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Extraterritorial Antitrust Enforcement: The American Banana Case a Half Century Later

COMMENTS

EXTRATERRITORIAL ANTITRUST ENFORCEMENT: THE AMERICAN BANANA CASE A HALF CENTURY LATER

America's antitrust policy was first given statutory definition in the Sherman Act. That act was aimed at restraints of trade "among the several states" and also "with foreign nations." Initially it was open for the courts to determine whether the words "with foreign nations" meant that our courts may take jurisdiction over acts performed abroad, the effects of which may be to restrain United States commerce, or whether these words were merely intended to extend the act's coverage to domestic activities in restraint of this country's import or export trade. Complicating this question is the fact that no foreign industrial nation has an exact counterpart to the Sherman Act, so that it must be considered whether United States courts may take jurisdiction of acts performed on foreign soil, even though those acts are legal where performed. Even if the answer to this question is in the affirmative, that is, if the ultimate test is to be the effects on United States commerce regardless of the location of the individual act involved, there yet remains the question of what action our courts may take to restrain the illegal activity engaged in outside the limits of their jurisdiction.

Location of the Accused Activity

Whether an American statute is to be construed as applying to acts committed abroad is not a question of congressional power but rather one of congressional intent.[1] Normally, where a law does not immediately affect national interest it is construed to apply within the jurisdiction only, unless Congress has specifically provided otherwise.[2] The question, then, is what powers did Congress intend to confer on our courts for the enforcement of antitrust laws.

At first the Supreme Court refused to construe the Sherman Act as applying to activity engaged in outside of the United States. In *American Banana Co. v. United Fruit Co.*[3] the defendant, as part of a larger plan to monopolize the tropical fruit market, induced the Puerto Rican Government to seize a plantation and a railroad owned by its competitor, the plaintiff, who brought suit under the Sherman Act. In affirming the lower court's holding that no cause of action would lie, the Supreme Court wrote: "In the first place the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress."[4] Thus the Supreme Court

1. Blackmer v. United States, 284 U.S. 421 (1932). See U.S. Const. art. 1, § 8. "It is . . . unquestioned that a sovereignty has the right, subject to certain restrictions, to protect itself from and to punish as crimes certain acts which are peculiarly injurious to its rights or interests or those of its citizens wherever committed, at least if committed by a citizen or subject of such sovereignty." 15 C.J.S., Conflict of Laws § 6 (1939).

2. Blackmer v. United States, supra note 1; American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

3. 213 U.S. 347, 355 (1909).

4. Ibid.

took pains[5] to announce the rule that where the acts in restraint of trade were committed within a foreign jurisdiction, they would not fall under the prohibitions of the Sherman Act.

As American corporations became more involved in international business, however, the courts found this rule too confining. Therefore, later cases, seizing upon the fact that in the *American Banana* case all of the accused acts had been performed outside the United States, took jurisdiction even though the acts were performed partly,[6] or even principally, within another jurisdiction so long as some acts in furtherance of the conspiracy were performed within the United States.

In *United States v. Sisal Sales Corp.*,[7] for example, a conspiracy had been entered into in the United States to control the import and sale of sisal from Mexico, and to monopolize internal and external commerce in that commodity. A group of American banks had combined to organize an American company, which in turn had established Mexican sales agents. Aided by discriminatory legislation in Mexico this combination was able to force other buyers out of the sisal market. Though almost all of the acts in furtherance of the conspiracy were performed in Mexico, the court distinguished the *American Banana* case on the grounds that here the conspiracy was "made effective" by acts done within the United States. Actually these decisions were tacitly recognizing that "effects on United States commerce" were the controlling factor, but they continued to pay lip service to the rule requiring some activity within the United States in furtherance of the conspiracy.[8] While this rule has never been expressly overruled, it has become meaningless in light of the complex activities of today's corporations. Now, even where the accused activity is entirely outside the territorial jurisdiction of the United States, our courts will take jurisdiction if they find that is effect is to restrain our commerce.[9]

With regard to the place where the conspiracy was entered into, there has never been much conflict. It has been consistently held that where a conspiracy affects United States commerce, jurisdiction will not be denied because the idea was first formulated in another country.[10]

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5. The case did not have to be decided on this ground. See the district court and court of appeals opinions: 160 Fed. 184 (S.D.N.Y. 1908), 166 Fed. 261 (2d Cir. 1908).

6. United States v. Pacific & Arctic Ry., 228 U.S. 87 (1913).

7. 274 U.S. 268 (1927).

8. Ibid.; Bulova Watch Co. v. Steele, 194 F.2d 567 (5th Cir.), aff'd, 344 U.S. 280 (1952).

9. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945); Branch v. FTC, 141 F.2d 31 (7th Cir. 1944); cf. Strassheim v. Daily, 221 U.S. 280, 285 (1911), where the Court wrote: "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." In the American Banana case the Court found that it was conjectural what effects, if any, were felt within the United States. Therefore, the case can be reconciled on its facts with the later cases. In its underlying rationale, however, it is entirely contra.

10. United States v. American Tobacco Co., 221 U.S. 106 (1911); Thomsen v. Cayser, 243 U.S. 66 (1917).

Thus far, we have considered the situation where the court will take jurisdiction over the foreign conduct of a domestic corporation. Where the defendant is not a United States citizen but a citizen of a foreign country, the same tests are applied. It was early held that our courts may control his activities abroad whenever the courts can acquire personal jurisdiction over him.[11] In *United States v. Aluminum Co. of America*[12] it was held that such activities of a foreign national may be enjoined by our courts where they are intended to and do restrain our commerce.

Legality Under Foreign Law

The basic policy underlying American antitrust law is that the interests of the public are best safeguarded in a competitive economy. The public policy of most other industrial nations, however, is not in accord.[13] Indeed, the environment in many European countries is quite favorable to the development of monopolies and especially to those large combinations popularly known as cartels.[14] Where an American company becomes involved in an international cartel designed to divide world markets among its members, a conflict between the United States policy and that of other nations may well arise.[15] Normally, agreements by the foreign members of the cartel are not in violation of the laws of their own country and such agreements, entered into on foreign soil, may well be valid where made. But where the effect of the agreement is to restrain the import or export trade of this country then it contravenes the provisions of the Sherman Act.[16] What action our courts may take to enforce the public policy of this country while at the same time not interfering with the right of the other nations to formulate their own policy in respect to commerce, is a problem that has perplexed American jurists since the Sherman Act was first enacted.

In the *American Banana* case the Supreme Court wrote: "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."[17] The act complained of, though procured by defendant, had been performed by a foreign sovereign on land over which it had *de facto* jurisdiction. Though the above quotation has often been cited to establish that our courts will not take jurisdiction over foreign acts if they are legal where performed, the case more

11. United States v. Pacific & Arctic Ry., 228 U.S. 87 (1913).

12. 148 F.2d 416 (2d Cir. 1945).

13. See Note, Extraterritorial Antitrust Problems, 69 Harv. L. Rev. 1452 (1956).

14. See Kronstein & Leighton, Cartel Control, 55 Yale L.J. 297 (1946); Timberg, International Combines and National Sovereigns, 59 U. Pa. L. Rev. 575 (1947).

15. Haight, International Law and Extraterritorial Application of the Antitrust Laws, 63 Yale L.J. 639 (1954); Whitney, Sources of Conflict Between International Law and the Antitrust Laws, 63 Yale L.J. 655 (1954).

16. United States v. Timken Roller Bearing Co., 83 F. Supp. 284 (N.D. Ohio 1949), modified on appeal, 341 U.S. 593 (1951); United States v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945), aff'd, 332 U.S. 319 (1947).

17. 213 U.S. 347, 359 (1909).

properly stands for the proposition that our courts, in enforcing the antitrust laws, cannot interfere with the acts of a foreign sovereign.[18]

In *United States v. Sisal Sales Corp.*[19] the acts performed in Mexico were aided by discriminatory laws on the part of the Mexican Government. In reversing dismissal of the complaint, the Supreme Court distinguished the *American Banana* case in these words: "The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties. True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States."[20]

Although our courts may take jurisdiction even when the acts abroad are legal where performed, a problem may arise where the decree interferes with the rights of foreign nationals who are not before the court. It is here that conflicts with the laws of other nations may arise. The foreign courts cannot be expected to grant comity to an American decree which violates the rights of their citizens by attempting to enforce a policy not in accord with their own.[21] The possibility that the decree will not be recognized by a foreign court is a practical one to be considered when the decree is framed, but does not constitute a bar to the court's jurisdiction.

Degree of Restraint Involved

When determining the legality of international cartels, the courts generally apply the same tests as are used in regard to domestic combinations.[22] Whenever two or more companies combine and agree not to compete in each other's territories, the result, at least as between themselves, must be a restraint of trade. When an American company is a party to such an agreement, the effect is to curtail some portion of America's export trade. Of course if the company occupies a dominant position in the American market, then most or all of America's export trade in that line of commerce may well be stifled. Such a restraint would necessarily be unreasonable.[23] Often, the territorial agreements are accompanied by so-called "patents and processes agreements" whereby the parties agree to exchange, on an exclusive basis, all inventions, improvements and discoveries which the members then hold or may obtain, along with what-

18. See Restatement, Conflict of Laws § 44 (1934).

19. 274 U.S. 268 (1927).

20. Id. at 276; cf. Bulova Watch Co. v. Steele, 194 F.2d 567 (5th Cir.), aff'd, 334 U.S. 280 (1952); Ramirez & Ferand Chili Co. v. Las Palmas Food Co., 146 F. Supp. 594 (S.D. Cal. 1956).

21. See British Nylon Spinners Ltd. v. Imperial Chemical Industries Ltd. [1955] 1 Ch. 37 (1954).

22. But see Justice Frankfurter's dissenting opinion in United States v. Timken Roller Bearing Co., 341 U.S. 593 (1951).

23. "No citation of authority is any longer necessary to support the proposition that a combination of competitors, which by agreement divides the world into exclusive trade areas, and suppresses all competition among the members of the combination, offends the Sherman Act." United States v. National Lead Co., 63 F. Supp. 513, 523 (S.D.N.Y. 1945).

ever technical information is needed to utilize them.[24] The parties to such an agreement are put into so strong a competitive position that they will probably have the power to exclude any potential competitors from their territory. On the other hand where a company holds less than a dominant share of the market, it could be argued that, rather than creating an unreasonable restraint on competition, such agreements give an American company access to foreign inventions and discoveries which will benefit the American consumer. Nevertheless, since our antitrust laws are founded on the premise that the consumer is benefited most by free competition, division of territories agreements may well be unreasonable per se.[25] And where they are accompanied by a patents and processes agreement the threat of growing monopoly which they present would almost certainly put them in contravention of our antitrust policy.[26]

Often, however, the defendant contends that due to high tariffs and trade barriers it would be impossible for him to compete in the foreign markets in any event.[27] If this contention is proven to be true, then, of course defendant cannot have restrained America's foreign commerce because there would be no foreign commerce to restrain.[28] If, on the other hand, it is not impossible, but only difficult for defendant to compete, then our courts will not read exceptions into the Sherman Act.[29]

The Decree

At the heart of effective antitrust enforcement is the framing of a decree which will prevent future violations. Here too, the complexities of large international combinations have forced the courts to abandon confining rules in favor of practical effects. The combinations involved in the early cases were comparatively simple and the courts were able to enjoin a single line of activity. An international cartel on the other hand, normally involves varied activities within several countries, covering many years. In framing its decree, the court must consider each contract, agreement and operation. The effect of each on the over-all scheme must be weighed and then the court must decide how best to deal with it. Normally the defendant is enjoined either from complying with or from enforcing the territorial agreements.[30] Exclusive license agreements which were found to be in furtherance of the illegal conspiracy have been cancelled or enjoined and the defendant ordered to license on a non-exclusive basis.[31] American courts have undertaken to cancel contracts

24. United States v. Imperial Chemical Industries, Ltd., 100 F. Supp. 504 (S.D.N.Y. 1951); United States v. Timken Roller Bearing Co., 83 F. Supp. 284 (N.D. Ohio 1949).

25. See Addyston Pipe and Steel Co. v. United States, 175 U.S. 211 (1899); Att'y Gen. Rep. to Study the Antitrust Laws 26 (1955).

26. United States v. Holophane Co., 119 F. Supp. 114 (S.D. Ohio 1954).

27. See, e.g., the argument before the Court in Holophane Co. v. United States, 25 U.S.L. Week 3141 (Nov. 13, 1956).

28. United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947, 958 (D. Mass. 1950).

29. United States v. National Lead Co., 63 F. Supp. 513, 524 (S.D.N.Y. 1945).

30. United States v. Imperial Chemical Industries, Ltd., 105 F Supp. 215 (S.D.N.Y. 1952).

31. Ibid.

between an American defendant and a foreign citizen not before the court.[32] And on occasion dissolution of a foreign subsidiary has been ordered.[33]

But the operation of the American decree may well be thwarted by the failure of foreign courts to give it recognition. In *United States v. Imperial Chemical Industries, Ltd.*[34] the defendant was sued abroad to prevent compliance with the American decree. The district court had enjoined the Imperial company, a British concern over whom it had personal jurisdiction, from asserting its patent to prevent the importation of nylon polymer and nylon yarn into Great Britain and further ordered it to grant licenses on a non-exclusive basis only. An exclusive licensing contract between the Imperial company and the Nylon Spinners company, an English concern not personally before the court, had been entered into in England and involved an English patent. Therefore, when the Nylon Spinners company sued the Imperial company in England for anticipatory breach of this contract, the English court refused to grant comity to the United States decree on the ground that it represented an attempt by an American court to exert an extraterritorial jurisdiction which it did not have over a contract governed by English law.[35] The British court enjoined the Imperial company from complying with the American decree and also granted specific performance of the contract.[36]

This case illustrates a practical limitation of the in personam power of a court of equity. A saving clause in the American decree prevented defendant from being further prosecuted for a failure beyond his control, to comply with the decree. Therefore, defendant had not been seriously injured. If he had been put to some expense in defending the action in England, that would be one of the penalties to be borne by one who violates the antitrust law. On the other hand, it is always possible that no suit will be brought abroad or that if it is brought the foreign court will recognize our decree.

The trend has been toward greater liberality in the employment of the court's equity powers. In no case have the courts gone so far as in *United States v. Holophane Co.*[37] where the district court not only enjoined defendant from complying with or enforcing the restrictive agreements but, further,

32. United States v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945).

33. Ibid. But see the concurring opinion in United States v. Timken Roller Bearing Co., 341 U.S. 593 (1951).

34. 100 F. Supp. 504 (S.D.N.Y. 1951), decree 105 F. Supp. 215 (S.D.N.Y. 1952).

35. British Nylon Spinners Ltd. v. Imperial Chemical Industries Ltd., [1953] 1 Ch. 19 (C.A. 1952) (interlocutory decree); [1955] 1 Ch. 37 (1954) (final decree).

36. The district judge had foreseen the possibility of action by the English court. In his opinion on remedies, dated May 16, 1952, he wrote: "What credit may be given to such an injunctive provision by the courts of Great Britain . . . we do not venture to predict. We feel that the possibility that the English courts in an equity suit will not give effect to such a provision in our decree should not deter us from including it. . . . If the British courts were not to give credit to this provision, no injury would have been done; if the holding of the British courts were to the contrary, a remedy available would not have to be needlessly abandoned." United States v. Imperial Chemical Industries, Ltd., Civil No. 24-13 (S.D.N.Y.) 27.

37. 119 F. Supp. 114 (S.D. Ohio 1954).

ordered defendant to perform certain affirmative acts in the territories of the foreign members of the cartel,[38] in a reasonable effort to compete. These acts included advertising and the circularizing of defendant's products to distributors in those territories.[39] The affirmative aspects of this extraordinary decree were recently affirmed by an equally divided Supreme Court.[40]

A saving clause in the decree provided that the defendant would not be required to export any of its products "in violation of the valid patent or trade-mark or trade name rights of any person in any foreign countries." Nevertheless, defendant might well be subject to suit within England and France for violating its contracts not to compete there. Should this occur it is fair to infer that defendant, having acted reasonably would not be required to violate openly foreign court orders in complying with the American decree.[41]

CONCLUSION

Though the first case to construe the foreign commerce clause of the Sherman Act held that Congress had not intended to give it extraterritorial application, the courts soon began to accept jurisdiction over foreign activities in restraint of United States commerce, where some acts within this country had furthered the conspiracy. Today, the sole test is what effect will the questioned activity have on United States trade. Our courts have come to recognize that America's foreign commerce cannot be protected if its antitrust enforcement must stop at the border. In addition the trend has been toward greater flexibility and practicality when framing the decree, consistent with the modern view that equity may order as well as restrain.

There is no doubt that this is the direction in which this country's law has been moving. However, strong voices have been heard in dissent, among them men prominent in the American bar.[42] They decry what they proclaim to be America's attempt to use its industrial prowess in order to foist its antitrust policy on other nations. The recent antitrust decisions are, they maintain, examples of "judicial aggression." They point to the *Imperial Chemical* case and the adverse reaction to our decree in England and Canada[43] as indications that our courts have been overstepping themselves and indeed as indications that our antitrust policy is causing us to lose friends abroad.

38. For the Holophane decree see CCH Trade Reg. Rep. (1954 Trade Cas.) ¶ 67679 (S.D. Ohio Feb. 8, 1955).

39. See the argument on appeal from the Timken decision 19 U.S.L. Week 3291, where the Government contended that the effect of the order would be to require Timken to enter the foreign market and sell abroad, bearings manufactured in this country.

40. Holophane Co. v. United States, 352 U.S. 903 (1956).

41. See argument on appeal, 25 U.S.L. Week 3141 (Nov. 13, 1956).

42. Whitney, Antitrust Law and Foreign Commerce, 11 Record of the Association of the Bar of the City of New York 134 (1956); Haight, International Law and Extraterritorial Application of the Antitrust Laws, 63 Yale L.J. 639 (1954); Whitney, Sources of Conflict Between International Law and the Antitrust Laws, 63 Yale L.J. 655 (1954); N.Y. Herald Tribune, July 1, 1957, § 2, p. 3, col. 1.

43. British Nylon Spinners Ltd. v. Imperial Chemical Industries Ltd., [1953] 1 Ch. 19, 24 (C.A. 1952); Toronto Globe & Mail, Aug. 20, 1952, p. 6, col. 1.

Surely it cannot be denied that this country has no right to force foreign nations to adopt its commercial policies. Thus, cartel agreements which do not unreasonably restrain our foreign commerce are simply none of our business.

However, this country does have a right to follow its own policy in regard to commerce. It has the further right to require that domestic companies remain in a free competitive position in their dealings with foreign companies and to require that these corporations do not raise artificial barriers against this country's import and export trade. Notwithstanding the fact that foreign countries may pursue their own commercial policy, which may not agree with ours, we may require that domestic companies remain aloof from cartel agreements which restrict our commerce. Where such agreements are found, their continuance may be enjoined. Because often an effective decree cannot be framed without interfering with the rights of citizens of other countries, it is inevitable that occasionally the courts of those countries will step in and prevent the operation of one or another aspect of our decrees. Nevertheless, this is no reason why our courts should refrain from framing their decrees in the way that will best enforce our antitrust policy. Of course, some saving clause should be incorporated into the decree to insure that the defendant will not find himself in the unhappy situation of being bound by conflicting orders of the courts in two jurisdictions.

In *United States v. Imperial Chemical Industries, Ltd.*, the district court noted that the Nylon Spinners company had knowingly participated in a contract violative of our antitrust laws. Usually foreign corporations are not unaware of this country's commercial policy. If they choose deliberately to enter contracts in contravention of it, they cannot complain if our courts take action to terminate such transactions.

This nation cannot enforce two antitrust policies, one that is strict against companies involved in purely domestic combinations and one more liberal in favor of those whose entanglements reach beyond our borders. Our policy must remain constant and uniform. It follows, therefore, that America's courts must do all in their power to keep its import and export trade free from monopolistic influences just as they do all in their power to preserve interstate commerce from such influences.