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REMARKS ON SUBJECT MATTER JURISDICTION

*Michael Blechman**

In United States jurisprudence, two quite different legal concepts are both labeled jurisdiction. In personam or personal jurisdiction refers to the extent to which a court has power over a particular defendant. Subject matter jurisdiction is an entirely different concept that addresses the question of whether a particular law is intended to apply to different kinds of conduct. In the antitrust area, for example, obtaining subject matter jurisdiction depends upon whether conduct within the United States has a sufficient impact on interstate commerce or foreign conduct has a sufficient impact on United States domestic or export commerce to be within the reach of the Sherman or Clayton Acts.

In personam or personal jurisdiction is an important threshold issue that often arises in litigation which has an international dimension. The outer limits of personal jurisdiction have constitutional due process ramifications. To comport with "fair dealing and substantial justice," a defendant can be sued only in that jurisdiction where he has sufficient minimum contacts. The content of this standard is delineated in a large body of case law.

Related to the notion of personal jurisdiction, the question of venue must often be considered in litigation. What is the right court in which to sue the defendant? A number of statutes determine the circumstances under which a defendant can be sued in a particular court. In an antitrust case, section 12 of the Clayton Act, a special venue statute, allows suit to be brought in any jurisdiction where the defendant resides or is found or transacts business. For foreign defendants, only the "transacting business" test is of substantive importance because such a defendant, by definition, neither resides nor is found in a local jurisdiction. How much contact must the defendant have with a particular jurisdiction in order to be found to transact business there? In the antitrust area, the types of contact necessary to meet the "transacting

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business" test for venue purposes are the same as those needed to establish the minimum contacts required for in personam jurisdiction. Thus, in an antitrust case, if venue is established under section 12 of the Clayton Act, as a practical matter, in personam jurisdiction is established as well.

In addition to section 12 of the Clayton Act, venue over foreign persons can be established under the Alien Venue Act. This Act provides that an alien can be sued anywhere in the United States under the rationale that it is equally inconvenient for the alien to make an appearance in California, Tennessee, New York, or Maine. If venue is established under the Alien Venue Act, the requisite minimum contacts must still be shown to establish in personam jurisdiction. Several cases, however, established the so-called the "national minimum contacts" test for establishing jurisdiction over foreign defendants. Under one version of this test, if a foreign defendant has had the requisite minimum contacts with a jurisdiction anywhere in the United States, and the particular violation was aimed at persons in the forum district, personal jurisdiction is established. Whether this test is the law is a very debatable subject. Even without the "national minimum contacts" test, however, the law with respect to personal jurisdiction is quite expansive. Indeed, even if a foreign company does not have the requisite contacts with the United States, jurisdiction may nevertheless be established based on the activities of a United States subsidiary of the foreign defendant. Thus, the activities of the subsidiary may be attributed to the foreign parent if the parent exercises sufficient control over the management of the subsidiary.

Service of process is another important aspect of in personam jurisdiction. Service of process is covered in Rule 4 of the Federal Rules of Civil Procedure. Rule 4 is very expansive, and in the case of a foreign defendant allows service by certified mail as well as by other methods. Service, however, may have to be effectuated under the Hague Convention for the Service of Process Abroad. The Convention has special rules that vary from country to country depending upon the type of caveats made or conditions stipulated by a particular state when it entered into the Convention.

As previously indicated, subject matter jurisdiction concerns the question of whether conduct is covered by a particular law. Subject matter jurisdiction cannot be considered in the abstract; the particular law in question must be examined. Most of the case law on, and controversy about, subject matter jurisdiction has

taken place in the antitrust area.

Subject matter jurisdiction under the Sherman Act has long been disputed and debated. The earliest case is *American Banana Co. v. United Fruit*, a 1909 case decided by Justice Holmes. *American Banana* grew out of the activities of the United Fruit Company. Early in this century, United Fruit was a powerful force throughout Latin America and had a strong hold on the farming of bananas for import into the United States. To a large extent, United Fruit kept its monopoly by controlling, or at least influencing, Latin American countries. The American Banana Company decided that it would like to compete with United Fruit. American Banana developed a certain amount of influence in Colombia, which at that time stretched all the way up to what is now Panama. United Fruit was apparently unhappy with the encroachment by American Banana into the region. Using its influence in Costa Rica, United Fruit persuaded the Costa Rican Government to help foment an independence movement and rebellion in the area that is now Panama. Aside from the fact that it occurred outside the United States, this conduct clearly constituted an antitrust violation, probably the only antitrust violation that had, as a byproduct, the creation of a country. Because it did occur abroad, the United States Supreme Court determined that the conduct of United Fruit was not within the subject matter jurisdiction of the Sherman Act. Justice Holmes thus adopted a rule of strict territoriality, limiting the scope of the Sherman Act to conduct that takes place within the geographical limits of the United States.

American Banana has never been expressly overturned. In the decades that followed the decision, subject matter jurisdiction was found in a number of cases involving conduct inside as well as outside the United States. In 1945 the law changed with Judge Learned Hand's decision in *United States v. Alcoa*, which established a new approach to subject matter jurisdiction—the "effects doctrine." Under this mode of analysis, if conduct outside the United States has a sufficient effect inside the United States, it falls within the subject matter jurisdiction of the Sherman Act. Judge Hand realized that not all conduct outside the United States having an effect inside the United States could be made subject to the United States antitrust laws. The economies of the world are so interconnected and interdependent that, for example, even a price-fixing conspiracy in Japan directed solely at the Japanese market could have an impact in the United States. The

potentially overbroad application of the effects doctrine, therefore, was limited by the further requirement that the conduct must also be intended to have an effect in the United States. This basic rule has been adopted in subsequent decisions under various rubrics requiring that the effect on United States commerce be substantial, direct, and, if not intended, at least foreseeable.

In determining whether there is a substantial, direct, or forseeable effect on United States commerce, what is United States commerce? In part, United States commerce may be defined as United States domestic commerce. In this respect, the effects doctrine in the United States is not that different from the effects doctrine in Germany or the Common Market. Both of these foreign entities recognize that conduct which has an effect on competition in those jurisdictions may come within the subject matter jurisdiction of their antitrust laws. United States law, however, also recognizes subject matter jurisdiction when there is the requisite effect on United States exports. This aspect of the doctrine has tended to push subject matter jurisdiction to its furthest limits. For example, the *Pacific Seafarers* case involved a conspiracy by a group of United States companies that shipped goods between Taiwan and Vietnam during the Vietnam War. The conspiracy between the shippers managed to exclude the plaintiff, another United States shipper, from receiving business on this route. The court found subject matter jurisdiction under the Sherman Act because the conduct affected a United States company's export of shipping services, and, therefore, affected United States export commerce. In another case involving the monopolization of tourist facilities in the Dominican Republic, subject matter jurisdiction was found based on the impact of the defendants' activities on the export of tourists from the United States.

What are the practical consequences of the effects doctrine? Its parameters can be gleaned from the 1977 Justice Department Guide to Antitrust and International Operations. Although the doctrine may be somewhat fuzzy at the edges it is clear that certain kinds of conduct are not within the subject matter jurisdiction of the Sherman Act. For example, suppose a United States company has a licensing arrangement with a Japanese company that states: "Any products manufactured by you under your license with us may not be shipped to Germany." This restriction does not fall within the subject matter jurisdiction of the Sherman Act because it only affects commerce in Germany. (The resolution may, of course, constitute a violation of the German anti-

trust laws.) Similarly, a tie-in arrangement under which a United States seller conditions the sale of a particular product to a foreign buyer on the buyer's purchase of another product, the tie-in would be within the subject matter jurisdiction of the Sherman Act because it might exclude other United States companies. A tie-in that merely required the foreign buyer to purchase the tied product from a United States source, however, would not be within the subject matter jurisdiction of the Sherman Act because the only persons it could possibly injure would be non-United States sellers. In short, the United States antitrust laws are not concerned with protecting foreign companies with respect to their sales outside of the United States.

Another doctrine which limits the application of United States antitrust law in the international context is the so-called jurisdictional rule of reason. This concept, originally developed by Kingman Brewster, was adopted in a number of cases in the late 1970s. It addresses the problem arising when conduct taking place outside the United States has the requisite effect on United States commerce, but a foreign state has an even stronger interest in regulating the conduct than does the United States. If this situation does arise, a number of factors are to be considered. For example, is the defendant a national of the country where the conduct took place? Where were the effects of the conduct manifested? Did the conduct have a greater impact in the United States or in the country where the conduct took place? The basic principle underlying the jurisdictional rule of reason is that, even where subject matter jurisdiction exists, a court should refrain from exercising jurisdiction for reasons of comity where the circumstances make it appropriate to defer to the laws of a foreign country.

A number of decisions in the 1970s developed this concept further. The decision of the Seventh Circuit in the *Uranium Antitrust Litigation*, however, departed from the teaching of the jurisdictional rule of reason, with the result that a major confrontation ensued between the United States and some of its closest allies. To understand the furor surrounding the *Uranium Antitrust Litigation*, it is important to understand the background of the case. After World War II, the United States persuaded a number of its allies, including Canada, South Africa, and Australia, to develop their uranium resources for United States strategic and economic policies. The United States then developed its nuclear energy industry to the point that it became the world's primary purchaser

of uranium. The United States market alone accounted for three-quarters of all the uranium sold in the world. The United States then adopted an embargo law which provided that United States buyers could only purchase uranium from United States sources. As a result, three-quarters of the world uranium market was denied to foreign producers, and the bottom fell out of the uranium market outside the United States. The foreign producers responded by forming a uranium cartel. The cartel was encouraged by the foreign producers' respective governments which wanted to protect their native uranium industries for both strategic and economic reasons. Because of the embargo, the cartel could directly affect sales only outside of the United States. The cartel did, however, limit production and fix prices of uranium produced abroad. The United States Government never attempted to prosecute members of the cartel.

The Westinghouse Electric Company had entered into long-term delivery contracts for uranium with various utilities. These contracts proved disastrous for Westinghouse when the market price of uranium dramatically increased. The utilities sued Westinghouse for breach of contract when it refused to deliver the uranium, and Westinghouse in turn sued the cartel members for fixing the price of uranium. Westinghouse claimed that although the cartel operated outside the United States, its actions ultimately had an effect within the United States. Westinghouse alleged that the effect on United States uranium prices continued to be felt even after the embargo had terminated and the cartel had disbanded.

The foreign defendants, relying on what they believed was a lack of jurisdiction, ignored service of process. Because they refused to appear, the district court, taking a different view of the jurisdiction issue, found that the defendants had defaulted. On appeal, the cause of the various foreign defendants was pleaded by their respective governments. The British, South African, Australian, and Canadian Governments all filed briefs arguing that their interests were affected by the conduct in question and that, under the jurisdictional rule of reason, a United States court should defer to their concerns.

The Seventh Circuit declined to adopt these arguments and found that it was within the discretion of the district court judge to decide whether the court had subject matter jurisdiction. The court stated that it was shocked at the extent of the foreign governments' subservience to the defendants. In fact, the foreign

governments had asked the State Department to plead their position for them, and it was the State Department that suggested the foreign governments make their own arguments to the court.

The foreign governments were understandably upset by the Seventh Circuit's decision and showed their displeasure by passing laws to block the enforcement of United States antitrust laws. Great Britain adopted the United Kingdom Protection of Trading Interests Bill of 1980. This Act provides that the British Secretary of State can block the enforcement of United States antitrust decrees and discovery orders within Great Britain if such blocking actions are in its interest. The Act also allows a British defendant facing United States treble damage liability to reduce, in effect, his liability for actual damages by giving him the right to recover in the British Courts two-thirds of the treble damage award paid to the United States plaintiff. This is generally referred to as the "clawback" provision. The Australians went beyond the British and drafted a bill that would have allowed, not two-thirds, but a one hundred percent "clawback" of the United States antitrust judgment. These bills, following in the wake of the *Uranium Litigation*, created a significant conflict between the United States and some of its principal allies.

In an attempt to resolve the conflict, numerous discussions between the United States and the affected foreign states have been held. Recent United States case law has somewhat ameliorated the problem by restricting the extraterritorial application of United States antitrust law. Thus, for example, one court ruled that no subject matter jurisdiction exists unless it can be established that a defendant's actions abroad had not only direct, substantial, and foreseeable consequences, but also anticompetitive effects, within the United States. In addition, Congress has now passed the Foreign Trade Antitrust Improvements Act which codified the effects doctrine by requiring a direct, substantial, and reasonably foreseeable effect on United States domestic commerce, import commerce, or exports by United States residents before conduct abroad comes within the subject matter jurisdiction of the United States antitrust laws. In short, both United States courts and Congress appear to be evidencing a heightened sensitivity to foreign concerns with respect to subject matter jurisdiction.

Subject matter jurisdiction is just one of a number of doctrines that limit the application of United States antitrust laws to foreign conduct. Among other doctrines which have similar limiting

effects is the Act of State Doctrine. The essence of this principle is that United States antitrust laws are not intended to apply to the acts of a foreign state. If private parties influence a foreign government to act in a particular way that has an antitrust impact, a United States court cannot attack that conduct without affronting the sovereignty of the foreign state. In addition to being intended to avoid the impropriety of attacking the conduct of a foreign state, the Act of State Doctrine is concerned with the separation of powers. Thus, the conduct of foreign policy is deemed to be within the province of the executive branch, and the judiciary is loathe to enter into areas that should be left to the Department of State.

Related to the Act of State Doctrine is the Sovereign Compulsion Doctrine which allows a defendant to raise as an affirmative defense to an antitrust action the fact that the defendant's actions were compelled by a foreign state. In order to establish this defense, compulsion is required; a suggestion by a foreign government is not enough. One problem is that many countries prefer to use persuasion and other similar methods short of compulsion to convince their industries to pursue desired goals. In Japan, for example, the technique of administrative guidance is often relied upon; by using numerous informal as well as formal contacts, the Japanese Government establishes a consensus on the desired course of action within an industry, and then guides the industry to do what the government perceives to be in the national interest.

Another relevant doctrine is the Sovereign Immunity Doctrine. In general, a foreign sovereign cannot be sued unless an exception in the Foreign Sovereign Immunities Act applies. Perhaps the most important exception covers the commercial conduct of a foreign state.

An interesting case that illustrates the interaction of the commercial conduct exception to the Foreign Sovereign Immunities Act and the Act of State Doctrine is the OPEC case. OPEC was sued in California for fixing the price of oil. To avoid the risk that OPEC would react to an adverse court order by taking retaliatory actions in the oil market, the trial court exercised judicial self-restraint by applying the Doctrine of Sovereign Immunity. It found that, although the selling of oil resembled a commercial activity, it really involved the protection of natural resources and, therefore, constituted sovereign activity. The Ninth Circuit reached the same result but based on a different rationale. The

court of appeals, relying on the Act of State Doctrine, recognized that a resolution of the case would involve an attack on the conduct of foreign states and would have an adverse effect on United States foreign policy.

Similar doctrines have developed in other nonantitrust areas. For example, *Vespa of America v. Bajajj Auto Limited* involved international licensing arrangements. Vespa manufactured motorscooters. Bajajj was an Indian company that also made motorscooters and was a licensee of Vespa. Although the license agreement expired, Bajajj continued to make motorscooters. Like many other developing countries, India requires a foreign licensor to allow the licensee to retain the acquired technology and continue producing at the end of the license term. Vespa brought suit in the Southern District of California. It claimed that Bajajj had breached its contract by manufacturing motorscooters after the license expired. The court refused to exercise subject matter jurisdiction over the contract because among other reasons, the Indian Government has a very strong national policy allowing companies like Bajajj to continue using acquired technology. Thus, a verdict by a United States court in favor of the plaintiff would conflict with this significant policy interest of the Indian Government.

Probably the most publicized area of dispute with respect to subject matter jurisdiction has been United States export control restrictions. A particularly controversial example is the issue of the Soviet gas pipeline from Siberia to Western Europe. After the suppression of Solidarity and the establishment of martial law in Poland, the feeling of the United States Government was that the Soviet Union should be taught a lesson. The solution was to impose export restrictions on high technology items used in the construction of the Soviet gas pipeline. Statutory authority which allows the President to impose export restrictions in the furtherance of United States foreign policy does exist. President Reagan extended the scope of the export restrictions to apply to foreign subsidiaries and foreign licensees of United States companies. The order had a significant impact on several foreign companies. Dresser Industries, a United States company with a French subsidiary, was particularly affected. The French subsidiary was obligated to deliver twenty-three gas compressors to the Soviet Union for use in the gas pipeline. The French Government issued a directive to the company that required delivery of the compressors, and the company complied. The United States Government imposed sanctions on Dresser that prohibited its French subsidi-

ary from receiving any exported high-technology items or any information from the United States. The parent company, therefore, was effectively prevented from sending or transmitting any type of know-how to its subsidiary. Dresser's French subsidiary needed this information from its parent company to fulfill its other contractual obligations. Dresser and another French company brought suit against the United States Department of Commerce to enjoin the sanctions on the grounds of lack of subject matter jurisdiction. The trial court refused to grant the injunction, pointing out that the sanctions were an important element of United States foreign policy and that the matter was beyond the scope of the court's jurisdiction. Dresser appealed the decision to the District of Columbia Circuit Court of Appeals. Before the court could make its determination, President Reagan lifted the sanctions, thus rendering the case moot. Until the next case is decided, no one will know the precise limits of subject matter jurisdiction under the Export Control Act.