Supp. 504, 592 (S.D.N.Y. 1951).

⁸² See, e.g., *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 102-03 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972). The FSIA appears to grant jurisdiction generally over all acts that have a “direct effect” on United States commerce. 28 U.S.C. § 1605(a)(2) (1976). See notes 15-16 and accompanying text *supra*.

⁸³ See, e.g., *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 705 (1961).

not require that the effect on commerce be intended. Some cases, however, indicate that intent may be important.⁸⁴

The classic analysis of the effects test for the extraterritorial reach of the American antitrust laws is Judge Learned Hand's opinion in *United States v. Aluminum Co. of America*.⁸⁵ A Canadian subsidiary of Alcoa had allegedly engaged in agreements with other foreign companies that effectively restricted the supply of aluminum in America. This made it more difficult for potential American competitors to enter the field. All the alleged illegal conduct had occurred abroad.

Judge Hand began his analysis with the proposition that the American antitrust laws cannot be used to attack every agreement made abroad that has some effect on American trade, even though the commerce clause of the Constitution might permit Congress to pass a statute that broad. For example, he stated, basic conflicts of laws doctrine must be read into the congressional intent in passing the Sherman Act.⁸⁶

Judge Hand then gave two examples of foreign agreements that the Sherman act was not designed to cover. The first was an agreement that manifests no intent to restrain American foreign commerce but that in fact does so. Creating liability in this situation would obviously be too broad. Judge Hand noted that "[a]lmost any limitation of the supply of goods in Europe . . . or in South America, may have repercussions in the United States if there is trade between the two."⁸⁷ However, the "international complications" likely to arise from finding antitrust liability in these situations would be monstrous. "Congress certainly did not intend the Act to cover" these situations.⁸⁸

Judge Hand felt that Congress also did not intend, and might not even have the constitutional power, to reach foreign agreements that are intended to affect American commerce but which in fact have no effect. "A statute should not be interpreted to cover acts abroad which have no consequence here."⁸⁹ However, he concluded, where there is both an intent to affect United

⁸⁴ See, e.g., *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 612 (9th Cir. 1976). See I P. AREEDA & D. TURNER, *supra* note 40, at § 236e.

⁸⁵ 148 F.2d 416 (2d Cir. 1945).

⁸⁶ *Id.* at 443.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 444.

States commerce and an actual effect, American antitrust jurisdiction is proper.⁹⁰

For all its superficial simplicity, Judge Hand's test is actually a very complicated doctrine, largely because it fails to answer some hard questions. Can intent be constructed from actual knowledge of foreseeable effects? Will any measurable effect do, or must the effect be "substantial?" Is there a meaningful difference between "direct" and "indirect" effects? Is actual "intent" really a requirement, or will a court infer intent when the impact on United States foreign trade is direct and obvious?

In an era when courts are supremely conscious of the potentially infinite scope of antitrust injury,⁹¹ more rigorous limitations on the foreign reach of American antitrust law seem to be in order. Some courts have begun to take seriously the requirement of section 18 of the *Restatement (Second) of the Foreign Relations Law of the United States* that a state may apply a domestic rule to foreign conduct only when the domestic effect is "substantial, direct, and foreseeable."⁹² As Areeda and Turner put it, "if the Sherman Act is not to govern the world, its reach must be limited to those acts (1) which 'significantly' or 'directly' affect United States commerce, or (2) which are intended

⁹⁰ *Id.* See generally the guidelines suggested in I P. AREEDA & D. TURNER, *supra* note 40, at § 237.

⁹¹ See *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (holding that indirect purchasers of cement block could not sustain a treble damage antitrust action under § 4 of the Clayton Act against the manufacturer).

⁹² RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965). The proposed revision of the Restatement is somewhat more expansive. See RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 415 (Tent. Draft No. 2, 1981). The proposed revision states:

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

(3) The United States has authority to exercise jurisdiction with respect to any other agreement or conduct in restraint of United States trade if such agreement or conduct has substantial effect on the commerce of the United States and the exercise of jurisdiction is not unreasonable. . . .

Id.

to have an effect, or (3) which are both intended to have and do have such an effect."⁹³

Recent case law has even questioned the basic integrity of the affecting commerce test itself when it is used to determine the extraterritorial reach of the Sherman Act. The main problem of the test is that it too easily transforms questions of foreign and public policy into questions of causation. The test creates the impression that principles of physics dominate in an area that is in fact concerned with the less scientific notions of conflicts and international comity. Courts have been aware of this problem at least since the time of *Aluminum Co. of America*.⁹⁴ However, they have not articulated their policy rationales very clearly. As a result, they have often created the impression that an effect on American commerce can be measured in the same way that a collision between two billiard balls can be analyzed. The affecting commerce test fails because it ignores the obvious. In an interdependent global economy one nation's decision can have an economic effect that extends everywhere. The real question is *not* whether an action abroad has a measurable or even foreseeable effect in America. Instead, it is whether American interests in the action's result are strong enough vis-a-vis the interests of other nations to justify condemnation of the act by an American court.

In *Timberlane Lumber Co. v. Bank of America*,⁹⁵ the Ninth Circuit concluded that the affecting commerce test is "incomplete because it fails to consider other nations' interests" and it fails expressly to "take into account the full nature of the relationship between the actors and this country."⁹⁶ The *Timberlane* court effectively discarded the affecting commerce test. It held that before the Sherman Act's provisions will reach activity abroad, a three-part test must be satisfied.

First, the court required that there be some actual or intended effect on American foreign commerce before the antitrust statutes would provide federal subject matter jurisdiction. Second, the court indicated that a "greater showing of burden or restraint" may be required to demonstrate an effect of sufficient

⁹³ I P. AREEDA & D. TURNER, *supra* note 40, at § 236c.

⁹⁴ *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945).

⁹⁵ 549 F.2d 597 (9th Cir. 1976).

⁹⁶ *Id.* at 611-12.

magnitude "to present a cognizable injury to the plaintiffs." Thus, a plaintiff alleging a violation of antitrust laws abroad may have to show a more substantial injury than required for a domestic antitrust violation. Third, the court required a showing that "the interests of, and links to, the United States" be "sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority."⁹⁷ In measuring American interests, a court should consider the magnitude of the alleged violation's effect on American foreign commerce.⁹⁸

The third part of the *Timberlane* test requires a court to balance American interests against the interests of other nations.⁹⁹ This process is designed to account for any additional factors that an American court should consider in an antitrust case when the defendant is a foreign sovereign and the FSIA provides jurisdiction. When an antitrust defendant is the agent of a foreign sovereign, there is a much greater threat that enforcement will raise fundamental questions about differences of ideology or economic policy that American antitrust ought not penetrate too deeply.¹⁰⁰ For example, a foreign nation's policy with respect to the conservation of its own natural resources can be made into an antitrust violation under the literal language of the FSIA and the American antitrust laws. American courts should fear to tread in this manner on the interests and ideology of other nations.

The antitrust laws' affecting foreign commerce test is generally stricter than either the minimum contacts test of *International Shoe* or the three effects tests of the FSIA. This is appropriate, since antitrust policy addresses the problems of international economic relations directly. The *International Shoe* and FSIA tests, on the other hand, are concerned with the more general question of the amenability of foreign parties to suit in American courts.

However, the antitrust affecting foreign commerce test is not always narrower than either the minimum contacts or FSIA tests. Suppose, for example, that a small country which does no

⁹⁷ *Id.* at 613.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See generally cases cited in notes 94 & 95 *supra*. See also Schwartz, *American Antitrust and Trading with State-Controlled Economies*, 25 ANTI-TRUST BULL. 513 (1980).

significant business with the United States has substantial market power in a rare mineral, zerkium. Two mineral extraction companies in the country, one independent and the other one wholly owned by the state, conspire to restrict production and raise the price of zerkium. Neither company does any business in the United States. They sell the mineral f.o.b. home port to an innocent British importer who in turn transports it to the United States and sells it. Price-fixing abroad which affects the price of American imports is clearly within the reach of the Sherman Act.¹⁰¹ However, federal courts likely have no personal jurisdiction over either company because they do not meet the minimum contacts or doing business standards of *International Shoe*.

In the relatively few cases presenting facts similar to those above courts have found no personal jurisdiction. This is so even though the allegations imply significant antitrust injury in America as a result of the foreign price-fixing. For example, *Weinstein v. Norman M. Morris Corp.*¹⁰² involved a private action by an American businessman against a Swiss corporation and an American corporation. The Swiss corporation sold watches in Switzerland to the American corporation. The plaintiff alleged that the Swiss corporation was imposing illegal distributional restraints on the American corporation as well as engaging in other unnamed antitrust violations. The district court dismissed the complaint against the Swiss corporation under Federal Rules of Civil Procedure 12(b)(2) and (5).¹⁰³ It found that the Swiss company did no business in the United States itself, that it owned no interest in the American defendant, that all relations with the American defendant involved arms-length business transactions, and that these transactions were carried on in Switzerland.

The plaintiff had relied on several asserted contacts between the Swiss defendant and the United States. It offered a "direct factory warranty" on watches sold in the United States; it had

¹⁰¹ See *United States v. R.P. Oldham Co.*, 152 F. Supp. 818 (N.D. Cal. 1957); *United States v. General Elec. Co.*, 80 F. Supp. 989 (S.D.N.Y. 1948). See also 15 U.S.C. § 8 (1976). See generally P. MARCUS, *supra* note 6, at 494-501.

¹⁰² 432 F. Supp. 337 (E.D. Mich. 1977).

¹⁰³ FED. R. CIV. P. 12(b) provides: "Every defense . . . to a claim for relief . . . shall be asserted in the responsive pleading . . . except that the following defenses may . . . be made by motion . . . (2) lack of jurisdiction over the person . . . (5) insufficiency of service of process"

appointed the American corporation as its exclusive agent in the United States; the alleged co-conspirator in the antitrust violation was the American corporation;¹⁰⁴ the territorial restraints imposed in the sales agreements between the Swiss and American defendants amounted to "considerable control" over the business activity of the American defendant; the American defendant distributed some of the Swiss defendant's promotional materials in the United States; the distribution agreement between the two defendants contained an arbitration clause "which possibly designates the United States as the site of arbitration proceedings;" and the Swiss defendants had appointed a New York agent for service of documents relating to an earlier consent decree into which the Swiss defendants and the United States had entered.¹⁰⁵ The district court found that none of these things, either individually or together, amounted to enough presence or doing business within the United States to provide personal jurisdiction.

On facts roughly analogous to those in *Weinstein*, another federal district court found no personal jurisdiction over a foreign defendant, even though the alleged American co-conspirator was a wholly owned subsidiary of the alleged foreign co-conspirator.¹⁰⁶ The court in *Smokey's of Tulsa v. American Honda Motor Co.*¹⁰⁷ based its finding on the nature of the relations between the foreign parent and its domestic subsidiary. Although the American defendant was owned by the foreign defendant, all business agreements between the two were the result of arms-length transactions, the foreign parent did not involve itself in the administration or internal affairs of the American subsidiary, and the foreign parent itself did no business in the United States. However, the foreign defendant distributed a relatively large amount of its production in the United States.

¹⁰⁴ Jurisdiction ordinarily does not exist over an antitrust defendant merely because jurisdiction exists over alleged co-conspirators, however. *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379 (1953); *Bertha Bldg. Corp. v. National Theatres Corp.*, 248 F.2d 833 (2d Cir. 1957); *Paramount Pictures, Inc. v. Rodney*, 186 F.2d 111 (3d Cir.), *cert. denied*, 340 U.S. 953 (1951); *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384 (D. Del. 1978).

¹⁰⁵ *Weinstein v. Norman M. Morris Corp.*, 432 F. Supp. 337, 341 (E.D. Mich. 1977).

¹⁰⁶ *Smokey's of Tulsa v. American Honda Motor Co.*, 453 F. Supp. 1265 (E.D. Okla. 1978).

¹⁰⁷ *Id.*

Smokey's represents a substantial limitation on the extraterritorial reach of the American antitrust laws in those situations where the foreign defendant effectively shelters itself from engaging in business in the United States. On the other hand, if the foreign defendant exercises a significant amount of control over its American subsidiary, a court may assert personal jurisdiction.¹⁰⁸ One thesis thus emerges rather clearly from the case law. Courts may enforce American antitrust laws against foreign entities only when the entities have sufficiently availed themselves of the privilege of doing business in the United States to make their submission to American courts fair and reasonable. In short, the due process clause and the minimum contacts test of *International Shoe* act as an effective limit on the extraterritorial reach of the antitrust laws.¹⁰⁹

A more difficult question is whether the FSIA itself imposes any practical limitations on the reach of the antitrust laws under the affecting commerce test. The question here is whether any situations exist in which the antitrust laws themselves would permit jurisdiction, but the FSIA would not. Since both the *International Shoe* doctrine and the affecting foreign commerce

¹⁰⁸ *United States v. Scophony Corp.*, 333 U.S. 795 (1948) (British corporation which exercised constant supervision and intervention, beyond the normal scope of a shareholder's rights, in its American subsidiary through a complex series of patent licensing and other contractual arrangements held subject to personal jurisdiction); *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384 (D. Del. 1978) (Polish golf cart manufacturer that controlled its wholly owned American distribution subsidiary and mandated territorial marketing restraints held subject to jurisdiction); *Hitt v. Nissan Motor Co.*, 399 F. Supp. 838 (S.D. Fla. 1975) (Japanese auto manufacturer's exchange of officers and employees and common directors with wholly owned American subsidiary engaged in distributing the automobiles held sufficient to attach personal jurisdiction).

¹⁰⁹ Of course, a court could have personal jurisdiction based on the defendant's contacts with the forum that are unrelated to the cause of action, if those contacts are substantial enough. *See* cases cited at note 112 *infra*. In this area, James Martin proposes that a state should not be permitted to apply its own law in a case unless the defendant has sufficient minimum contacts to provide "specific personal jurisdiction"—that is, jurisdiction based upon contacts relating to the claim. The argument is particularly strong when the state involved is a sovereign nation and the question is whether the nation, and not a state of the United States, ought to apply its law. Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872 (1980); von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

limitations apply whether or not the defendant is a foreign sovereign, this question becomes more important when it is stated another way: will the jurisdictional reach of the antitrust laws be any less when the defendant is a foreign sovereign than when it is a private party?

Both the logic and the legislative history of the FSIA suggest a negative answer. First of all, the FSIA's third test, which would grant jurisdiction over "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere [when] that act causes a direct effect in the United States,"¹¹⁰ appears less rigorous than the tests applied to determine the effect on foreign commerce in antitrust litigation.¹¹¹ Actions having a sufficient effect on American foreign commerce to create antitrust liability would also meet at least this third FSIA effects test, if not one of the other two FSIA tests.¹¹²

In addition, the legislative history of the FSIA states that the statutory requirements of "substantial contacts" or "direct effect" in the statute are not "intended to alter the application of the Sherman Antitrust Act . . . to any defendant."¹¹³ The legislative history then concludes that two holdings that gave the Sherman Act broad extraterritorial jurisdiction would come out the same way even if the defendant were the agency of a foreign government and jurisdiction were found under the FSIA.¹¹⁴

The case cited in the FSIA legislative history that gives the Sherman Act the broadest extraterritorial jurisdiction is *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*¹¹⁵ The case involved allegations of a concerted boycott and predatory pricing on a shipping route between Taiwan and South Vietnam. The

¹¹⁰ 28 U.S.C. § 1605(a)(2)[3] (1976), set forth in note 13 *supra*.

¹¹¹ See text accompanying notes 79-99 *supra*.

¹¹² These two tests are set forth in note 13 *supra*.

¹¹³ S. REP., *supra* note 35, at 19.

¹¹⁴ *Id.* The two cases cited are *United States v. Pacific & Arctic Co.*, 228 U.S. 87 (1913) and *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969). In *United States v. Pacific & Arctic Co.*, the Supreme Court held that the Sherman Act prohibited a rate-fixing agreement between American railroads and shipping companies operating on routes both within and without United States ports. The Sherman Act's reach extended even to routes that involved no stops in United States territory.

¹¹⁵ 404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969).

route contained no American ports. Although the cargoes were foreign owned, the United States government financed their carriage. The parties were American corporations, and the ships involved carried American flags. Originally the plaintiffs had filed their claims before the Federal Maritime Commission under the Shipping Act,¹¹⁶ but the Commission dismissed the claim for lack of jurisdiction. The district court also dismissed a subsequent antitrust action for want of jurisdiction.¹¹⁷

Pacific Seafarers is a complex case that can be made to stand for either a little or a great deal. Stated in the broadest possible terms, the case holds that commerce between two foreign points becomes foreign commerce of the United States, thus creating antitrust jurisdiction, simply because Americans are engaged in it.¹¹⁸

However, the case probably does not go that far. The Agency for International Development (AID) subsidized the business of both plaintiff and defendants in which the alleged restraints occurred. Under the subsidy program, AID either loaned or granted money to South Vietnam. That country in turn loaned the money to South Vietnamese merchants who used it to buy and import staple commodities from abroad. Under the requirements of the Cargo Preference Law¹¹⁹ under which AID operates, fifty percent of the imported cargoes that had been financed in this way had to be transported by privately owned commercial vessels bearing United States flags. The *Pacific Seafarers* court held that this statutory financing scheme "created" the line of commerce involved in the case, particularly since AID financed not only the purchase of the cargoes but also the shipping costs.¹²⁰ In short, the court defined the market as "the transportation of AID-financed cargoes" and concluded that this market had "a definite nexus with significant interests of the

¹¹⁶ 46 U.S.C. §§ 801-42 (1976 & Supp. III 1979). The Act reaches common carriers "engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country." *Id.* § 801.

¹¹⁷ *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804, 808 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969).

¹¹⁸ *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804, 811 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969).

¹¹⁹ 46 U.S.C. § 1241(b) (1976).

¹²⁰ *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804, 808 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969).

United States"¹²¹

According to its legislative history, the FSIA would create jurisdiction in a case like *Pacific Seafarers* even over a foreign sovereign defendant who could be reached only under the direct effect test of section 1605(a)(2)[3].¹²² The legislative history's assertion that Congress did not intend the direct effect test "to alter the application of the Sherman Antitrust Act . . . to any defendant,"¹²³ together with the citation to *Pacific Seafarers*, suggests that Congress regarded *Pacific Seafarers* as the current outer limit of the Sherman Act's extraterritorial reach.¹²⁴ If that is true, then a plaintiff bringing an antitrust action under the FSIA need not worry about the direct effects test stated in section 1605(a)(2)[3]. The plaintiff merely must determine that sufficient effect on American foreign commerce exists to create subject matter jurisdiction under the antitrust laws. One of the three FSIA tests would be automatically satisfied as well.

The words of the FSIA suggest one alternative: that the three effects tests stated in section 1605(a)(2) are equivalent to the effects test necessary to obtain subject matter jurisdiction under the Sherman Act when the plaintiff brings the case under the FSIA. That is, when an antitrust plaintiff brings the case under the FSIA, subject matter jurisdiction will exist as to any matter that satisfies one of the FSIA's three effects tests. This will be so regardless of whether subject matter jurisdiction would exist under the antitrust laws standing alone.

Congress probably has the constitutional power to enact a statute that would reach this far. Most of the operative limits on the extraterritorial reach of the antitrust laws do not derive from a lack of congressional power to reach a certain activity under the foreign commerce clause. The limits arise instead because in passing the antitrust laws, Congress did not intend to reach every conceivable effect on commerce over which the commerce clause gives it power.¹²⁵ The direct effect test in the FSIA

¹²¹ *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804, 816 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969). The court stated that "the trade [involved here] is entirely a product of the United States policy of subsidizing its merchant marine." 404 F.2d at 816.

¹²² S. REP., *supra* note 35, at 19.

¹²³ *Id.*

¹²⁴ See I P. AREEDA & D. TURNER, *supra* note 40, at § 236f.

¹²⁵ See Judge Hand's discussion in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), discussed at text accompanying notes 85-

may simply expand antitrust jurisdiction under the FSIA to the full constitutional limit of congressional power to control American foreign commerce.¹²⁶

However, this interpretation creates one enormous difficulty. It would mandate a broader jurisdictional scope for American antitrust laws when the defendant is a foreign sovereign over whom jurisdiction is obtained under the FSIA than the antitrust laws currently provide when the defendant is a private entity. Although the legislative history nowhere raises the issue, it seems clear that Congress would *not* have intended to subject a foreign sovereign to antitrust liability under circumstances in which the antitrust laws would not reach a private entity.

This leaves one issue. Are there any occasions when the anti-trust affecting commerce test would provide subject matter jurisdiction and *International Shoe's* minimum contacts test would supply personal jurisdiction, but jurisdiction under the FSIA would fail because the FSIA imposes a narrower long-arm test than the *International Shoe* due process doctrine would require?

To date, in only one set of facts would it seem that the FSIA long-arm test is narrower than the *International Shoe* test. That is the situation where a defendant is so substantially present within the forum state that *International Shoe* would permit personal jurisdiction over the defendant, even though the cause of action was totally unrelated to the local activity that established the required minimum contacts.¹²⁷ In this situation, the affecting commerce test of the antitrust statutes would generally preclude jurisdiction without additional inquiry into the language or intent of the FSIA. The affecting commerce test for extraterritorial antitrust subject matter jurisdiction requires that the defendant's activities which affect commerce be related to the activity that gives rise to the cause of action. The commerce clause of the United States Constitution mandates that the antitrust laws confer jurisdiction over activities abroad only when those activities affect commerce. A court acting under the antitrust laws cannot take jurisdiction over an act abroad that

90 *supra*; I P. AREEDA & D. TURNER, *supra* note 40, at §§ 234a-37.

¹²⁶ See text accompanying notes 69-99 *supra*.

¹²⁷ See text accompanying notes 37-67 *supra*. See also *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); *Navarro v. Sedco., Inc.*, 449 F. Supp. 1355 (S.D. Tex. 1978).

has absolutely no effect on American foreign commerce simply because some other, unrelated aspect of the defendant's business involves commerce.¹²⁸

It would therefore appear that if a foreign antitrust defendant has sufficient minimum contacts with the forum to render personal jurisdiction constitutional under the *International Shoe* doctrine, and if the alleged antitrust violation affects American foreign commerce sufficiently to make extraterritorial application of the American antitrust laws proper, then the requirements of one of the FSIA's three effects tests will have been met as well. However, a plaintiff who gains jurisdiction over a foreign defendant under the antitrust law or the FSIA must surmount another hurdle. The activity involved must be "commercial" and not "governmental" in nature.

IV. "COMMERCIAL ACTIVITY"—THE "NATURE OF THE ACT" TEST

The FSIA codifies the restrictive theory of sovereign immunity, which provides for liability of foreign nations for "commercial" but not "governmental" activities.¹²⁹ In addition, the FSIA provides that the determination of an activity's commercial status shall be made by examining the *nature* of the activity rather than its *purpose*.¹³⁰

Whether a particular activity is commercial or proprietary on one hand, or governmental on the other, is a question that has long plagued the law.¹³¹ The United States has followed the

¹²⁸ See Judge Hand's discussion in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), discussed at text accompanying notes 85-90 *supra*. See also *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 121 (1942); *United States v. Mountain States Lumber Dealers Ass'n*, 40 F. Supp. 460, 463 (D. Colo. 1941); I P. AREEDA & D. TURNER, *supra* note 40, at § 237; RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 415 (Tent. Draft No. 2 1981), quoted at note 92 *supra*; Rahl, *Foreign Commerce Jurisdiction of the American Antitrust Laws*, 43 ANTITRUST L.J. 521 (1974).

¹²⁹ 28 U.S.C. § 1605(a)(2) (1976); S. REP., *supra* note 35, at 9.

¹³⁰ 28 U.S.C. § 1603(d) (1976) provides: "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."

¹³¹ See T. GUITTARI, *THE AMERICAN LAW OF SOVEREIGN IMMUNITY* (1970); Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United*

commercial activity exception to foreign sovereign immunity since the publication of the Tate Letter in 1952.¹³² On the other hand, whether the determination of an activity's commercial status should be made on the basis of its purpose or its nature has been a controversial question.¹³³ The 'nature of the act' test clearly became part of the American law of foreign sovereign immunity only with the passage of the FSIA.¹³⁴ The legislative history of the FSIA would allow courts "a great deal of latitude in determining what is a 'commercial activity.'"¹³⁵ Nevertheless, the legislative history itself provides considerable guidance for determining an activity's nature. For example, an activity that is customarily carried on for profit is probably commercial in nature.¹³⁶ More importantly, use of goods or services procured through a contract for a public purpose does not negate the activity's commercial status. Rather, an activity's "essentially commercial nature" is the critical factor.¹³⁷ The legislative history thus concludes that a contract to purchase equipment for a country's army or to build a government building is commercial even though the contract will ultimately further a public function.¹³⁸ The legislative history also classifies "carrying on of a

States Law, 44 N.Y.U. L. REV. 901 (1969).

¹³² Letter from Jack B. Tate, Acting Legal Advisor of the Dep't of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), reprinted in 26 DEP'T ST. BULL. 984 (1952). Prior to enactment of the FSIA, defendant foreign sovereigns could petition the State Department to rule that their conduct was immune from prosecution. The Tate Letter adopted the restrictive theory to afford immunity for only public, as opposed to commercial, conduct. See generally von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 39-43 (1978).

¹³³ See, e.g., *Victory Transport, Inc. v. Comisaria General*, 336 F.2d 354 (2d Cir. 1964) (Spanish government's chartering of an American ship to transport wheat held commercial); *Kingdom of Romania v. Guaranty Trust Co.*, 250 F. 341 (2d Cir.), cert. denied, 246 U.S. 663 (1918) (Romanian government's contract to purchase shoes for its army from American company held not commercial); *In re Investigation of World Arrangements*, 13 F.R.D. 280 (D.D.C. 1952) (British owned corporation's arrangements for supply of oil to British navy and air force held not commercial); *Et Ve Balik Kurumu v. B.N.S. Int'l Sales Corp.*, 25 Misc. 2d 299, 204 N.Y.S.2d 971 (1960) (Turkish government agency's contract to purchase meat for the army and resale to public held commercial).

¹³⁴ See *Kahale & Vega*, *supra* note 14.

¹³⁵ S. REP., *supra* note 35, at 16.

¹³⁶ *Id.* at 15.

¹³⁷ *Id.*

¹³⁸ *Id.* at 16.

commercial enterprise such as a mineral extraction company, an airline or a state trading corporation" as commercial activities for the purpose of the statute.¹³⁹

Despite the legislative history's guidance, courts still have difficulty deciding whether a particular activity is commercial because a literal reading of the statute cuts very broadly.¹⁴⁰ A case in point is *International Association of Machinists v. Organization of Petroleum Exporting Countries*.¹⁴¹

The *IAM* case presented a sensitive problem. The plaintiffs sought to enjoin OPEC from reducing the production and raising the price of crude oil on the world market. The plaintiffs, who were individual consumers, based their claim solely on injury to their "business or property" under section 4 of the Clayton Act.¹⁴² The alleged injury arose because they had to pay higher prices for gasoline at the retail pump. The plaintiffs' theory would have allowed a solitary American who was forced to pay more for gasoline because of OPEC's concerted production restrictions to use the American antitrust laws to force OPEC to modify its behavior. Further, the legislative history of the FSIA appeared to support the plaintiffs' case.

The district court found three reasons for dismissing the claim. First, it held that the FSIA did not grant jurisdiction over the defendants because OPEC's activities were governmental and not commercial.¹⁴³ At that point the court could have dismissed the complaint for failure of jurisdiction. However, perhaps because its first ruling was controversial, it went on to hold that under the doctrine of *Parker v. Brown*¹⁴⁴ a foreign sovereign

¹³⁹ *Id.* at 15.

¹⁴⁰ See generally Note, "Commercial Activity" in the Foreign Sovereign Immunities Act of 1976, 14 J. OF INT'L L. & ECON. 163 (1979). Some foreign scholars believe that the FSIA's definition of commercial activities is much too broad when the Act is used in antitrust cases. See Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad*, 11 CORNELL INT'L L.J. 195 (1978).

¹⁴¹ 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, — U.S. —, 102 S. Ct. 1036 (1982).

¹⁴² 15 U.S.C. § 15 (1976). See also *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). See note 17 and accompanying text *supra*.

¹⁴³ *International Ass'n of Machinists v. Organization of Petroleum Exporting Countries*, 477 F. Supp. 553, 566-69 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, — U.S. —, 102 S. Ct. 1036 (1982).

¹⁴⁴ 317 U.S. 341 (1943).

is not a person who can be sued under the antitrust laws.¹⁴⁵ Finally, the court held that the plaintiffs had not established proximate cause because they had not shown that OPEC's actions had been a substantial factor in the rise of American gasoline prices.¹⁴⁶

The district court's dilemma is easy to understand. The FSIA was not designed to allow American consumers to intrude this deeply into the natural resources policy of other nations. Every nation, including the United States, has conservation policies that limit the production or export of certain natural resources and thus effectively raise prices.¹⁴⁷ The district court's solution, however, is controversial. Commentators have criticized the holding that the OPEC agreement was governmental. They assert that it flies in the face of the statutory requirement that activities be evaluated with reference to nature and not their purpose, and that profit-making activities generally fall within the commercial activities definition regardless of their purpose.¹⁴⁸

To be sure, the district court could appropriately have used a "purpose" rather than a "nature" of the act test in determining

¹⁴⁵ *International Ass'n of Machinists v. Organization of Petroleum Exporting Countries*, 477 F. Supp. 553, 570-72 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, — U.S. —, 102 S. Ct. 1036 (1982).

¹⁴⁶ *International Ass'n of Machinists v. Organization of Petroleum Exporting Countries*, 477 F. Supp. 553, 572-74 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, — U.S. —, 102 S. Ct. 1036 (1982). In affirming the district court, the Ninth Circuit failed to pass on any of the three reasons given below for dismissing the complaint. It instead found that the Act of State doctrine precluded suit. See text accompanying note 150 *infra*.

¹⁴⁷ For example, 42 U.S.C. § 6212 (1976), authorizes the President to restrict American exports of coal, oil, and natural gas. See also 15 C.F.R. §§ 377.1 to .5 (1980) for information regarding the establishment of export quotas.

¹⁴⁸ See, e.g., Note, *Restrictive Immunity and the OPEC Cartel: A Critical Examination of the Foreign Sovereign Immunities Act and International Association of Machinists v. Organization of Petroleum Exporting Countries*, 8 HOFSTRA L. REV. 771 (1980); Note, *IAM v. OPEC: The Demise of the Restrictive Theory of Sovereign Immunity and of the Extraterritorial Effect of the Sherman Act Against Foreign Sovereigns*, 41 U. PITT. L. REV. 841 (1980). But see Kestenbaum, *The Antitrust Challenge to the Arab Boycott: Per Se Theory, Middle East Politics and United States v. Bechtel Corp.*, 54 TEX. L. REV. 1411 (1976) (written before passage of the FSIA and before the decision in *International Ass'n of Machinists v. Organization of Petroleum Exporting Countries*, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, — U.S. —, 102 S. Ct. 1036 (1982)).

Sherman Act jurisdiction over OPEC. However, that test should not have come from the FSIA but from the general jurisdictional limitations on the Sherman Act itself. As noted in *Timberlane*, one of the important factors to be considered in determining Sherman Act jurisdiction is whether the interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority.¹⁴⁹

The district court could easily have concluded that the OPEC nations have an interest in the preservation of their own natural resources and in the integrity of their own relatively undiversified economies that would justify output restrictions despite any adverse effects that the restrictions might have on American consumers. In other words, the FSIA concededly provides a nature of the act test for the commercial activities exception to foreign sovereign immunity. However, American antitrust law determines whether its scope includes activity like OPEC's through use of a much more stringent test that contemplates governmental purpose and comity.

The issue in *IAM* was one of *antitrust policy* and congressional intent regarding the extraterritorial reach of the Sherman Act. It was *not* properly an issue of jurisdiction under the FSIA. The district court could quite reasonably have concluded that although it *had* jurisdiction under the FSIA, Congress never intended for the Sherman Act itself to be enforced against OPEC in this way. This interpretation would have done less violence to the FSIA while clarifying an important element of American antitrust policy.¹⁵⁰

¹⁴⁹ *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 613 (9th Cir. 1976). See text accompanying notes 97-98 *supra*.

¹⁵⁰ One should be wary of the view that the "purpose of the act" test is properly a part of the Act of State doctrine. See Comment, *Defenses to Actions Against Foreign States Under the United States Antitrust Laws*, 20 HARV. INT'L L.J. 583, 640 (1979). The authors argue that in adjudicating claims under the FSIA, courts should assess whether a particular activity is commercial for FSIA purposes by looking at the *nature* of the activity, but should determine whether the activity is commercial for Act of State purposes by looking at the *purpose* of the activity. This approach contradicts the FSIA's legislative history, which urges that courts not use the Act of State doctrine when considering cases covered by the FSIA. See S. REP., *supra* note 35, at 19 n.1, which argues that the Act of State doctrine "would not apply to cases covered by" the FSIA. The authors of the legislative history reach this conclu-

Significantly, the Sherman Act contains a rather important exception for the noncommercial activities of private domestic defendants. For example, in *Missouri v. National Organization for Women*¹⁵¹ the Eighth Circuit held that the noncommercial boycott organized by NOW to pressure states to ratify the Equal Rights Amendment did not violate the Sherman Act. Extending the Act to cover noncommercial boycotts was "beyond the scope and intent" of the antitrust laws.¹⁵²

Whether a court should judge the noncommercial status of an activity by its "nature" or its "purpose" generally has not been an issue in domestic noncommercial boycott cases. However, courts have often looked at "purpose" criteria in deciding cases in this area. The district court in the *NOW* case had decided that the boycott was "noncommercial in that its participants are not business interests and its purpose is not increased profits"¹⁵³ The Eighth Circuit felt that both the legislative history of the Sherman Act and earlier Supreme Court decisions indicated that Congress intended the antitrust laws to apply to "business combinations with commercial objectives."¹⁵⁴ In fact,

sion because the Act of State doctrine should not apply to commercial activities and because the FSIA applies *only* to commercial activities. In short, the legislative history urges that the Act of State doctrine and the FSIA apply in mutually exclusive sets of cases. Any other interpretation, the legislative history urges, would permit "sovereign immunity to reenter through the back door, under the guise of the Act of State doctrine." S. REP., *supra* note 35, at 19 n.1 (quoting *Dunhill v. Republic of Cuba*, 425 U.S. 682 (1976); Amicus Brief of the United States at 41). However, the purpose behind the acts of a sovereign state still plays an important part in determining antitrust liability. *Parker v. Brown*, 317 U.S. 341 (1943). By treating this question as one of antitrust policy and not Act of State doctrine, courts will be able to apply meaningful limits to the reach of the American antitrust laws without creating a gaping hole in the FSIA that its framers did not intend. See *International Ass'n of Machinists v. Organization of Petroleum Exporting Countries*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, — U.S. —, 102 S. Ct. 1036 (1982).

¹⁵¹ 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980). The district court opinion is reported at 467 F. Supp. 289 (W.D. Mo. 1979). See Note, *NOW or Never: Is There Antitrust Liability for Noncommercial Boycotts?*, 80 COLUM. L. REV. 1317 (1980).

¹⁵² *Missouri v. National Org. for Women*, 620 F.2d 1301, 1312 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980).

¹⁵³ *Missouri v. National Org. for Women*, 467 F. Supp. 289, 296 (W.D. Mo. 1979), *aff'd*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980).

¹⁵⁴ *Missouri v. National Org. for Women*, 620 F.2d 1301, 1311 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980).

throughout the opinion the court predicated its finding of nonliability on the motivations behind, and not the nature of, NOW's activities.

To be sure, the noncommercial boycott cases are not a perfect analogy to cases like *IAM*. For example, the domestic cases raise first amendment issues that are not relevant when the defendant is a foreign sovereign.¹⁵⁵ However, one principle seems common to both kinds of cases: the antitrust laws were not designed to intrude too deeply into the American political process—and presumably they were not designed to intrude into the political process of other nations either.¹⁵⁶

CONCLUSION

Jurisdictional questions raised in extraterritorial antitrust cases are already complex and confusing. The fact that the defendant is a foreign sovereign or its agent, and that jurisdiction is obtained under the FSIA, need not be an additional complicating factor. Although the logic of the FSIA might suggest that a court should first address jurisdictional questions under that statute, it would make more sense in most litigation involving antitrust claims against foreign sovereigns to deal first with two jurisdictional questions that apply in all extraterritorial antitrust cases. First, does the court have personal jurisdiction over the defendant under the due process clause and *International Shoe Co. v. Washington*? Second, does the court have subject matter jurisdiction over the cause of action under the antitrust laws themselves? If the court answers these two questions affirmatively, the jurisdictional tests of the FSIA probably have been met as well.

Finally, proper judicial analysis of antitrust claims against foreign sovereigns should distinguish the essentially adjudicative goals of the FSIA from the essentially economic and regulatory goals of American antitrust laws. Nothing in the FSIA or its legislative history suggests that Congress designed it to rewrite American antitrust policy or to abrogate the long-standing and

¹⁵⁵ *Missouri v. National Org. for Women*, 620 F.2d 1301, 1311-16 (8th Cir.), cert. denied, 449 U.S. 842 (1980). However, the court held that the Sherman Act was not designed to apply to the noncommercial boycott at issue, quite apart from the first amendment claims. 620 F.2d at 1319.

¹⁵⁶ *But see* Kestenbaum, *supra* note 148.

carefully developed limits on assertions of extraterritorial jurisdiction in antitrust.